This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

+ *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
+ *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
+ *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
+ *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at `http://books.google.com/`

THE

Weekly Reporter:

APPELLATE HIGH COURT.

CONTAINING

DECISIONS OF THE APPELLATE HIGH COURT IN ALL ITS BRANCHES, viz., IN CIVIL REVENUE, AND CRIMINAL CASES, AS WELL AS IN CASES REFERRED BY THE MOFUSSIL SMALL CAUSE COURTS AND THE RECORDER'S COURTS; TOGETHER WITH LETTERS IN CRIMINAL CASES, AND THE CIVIL AND CRIMINAL CIRCULAR ORDERS ISSUED BY THE HIGH COURT; ALSO DECISIONS OF H. M.'S PRIVY COUNCIL IN CASES HEARD IN APPEAL FROM COURTS OF BRITISH INDIA.

BY D. SUTHERLAND.

VOLUME X.

Calcutta:
RE-PRINTED BY D. E. CRANENBURGH,
AT HIS LAW-PUBLISHING PRESS,
NO. 57, BOW BAZAR STREET.

1891.

INDEX

(CIVIL RULINGS).

A.

ATEMENT.

(1) A lease given by a landlord implies that he has sufficient title, and a tenant evicted under the paramount title of a third party from a part of his tenure, is entitled to — of rent ... 120

(2) —— of rent by order of Court in consequence of diluvion does not prove change in *rate* of rent, or affect a ryot's claim to the presumption under Section 4, Act X., 1859 246

See Jurisdiction (16)

KARRY.

The —— Acts not being extended to British Burmah, and the Chief Commissioner having no power to make rules with penal clauses, the —— rules passed by him have not the force of law ... 350

COUNTS.

See Jurisdiction (24)
See Mortgage (8)
See Onus Probandi (19)

RETION.

(1) Land forming the dry bed of a canal belongs to the estate in which the canal is included ... 68

(2) Land cannot be legally proved to be an —— to a talook when there is an unfordable stream between it and the talook, nor can possession under such circumstances give right to a declaration of title ... 272

See Jurisdiction (36)

T I. OF 1841.

See Permanently-settled Estates (1)

T XIX. OF 1843.

See Mortgage (4)
See Registration (6)

T III. OF 1851.

Section 58. *See Evidence* (36)

T II. OF 1855.

Section 13. *See Evidence* (31)
Section 43. *See Jumma-wassil-bakee Papers* (3)

ACT XV. OF 1856.

Sections 2 and 5, as applied in a case in which a Hindoo widow on the death, after her re-marriage, of her son by her first husband, claims his estate inherited from his father ... 34

ACT XL. OF 1858.

Section 3. *See Guardian* (3)
See Certificate (4)
See Jurisdiction (25)

ACT VIII. OF 1859.

(1) An order under Section 246 is not open to appeal, though the party against whom it is made may sue to establish his right ... 21

(2) Section 180 of——as applied to Act X. cases allows Courts of first instance the widest discretion in regard to local investigations; and a Deputy Collector may depute a Civil Ameen to examine witnesses in a suit for enhancement ... 34

(3) The abandonment of proceedings under Section 269 does not amount to dismissal on default under Section 114 ... 61

(4) Where the purchaser of immoveable property sold in execution of a decree of a Civil Court gets a certificate under Section 259, and sues for possession, defendant (who is in possession) is debarred by Section 260 from pleading that he himself is the real purchaser ... 167

(5) Section 73 does not enable third parties not likely to be affected by the result to come into a suit, and raise new questions which do not properly arise ... 283

Section 1. *See Jurisdiction* (22)
Section 2. *See Court of Rajah of Tipperah.*
See Limitation (14)
See Mesne-profits (5)
See Res Adjudicata (1) (3) (7) (8)
Section 15. *See Declaratory Decree* (1)
Sections 65, 66. *See Summons.*
Section 73. *See Procedure* (2)
Section 77. *See Amendment* (1)
Sections 86 & 227. *See Limitation* (27)
Section 86. *See Intervenor* (1)
Section 119. *See Attachment* (1)
Section 128. *See Evidence* (16)
Sections 159 & 160. *See Jurisdiction* (27)
Sections 166, 170. *See Moonsiff's Power.*

ACT VIII. OF 1859.—*(Continued.)*
Section 170. *See Evidence* (15)
See Procedure (7)
Section 177. *See Kingdom of Ava.*
Sections 178, 179. *See Evidence* (40)
Section 180. *See Evidence* (32)
Sections 196, 197. *See Mesne-profits* (1)
Section 203. *See Execution* (6)
Section 206. *See Execution* (11)
Section 207. *See Joint Judgment.*
Section 208. *See Execution* (12)
Section 209. *See Cross-decree.*
Section 210. *See Decree* (6)
Section 212. *See Application* (4)
Sections 223, 224. *See Res Adjudicata* (5)
Section 229. *See Jurisdiction* (33)
Section 230. *See Remand* (11)
Sections 235, 239, and 240. *See Attachment* (3) (6) (7)
Section 236. *See Attachment* (2)
Section 237. *See Deputy Collector's Court.*
Section 246. *See Execution* (7)
See Intervenor (1)
See Jurisdiction (19)
See Limitation (29)
Sections 284, 285. *See Execution* (3)
Sections 285, 286. *See Proceeding* (6)
Sections 308, 309. *See Pauper* (1)
Section 313. *See Arbitration* (1)
Section 316. *See Arbitration* (3) (4)
See Jurisdiction (45)
Section 327. *See Jurisdiction* (13) (32)
Section 347. *See Limitation* (32)
Section 348. *See Cross-appeal.*
Section 350. *See Objection* (15)
Section 351. *See Remand* (8)
Sections 351, 352. *See Remand* (2)
Sections 351—353. *See Remand* (6)
Section 352. *See Remand* (9)
Section 354. *See Remand* (3) (13)
Section 355. *See Procedure* (11)
Section 359. *See Remand* (1)
Section 365. *See Right of Appeal* (3)
Section 367. *See Review* (4)
Section 377. *See Review* (1)
Section 378. *See Review* (8)

ACT X. OF 1859.
(1) Where in a suit for arrears of rent, the Judge finds against an intervenor as between him and plaintiff, he is bound under Section 67 to decree for the plaintiff ... 81
(2) There is no power under —— given to the Collector to sell rights of suit *qua* rights of suit alone ... 224
(3) An application under Section 25 is not equivalent to the institution of a suit, and the Collector, whether acceding to or refusing it, does not adjudicate ... 295
Sections 3 & 4. *See Presumption* (5)
Section 4. *See Abatement* (2); *Evidence* (5); *Jumma-wassil-bakee Papers* (1)
See Presumption (4)
Section 6. *See Enhancement* (4)
See Resumption (1) (2)
Section 10. *See Jurisdiction* (23)

ACT X. OF 1859.—*(Continued.)*
Section 13. *See Notice.*
Sections 13 & 17. *See Enhancement*
Section 17. *See Enhancement* (4)
Section 20. *See Cause of Action* (1)
Section 21. *See Right of Occupancy*
Section 23. *See Ejectment* (1)
See Res Adjudicata (3)
Section 23. Clause 5. *See Ejectment*
See Jurisdiction
Section 24. *See Jurisdiction* (8)
See Right of Suit (9)
Section 25. *See Res Adjudicata* (1)
Section 27. *See Jurisdiction* (22)
See Registration (3)
Section 28, Clause 6. *See Jurisdiction* (1) (7)
See Right of Occupancy
Section 32. *See Limitation* (8)
Section 58. *See Ex-parte Decree* (1)
Section 65. *See Issue* (1)
Section 73. *See Act VIII. of 1859*
Section 77. *See Intervenor* (2)
See Intervention (1) (2)
See Jurisdiction (5)
See Procedure (1)
Section 78. *See Ejectment* (2)
See Jurisdiction (38)
Section 105. *See Purchaser* (1)
Sections 105 & 109. *See Execution*
Section 153. *See Jurisdiction* (5)
Section 327. *See Jurisdiction* (13)
Section 350. *See Objection* (5)
Section 359. *See Remand* (1)
Section 377. *See Review* (1)
See Arrears of Rent (3)
See Jurisdiction (18) (26) (30)

ACT XI. OF 1859.
Section 33 contemplates an action against the individual wrong-doer, irrespective of Government and co-parceners ...
See Act XXXII. of 1860.

ACT XIV. OF 1859.
(1) Repaying a debt does not constitute trafficking under Section 8 ...
(2) A statement of balances found in plaintiff's book duly verified, without any signature by defendant, is not an acknowledgment within the meaning of Section 4; defendant's name in one column in connection with a cross in another column being no valid signature ...
Clause 2, Section 1. *See Tehsildar.*
Clause 6, Section 1. *See Limitation* (5)
Clause 12, Section 1. *See Limitation* (15) (30)
Clause 15, Section 1. *See Evidence*
Section 4. *See Liability* (3)
See Limitation (25)
Section 11. *See Minor* (1)
Section 17. *See Limitation* (15) 30)
Section 20. *See Application* (3) (4)
See Limitation (1)
See Proceeding (1)(2)(3)(4)

XXVII. OF 1860.
See Certificate (1) (2) (4) (5)

XXXII. OF 1860.
A sale under —— does not render a mokurruree title void with reference to Act XI. of 1859 ... 31

XXIII. OF 1861.
(1) Section 37 does not make Section 7 applicable to cases in which the Appellate Court has dismissed the appeal under Section 6 ... 160
(2) The word "powers" in Section 37 is not synonymous with "jurisdiction;" and especially in other parts of —— and in Act VIII. of 1859, it does not comprehend jurisdiction... 160
Sections 5 & 6. *See Application* (2)
Section 11. *See Mesne-profits* (1) (2)
Section 11. *See Procedure* (21)
Section 27. *See Arbitration* (2)
See Jurisdiction (4) (10) (11)
See Procedure (14)
Section 38. *See Procedure* (21)
See Jurisdiction (2) (42)
See Permanently-settled Estates.
See Right of Action (1)

VI. (B. C.) OF 1862.
Section 9 gives a proprietor the right of making a general survey of lands held under an independent title ... 361
Section 4. *See Deposit* (2)
Section 3. *See Remand* (5)
Section 10. *See Enhancement* (6)
See Jurisdiction (51)
Section 16. *See Intervenor* (1) *See Rent* (1)

X. OF 1862.
Clause 6, Section 15. *See Pauper* (2)

XVI. OF 1864.
Section 17. *See Registration* (9)
Section 52. *See Interest* (1)
See Registration (1) (7) (8)

VIII. OF 1865 (B. C.)
Section 6. *See Deposit* (1)
Section 16. *See Under-tenure* (2)

XI. OF 1865.
(1) Huts are not moveable property under Section 19. The word "moveable" explained ... 416
(2) The words "personal property" in Section 6 are used in the sense of moveable property ... *ib.*
Section 6. *See Jurisdiction* (4) (20)
See Small Cause Court.

XX. OF 1865.
There is nothing in —— to restrain any person from supplying information to the vakeels in the presence of the Judge. The word "appearance" does not mean actual presence, *e. g.*, of a mookhtar standing behind the pleader .. 355
See Small Cause Court.

ACT XX. OF 1866.
(1) A summary application under Section 53 cannot be entertained at the suit of the assignee of the obligee ... 84
Clause 2, Section 17. *See Registration* (4)
Clause 4, Section 17. *See Construction* (1)
Section 49. *See Registration* (5)
Section 50. *See Registration* (2)
Section 84. *See Res Adjudicata* (4)
See Registration (13)
See Sale (1)

ADDITIONAL FINDING.
See Remand (5)

ADJUSTMENT.
See Execution (11)

ADMINISTRATOR.
The claim of an applicant to be a co-—— of his deceased brother's estate may be rejected when the intestate has stated that he had to receive money from him ... 90

ADMISSION.
(1) The —— by a zemindar that the holding of certain tenants is mokurruree at a given rent is binding on any subsequent zemindar not an auction-purchaser at a sale for arrears of revenue ... 72
(2) If a defendant's —— is read against him, the whole must be taken together; but this does not prevent separate allegations made without qualification from being used separately against him ... 189
(3) The fact that no objection was raised by the representatives of the present plaintiffs against pottahs put forward in suits to which they were parties is an —— of the *bona fides* of the pottahs ... 403
(4) In a suit for enhancement, plaintiff's —— that defendant had held the tenure for 30 or 32 years at the same rent is not an —— that the land has been held at that rate from the Permanent Settlement, and he should be allowed to rebut any presumption arising from the —— 427
See Evidence (33)

ADVANCES.
See Onus Probandi (19)

AGENT.
(1) Where a native lady opens an account with a banker through her son as ——, to provide for the punctual payment of Government revenue and current expenses, the banker is not warranted in advancing to the son as —— large sums of money on bonds ... 376
See Cause of Action (1)

AGREEMENT.
(1) Where a putnee, the refusal of which was promised to a certain ijaradar, is given to another, the latter, being no party to the stipulation, is not bound thereby ... 25

ALIENATION.
Where land is a heritable property burdened with a trust, it may be alienated subject to the trust ... 299
See Benamee (1)
See Hindoo Law (2)
See Limitation (6) (24)
See Service Tenure.

AMENDMENT.
(1) Where a Hindoo widow sues as guardian of her daughter by her first husband, claiming the estate of her son, who died after her re-marriage, and then applies to be made a co-plaintiff in her own right, the Lower Court is not wrong in arraying the plaintiff among the parties to the suit under Section 77, Act VIII. of 1859 ... 34
(2) A Lower Court, in executing a decree of the High Court, cannot alter it; any —— being obtained by application to High Court by the decree-holder ... 60
(3) A Lower Court may or may not permit the filing a petition to amend a plaint, and its refusal is no ground for special appeal ... *87

ANCESTRAL PROPERTY.
A plaintiff, suing for confirmation of possession of a share of —— as the self-acquisition of two grandsons of the common ancestor, must prove his allegation and possession ... 393

APPEAL.
(1) HELD, with reference to Full Bench decision, page 181, Volume IX., Weekly Reporter, that a new statement of the law by the High Court is no excuse for delay in appealing against a judgment ... 178
(2) Where a case is remanded for trial of the issue of limitation, it is open to the parties to —— upon the whole case, notwithstanding the —— already had ... 335
(3) Where in an —— against part of a decree the party in whose favor the decree is made is made sole respondent, the Appellate Court has only to determine whether, as between appellant and respondent, the order of the first Court is correct ... 432
See Application (2)
See Arbitration (2)
See Evidence (41)
See Error of Valuation.
See Jurisdiction (4) (21) (35) (48)
See Limitation (32)
See Objection (2)
See Procedure (11)
See Review (6)
See Right of Appeal.
See Special Appeal.

APPLICATION.
(1) Where an —— for a certificate under Act XXVII. of 1860 contains allegations requiring to be clearly accounted for, applicant should be allowed to adduce evidence ...
(2) Where a Judge under Sections 5 and 6, Act XXIII., 1861, dismisses an appeal, and an —— is made to have the appeal re-heard, the Judge's decision rejecting it is final ...
(3) A *bonâ fide* —— for execution though amended by order of Court, is a proceeding within the meaning of Section 20, Act XIV. of 1859 ...
(4) A defective and partial —— for execution of a decree is not a proceeding within the meaning of Section 20, Act XIV. of 1859 ...
(5) An —— for execution rejected owing to the applicant's failure to prove that he is the purchaser of the decree is not a proceeding properly taken to enforce a decree ...
See Act X. of 1859 (3)
See Execution (8)

ARBITRATION.
(1) An application for —— under Section 313, Act VIII., 1859, is invalid, unless made by *all* the material parties interested ...
(2) Section 27, Act XXIII., 1861, bars appeal to the High Court in suits cognizable by a Small Cause Court, even when the suit is referred to ——
(3) An order referring a suit to —— should provide for the appointment of an umpire, and that the decision shall be with the majority ...
(4) A matter referred to —— cannot be dealt with by the Court unless the reference be fruitless ...
(5) Where plaintiffs claim a 6-annas share of land belonging to a mouzah, and 262 beegahs are found to belong to that talook, and, pending the suit, all the defendants, except one (*O*), agree to ——. upon which it is found that 44 beegahs more belong to the plaintiffs—HELD that plaintiffs may recover as against all the defendants, including *O*, a 6 annas share in 262 beegahs, and as against all, except *O*, a 6-annas in the 44 beegahs ...
See Award (1) (2)
See Jurisdiction (45)

ARREARS OF RENT.
(1) Where in a suit for —— the Judge, finding against an intervenor, as between him and plaintiff, decrees for the plaintiff, but plaintiff's claim to a higher rate than defendant admitted is not proved, the decree for plaintiff will be only to the

ARS OF RENT.—*(Continued.)*
extent and at the rate admitted by the ryot ... 81
) A zemindar, in execution of a decree, selling the rights and interests of a tenant, is not bound to give the purchaser notice before ejectment under a decree for——and ejectment if the latter has not had his name registered in the zemindar's serishta ... 304
) A suit for —— due under an indenture drawn up in English form will lie under Act X. of 1859, although no separate kubooleut is executed 324
See Act X. of 1859 (1)
See Attachment (5)
See Reimbursement (1)
See Right of Suit (3)

ETS.
See Sale (6)

ONMENT OF DEBT.
) Where a plaintiff, purchasing a debt due from defendant to a third party (*R*), sues defendant, the latter may set off as against him the debt due from *R* to her at the time of plaintiff's purchase ... 380

ACHMENT.
) Any —— made under a decree afterwards set aside, a new trial being granted under Section 119, Act VIII. of 1859, falls to the ground, and the validity of a sale of property so attached is not affected ... 99
) Money payable to sirdars as wages of coolies is debt to the coolies, and is not attachable under Section 236, Act VIII., 1859, in execution of a decree against a sirdar ... 149
) To render an —— of land effectual so as to make a subsequent alienation void, the processes prescribed in Section 239, Act VIII. of 1859, must be gone through ... 264
) —— s before judgment, though perfected by judgment, do not prevent possession being taken by Official Assignee. An —— after decree does not put a creditor into a better position than —— before... 353
) Where the purchaser of a jote jumma, to save the tenure from sale under a decree against defendant obtained by the putneedar for arrears of rent due before the purchase, pays the amount of the decree—HELD that the payment is not recoverable by suit against defendant ... 446
) Salaries or debts due from a Railway Company to its servants may be attached under Section 236, Act VIII. of 1859. A Small Cause Court need not make any other Court the medium of —— ... 447

ATTACHMENT.—*(Continued.)*
(7) The order of —— of pay due to a judgment-debtor, the servant of a Railway Company, must be made by the Small Cause Court, and a copy served upon the debtor ... 447
(8) Defendant, attempting to sell in execution of a decree against some body else property belonging to plaintiff, has no right to retain money which he had compelled the plaintiff to pay him to save the property from sale ... 453
See Execution (9)
See Jurisdiction (50)
See Onus Probandi (20)
See Procedure (20)
See Sale (9)

AUCTION-PURCHASER.
The rights of an —— cannot arise under Regulation VIII. of 1879, where the lease of a howala-tenure does not expressly reserve it for sale for non-payment of rent ... 220
See Defective Suit.
See Kubooleut (5)

AURUNG.
(1) An —— is not necessarily connected with the land-revenue definition of a pergunnah ... 127

AWARD.
(1) Where, in an order of Court referring a case to arbitration, no time is fixed for sending in an — —, the —— itself falls to the ground ... 206
(2) *Quære.*—What is the effect of an —— arrived at in a pending suit referred to arbitration by an order of Court otherwise than by consent of all the parties? ... 463

B.

BENAMEE.
(1) A decree of foreclosure in respect of property mortgaged by a benameedar by conditional sale is good and binding against the auction-purchasers of the rights and interests of the real owner, unless they can show fraud. If property is purchased in the name of a benameedar, and the *indicia* of ownership are in his hands, the true owner can only get rid of the effect of an alienation by showing that it was made without his acquiescence, and that the purchaser took with notice of the fact ... 185
(2) A suit to recover property purchased from a client ——, and never made over to the ostensible purchaser, cannot be maintained in his name 469
See Act VIII. of 1859 (4)
See Procedure (5)

BENEFICIAL OWNERSHIP.
See Intervenor (2)
See Jurisdiction (9)

BONA FIDES.
(1) Where a motion is not *bonâ fide*, the party moving cannot benefit by the Court's action upon it ... 229
(2) The Lower Court is not required to determine the —— of a plaintiff's purchase, unless defendant alleges fraud ... 231
See Fraud (2)
See Proceeding (2)

BOND.
(1) Where money is lent on a ——, under which property is hypothecated to the obligee, who, however, obtains a simple money-decree, he cannot follow the property, except by regular suit against the party in possession ... 27
(2) Where defendant denies the execution of a ——, and plaintiff sues for payment before the specified time, the suit cannot be maintained ... 351
(3) Where a —— recites receipt of money, and defendant admits having executed it, a *primâ-facie* case arises, which defendant must rebut ... 467
See Interest (1)
See Onus Probandi (6)

BREACH OF CONTRACT.
Where certain putneedars having agreed, at the time of a butwarra, that, in the event of a particular village falling wholly to either of them, they would re-unite and hold jointly as before, one party resiles from the agreement, the other party may sue for specific performance, but in the Civil Court only ... 69
See Consideration.

BUDDHIST'S WILL.
See Probate.

BUTWARRA.
—— papers are only evidence of the proportionate assessment payable by proprietors after partition, not evidence binding ryots ... 197
See Breach of Contract.
See Consideration.

BYRAGEE.
A Hindoo becoming a ——, and choosing to retain possession of, or assert his right to, property to which he is entitled, will not be restrained by the Courts ... 172

C.

CAMP-FOLLOWER.
See Jurisdiction (43)

CARRIAGE OF GOODS.
See Damages (5)

CAUSE OF ACTION.
(1) A —— against an agent, falling within Section 20, Act X. of 1859, survives the death of the agent ... 59
(2) The second purchaser of a share, of which two mortgages have been executed, and which has been sold under separate decrees, has not, by any act of his, disturbed the rights of the first purchaser, who, in suing for confirmation of possession, on the ground that his title is affected by the subsequent purchase, has no —— ... 126
(3) Where the first Court tries a case as a whole, notwithstanding that it finds the causes of action to be several and distinct against several defendants, the Lower Appellate Court ought to try the case as made up of separate suits ... 187
(4) In a suit for a share in certain joint property claimed under an ikrarnamah, plaintiff's —— accrues after the date of the ikrarnamah ... 194
(5) Where a party purchasing a portion of a putnee is unable to get possession, and sues the ryot for rent under Act X., the plaint is bad as against the ryot, but it discloses a —— against the zemindar ... 209
(6) Where evidence given to support one —— establishes a different ——, the Court should dismiss the suit ... 242
(7) Where an error in a Revenue Survey map, representing part of a purchased mehal as included in another, is in no way prejudicial to plaintiff, he has no —— ... 254
(8) A suit to recover the amount of a hoondee, in which four persons are made defendants, is a combination of four suits in one, not to be allowed by the Civil Courts ... 263
(9) A Court trying as a single suit a plaint containing separate causes of action on the part of distinct plaintiffs, though but one prayer, commits, not a mere technical irregularity, but an incorrect proceeding liable to lead to injustice ... 279
(10) Where the entire sum due on a bond with penal interest to date of decree has been recovered, the —— of the widow of one of the judgment-creditors has fully accrued ... 397
See Mesne-profits (6)
See Limitation (16)
See Plaint (1)

CERTIFICATE.
(1) Under what circumstances an applicant is entitled to a —— under Act XXVII. of 1860 ... 4
(2) A —— under Act XXVII. of 1860 does not determine any question of title, and is only conclusive of the holder's representative title as against all debtors to the deceased. 105

CERTIFICATE.—*(Continued).*
(3) A —— cannot be granted for the collection of fractions of the debts of deceased ... 105
(4) A —— under Act XI. of 1858 gives the right to collect the debts due to the estate; but if the debtor objects to pay, the right cannot be enforced without a —— under Act XXVII. of 1860 ... 462
(5) Where an applicant for a —— under Act XXVII. of 1860 is opposed by a party claiming under a will, the Judge is bound to proceed under Section 3 ... *ib.*
(6) Where an applicant for a —— is entitled to a share, the smallness of the share will not debar her from getting a —— entitling her to collect according to the share ... *ib.*
See Execution (3)

CESS.
A tenant adjudged to pay a particular —— or demand in a particular year is not compelled to pay for ever ... 257
See Jurisdiction (30)

CHITTAH
——s produced as evidence of land being *mál* are sufficiently attested by the deposition of the village-gomashta ... 443
See Evidence (36)

CIVIL AMEEN.
The proceeding of a —— in a subdivision where he has no jurisdiction is not legal evidence ... 153
See Evidence (32)

CLAIM TO ATTACHED PROPERTY.
See Limitation (27)

COLLECTIONS.
See Purchaser (5)

COLLUSION.
Where plaintiff has purchased *B's* right in a 4-annas share of property, the rights and interests in which are sold in execution and purchased by defendant, and *B*, the vendor, admits the sale to plaintiff—HELD that the Lower Appellate Court did wrong in presuming —— between *B* and his vendee, and ought not to reject the deed of sale without examining the writer and witnesses; and that it ought to decide plaintiff's possession at any time under the deed ... 451
See Partition (3)

COLLUSIVE DEED.
Where the conveying party remains in possession after he has executed a deed conveying his entire property to his son, the inference is that the deed was intended as a blind —— 449

COMPENSATION.
(1) A zemindar receiving rents in full is not entitled to share in——given to a putneedar for loss of land included in the putnee ... 12
(2) The principle laid down in the case published at page 328 of the Sudder decisions for 1860, regulating ——for land taken for public purposes, does not provide for the case of several putnees or intermediate tenures ... 391

CONDITIONAL DECREE.
See Pre-emption (1)

CONDITIONAL SALE.
See Mortgage (10)

CONFIRMATION OF TITLE.
A suit for——and possession where possession is found to be with defendant is held to be properly dismissed ... 176
See Limitation (5)
See Onus Probandi (18)

CONSIDERATION.
(1) Where certain putneedars agree at the time of a butwarra that, in the event of a particular village falling wholly to either of them, they would re-unite and hold jointly as before, the absence of mention of any money——in the agreement is no bar to its being enforced ... 69
See Evidence (17)
See Lease (1)

CONSOLIDATION OF TENURES.
See Presumption (2)

CONSTRUCTION.
(1) By সন বসন a year-by-year tenancy is meant; and such a pottah is a lease for a term exceeding one year, and is not evidence unless registered ... 410
(2) Where *N* and *D* jointly give a kubooleut for certain lands, agreeing that, under certain circumstances, those who succeeded to their rights would pay the rent, and *N* makes over his interest to *D*—HELD that the lease has passed into the hands of "others" within the meaning of the kubooleut ... 464
See Act XXIII. of 1861 (1) (2)
See Act XX. of 1865.
See Limitation (12) (20)
See Mortgage (6)

CONTRACT.
(1) Where one of two daughters sues to recover a moiety of rents due under a kubooleut executed in favor of a deceased mother, the zemindar: HELD that a —— originally single and indivisible does not, by the death of the zemindar, become separable into two ——s ... 108
(2) A —— of sale or conveyance entered into with one who stands in a

CONTRACT—*(Continued).*
fiduciary relation is liable to be called in question by the vendor, and to be set aside if the other party has made an unfair use of his advantages, undue influence being presumed until the contrary is proved ... 128
(3) A —— expressly declared to be made out of ill-feeling against a third party is a —— against public policy, and a suit cannot lie upon it 140
(3) The non-completion of an agreement of compromise does not exonerate defendant from performing his part of the —— ... 420
See Arrears of Rent (3)
See Ejectment (2)
See Jurisdiction (23)

CONTRIBUTION.
(1) How the obligation of co-sharers may be enforced, where one person jointly interested with others in land is compelled to pay revenue in excess of his proper share ... 10
(2) In a suit for —— in respect of Government revenue paid for an estate, it is sufficient for plaintiff to prove that he has paid more than his share, and his co-sharers less than theirs ... 158
See Liability (1) (2)
See Limitation (7)

CO-PARTNERSHIP.
See Pre-emption (4)

COPY.
See Evidence (34)

CORPORATION.
A —— must sue and be sued in its corporate name ... 366

CO-SHARER.
(1) A —— refusing to sue jointly may be made a defendant, the Court having full power when all concerned on both sides are parties to the suit ... 108
(2) Long possession under a pottah from one sharer without interference from the others legally warrants the inference that the grantor had authority to bind his —— ... 389
See Contract (1)
See Contribution (2)
See Joint Property.
See Jurisdiction (11)

COSTS.
Where a party is made a defendant without cause of action being alleged, his —— should be paid, not by co-defendant, but by plaintiff ... 194
See Execution (10)
See Withdrawal of Claim.

COURT OF RAJAH OF TIPPERAH.
The —— is not an independent Court within the meaning of Section 2, Act VIII. of 1859 ... 337

COURT OF WARDS.
See Liability (3)

CREDIT.
See Agent (1)

CRIMINAL PROSECUTION.
Parties acting honestly in initiating proceedings in a Magistrate's Court are not civilly responsible for any order of the Magistrate ...

CRIMINAL VERDICT.
See Evidence (6)

CROSS-APPEAL.
If a decree is passed partly in favor of, and partly against, a plaintiff, and one of the defendants alone appeals as against the decree in favor of the plaintiff, making a co-defendant a respondent, the latter need not appear, and the plaintiff need not be allowed at the hearing to raise objections to his suit being dismissed against the other defendant

CROSS-DECREE.
Where *A* applies to have a decree held by his son against *B* set off as a —— under Section 209, Act VIII., 1859, on the ground that his son held *benamee* for him: HELD that the parties to the decrees are not the same in any possible sense

CUSTODY OF IDOLS.
The plaint in a suit to amend a decree declaring the defendants entitled, *on the occasion of all ceremonies*, to take certain —— from plaintiff's house and keep them a certain number of days, is bad in respect of the prayer for specification of the ceremonies and for damages ...

CUSTOM.
A question of —— is a question of fact, on which the High Court cannot interfere ...

D.

DAMAGES.
(1) The amount of —— to be awarded on account of a false charge should be decided by a Jury, and cannot be interfered with by the High Court in special appeal ... 1
(2) Injury to plaintiff's feelings in a letter written and sent to him by defendant is not in itself a ground for —— in a civil action ... 1
(3) —— should be awarded according to the loss caused by defendant's wrongful act; and where such act makes it probable that plaintiff will be a loser in future time, the award should embrace the prospective loss ... 2

AGES.—*(Continued.)*
(4) A Judge in appeal decreeing the full amount claimed for crops alleged to have been plundered is bound to ascertain on evidence the real extent of the —— ... 252
(5) In a suit for money claimed for the carriage of goods, defendant cannot answer with a set-off on account of——, though he may put in issue to what extent he is entitled to draw —— back, and may bring an action for special —— ... 295
(6) The Code of Civil Procedure gives no power in an ordinary suit for —— to direct the amount to be assessed in execution ... 299
See Custody of Idols.
See Distraint.
See Joint Judgment.
See Jurisdiction (15) (17)
See Limitation (28)
See Onus Probandi (22)
See Procedure (14)
See Remand (5)
See Special Appeal (1)

UGHTER.
When a man acknowledges a person to be his ——, he must be taken to mean his legitimate ——, unless the contrary appears ... 469

BT.
See Act XIV. of 1859 (1)
See Limitation (11)
See Personal Debt.
See Procedure (20)

BUTTER LAND.
See Declaratory Decree (2)

CLARATORY DECREE.
(1) Suit by a guardian for a —— that certain pottahs put forth by defendants to protect themselves from enhancement are spurious and likely to injure the minor's interests is premature, and cannot lie under Section 15, Act VIII. of 1859 ... 47
(2) Where property in dispute is found to be *debutter* land belonging to plaintiff, and it is contended in special appeal that he is entitled to a fourth share only, he is entitled to a declaration that the whole land is *debutter*, and that he is entitled to a fourth share ... 105
(3) Where plaintiff obtaining a mowrosee pottah of some jotes of land from the Soobah of Mynagorie has received kuboolleuts and payments of rent from the jotedars, and has had his rights recognized by the British authorities, he is entitled to a declaration of title ... 135

DECREE.
(1) A —— awarding immediate mesne-profits at the rate admitted by defendants, and larger mesne-profits contingently on a higher rate being proved at the time of execution, is irregular ... 24
(2) Duties of Judges and Pleaders in preparing ——s pointed out ... 96
(3) A privately executed endorsement on a ——, unregistered and unproved, is no evidence of the transfer of the —— ... 144
(4) A —— for possession with wassilat obtained by a zemindar of an estate, as such, cannot be pledged as security for a personal debt ... 152
(5) —— declaring plaintiff's title, in an Act X. suit not executed within the time allowed by law, is no longer a ——, and is no evidence against an intervenor having received rents *bonâ fide* ... 215
(6) A —— passed against a person who was dead at the time the suit was instituted cannot be executed against his legal representatives... 455
(7) The duty of Judges in seeing that ——s are properly drawn up pointed out ... 487
See Amendment (2)
See Conditional Decree.
See Cross-decree.
See Limitation (2)
See Onus Probandi (7)
See Plaint (1)
See Resumption-decree.
See Sale (2) (4)

DEED.
A fraudulent alteration in a —— vitiates the —— wholly, whether the alteration be material or otherwise 250
See Collusive Deed.

DEED OF SALE.
Where, in a —— of a property belonging to three brothers, one of whom is a minor, no mention is made of the minor's rights and interests, these are not conveyed to the purchaser ... 241
See Evidence (30)
See Registration (5)

DEFAMATION.
See Damages (2)
See Publication.

DEFECTIVE SUIT.
A suit to set aside the sale of certain lands attached and sold by a decree-holder is not defective because the auction-purchaser is omitted from the list of defendants 317

DEPOSIT.
(1) Money deposited to protect from sale a tenure advertized under Act VIII., 1865, is a loan to the proprietor

DEPOSIT.—*(Continued.)*
of the tenure which becomes security, and of which depositor may obtain immediate possession ... 205
(2) A defendant in a suit for rent, claiming credit for a —— under Section 4, Act VI. (B. C.) of 1862, is entitled to a set-off ... 492

DEPUTY COLLECTOR'S COURT.
(1) A —— is a Court of justice within the meaning of Section 237, Act VIII. of 1859 ... 43

DEVASTATION.
A widow is not liable in a suit against her individually to be made answerable out of her husband's assets for any —— which he may have committed ... 444

DISAPPEARANCE OF A HINDOO.
When a Hindoo disappears, no right accrues to any person as his heir till 12 years from the date in which he was last heard of ... 484

DISCLAIMER.
See Right of Appeal (1)

DISCRETION OF COURT.
See Procedure (4)

DISTRAINT.
(1) Where putneedars in execution of a decree for *khas* possession are put into nominal possession, and allow the ryots to cultivate and then cut and carry away their crops, their act is an abuse of the Law of ——, and they are liable for damages... 70

DOCUMENTS.
Where a —— is found on independent evidence to have been in existence before the institution of the suit, and to be genuine, the testimony of subscribing witnesses is not needed 340
See Evidence (5)
See Old Documents.

E.

EDUCATION FROM JOINT ESTATE.
See Joint Hindoo Family (2)

EJECTMENT.
(1) A farmer having no permanent interest in land has no transferable interest, and cannot be ejected except in execution of a decree or order under Act X. of 1859 ... 26
(2) In a suit under Clause 5, Section 23, Act X. of 1859, for *khas* possession of a farm, based on a contract providing that, on default in payment of rent, the lessor should seek a decree for arrears, and should be entitled to enter on *khas* possession, if the arrears were not paid within 15 days of the execution:

EJECTMENT.—*(Continued.)*
HELD that plaintiff ought to have brought his suit under Section 78, Act X., and obtained a decree for —— ... 156
See Rent (5)
See Right of Occupancy (2)

ENCUMBRANCE.
Property sold under a decree in favor of a mortgagee is not free from such lease or farm as the owner may have found expedient, provided its value is not impaired, and the operation of the mortgagee's lien not impeded ... 324

ENDORSEMENT.
See Decree (3)

ENDOWMENT.
Where a plaintiff shows no title to partake of the benefit of an ——, he has no right to recover possession, and the utmost he can do is to ask for the appointment of a new mutwalee ... 458

ENHANCEMENT.
(1) A ryot relying on a mokurruree pottah for protection against —— must prove special title; mere possession and payment of rent for years cannot bar a farmer's right to —— ... 73
(2) Where a plaintiff suing for arrears of rent at enhanced rates calls all the assessable lands of a village mâl lands, and there is nothing to show that the ghatwalee lands are excepted, the case cannot proceed in its existing form ... 87
(3) In a suit for —— where a mokurruree lease is pleaded by defendants, but no pottah is filed, the existence of the tenure must be proved by evidence ... 107
(4) Section 6, Act X. of 1859, does not apply to a ryot with a right of occupancy; and in fixing a rate for such a ryot, Courts are not restricted to Section 17 ... 123
(5) While a suit for —— is pending, defendant is not liable for interest; but after the rent is determined, he is liable for interest for all arrears from, and instalments after, that date ... 166
(6) In a suit for —— of rent paid by shikmee talookdars, plaintiff is bound to give data as to what would be a fair and equitable rate, and is competent to measure the talook and ascertain assets ... 213
(7) Where a notice of —— treats the party served with it as a talookdar, the Court should not assess ryotwaree rates ... 245
(8) Where there is no joint lease, and plaintiff's share is not disputed, a

ENHANCEMENT. — *(Continued.)*

suit for a kubooleut at an enhanced rent will lie: but the suit must be for —— on the whole of defendant's tenure, that the Courts may decide the proportion payable to plaintiff 307

(9) A notice of —— should set forth specific and tangible grounds of —— applicable to the particular case ... 323

(10) In a suit for a kubooleut at an enhanced rate, where the plaintiff seeks ——, not of his share of rent, but of the rate of rent of a specific portion of land, the Court may allow him to amend or explain his plaint, or give him what he is entitled to under the law 362

(11) In a suit for ——, where the right plaintiff claims to assess lands alleged to be in excess of ghatwallee lands has never before been exercised, the right should first be determined in a civil suit ... 383

(12) An inundation or other catastrophe during the year succeeding notice of —— makes the demand unfair... 395

(13) In a suit for ——, an entirely new plea of misconstruction of the terms of the lease cannot be admitted in special appeal ... 424

(14) A suit for —— will not lie against talookdars, Section 17, Act X. of 1859, not applying to intermediate holders ... 455

See Admission (4)
See Limitation (8)
See Onus Probandi (11)
See Presumption (4)

ERROR IN MAP.

See Cause of Action (6)

ERROR OF VALUATION.

An ——, which does not affect the jurisdiction of the Courts or the decision on the merits, is not sufficient ground for special appeal ... 33

ESTOPPEL.

(1) How applicable under Section 2, Act VIII. of 1859, to a suit for declaration of right, and to set aside a thakbust proceeding ... 22

(2) A plaintiff suing for property belonging to a Hindoo widow, on the ground of being the adopted son of the deceased husband's brother, is not barred by a decision in a former suit for other property, to the effect that he was not an adopted son ... 100

(3) In a suit for property, plaintiffs are not bound by an Act IV. award against a person in whose name the property was purchased by the father of the plaintiffs, but who had neither title nor interest in the property, and was not authorized

ESTOPPEL.—*(Continued.)*

by the plaintiffs to conduct the Act IV. proceeding ... 344

(4) In a suit for property, plaintiffs are not estopped by statements made as parties in another suit, which did not affect their status; nor by their failure to set forth their title in a former suit against them for mesne-profits ... *ib.*

EVIDENCE.

(1) Where a document is so old that the *factum* of its execution cannot be proved ... 1

(2) A nazir's return is no legal —— of service of notice ... 3

(3) Under what circumstances secondary —— may be received, whether documentary or oral ... 24

(4) —— in another suit, the reading of which was not objected to in the first Court, may be read as —— by the Lower Appellate Court ... 37

(5) Where a plea under Section 4, Act X. of 1859, is set aside by the —— of certain papers not objected to in the Lower Courts, they cannot be objected to in special appeal ... 50

(6) A plea of guilty in a Criminal Court may be considered in —— in a civil case, but not a verdict of conviction ... 56

(7) A copy of a pottah cannot be received in —— without cause being shown for the absence of the original ... 73

(8) In a suit to recover property claimed by plaintiffs as *sebayets*, statements made by the ancestors of plaintiffs and defendants are receivable as —— ... 89

(9) Plaintiffs as *sebayets* suing to recover property must prove the title which gives them the right to recover... *ib.*

(10) Documents put in by neither of the parties to a suit cannot be used as —— between them except for the cross-examination of witnesses in the Court of first instance ... 92

(11) A Court executing a decree has no power to modify it ... 95

(12) Where a zemindar, having resumed a *lakheraj* holding of plaintiff's ancestor, afterwards causes it to be sold in execution of a decree as the *lakheraj* of his debtor, the judgment in the resumption-suit is no —— of plaintiff's title as against the auction-purchaser ... 112

(13) Where both parties to a suit adduce calculations made in neighbouring villages as —— to establish their respective cases, they cannot afterwards object to them in special appeal ... 136

(14) The —— of members of the family is the best —— as to whether parties

EVIDENCE.—*(Continued.)*

are joint or separate, account-books being simply corroborative ... 148

(15) When a plaintiff cites defendants as witnesses, and cannot prove his case without them, his suit ought not to be dismissed without proof ... 158

(16) With reference to Section 128, Code of Civil Procedure, it is not necessary for parties in a case to file documentary —— unless it is called for by the Court ... 179

(17) A Judge acts correctly in considering —— on the question whether the consideration whose payment is recited in a deed has passed or not ... 208

(18) Oral —— may be as good for proving title to land, as documentary —— ... 217

(19) Where an alleged mortgage is denied by defendant, and plaintiff cannot produce the original mortgage-deed, he may produce witnesses to speak to its contents ... 219

(20) The —— of one witness, if believed, establishes a fact spoken to directly ... 236

(21) The deposition of a witness taken on commission is not inadmissible because the —— is given in the absence of the other side ... *ib.*

(22) The fact of a pottah being 30 years old does not do away with the necessity of proof before it is used as —— ... 237

(23) Where parties wish to put in —— judgments delivered in English, copies, not translations, should be tendered; but Bengali copies of formal decrees of a Zillah Court are admissible ... 239

(24) The recital in a judgment as to certain payments of rent is —— as between the parties ... 246

(25) A Court cannot decline to receive a document tendered in —— for the mere general reason that it is possibly a forgery ... 256

(26) A judgment adduced as —— is not to be rejected because it was *ex parte* ... 257

(27) A Court of justice may receive the —— of a defendant in favor of his co-defendant ... 261

(28) The best —— in support of a deed of gift is that of witnesses to its execution or custody: documentary —— is not necessary ... *ib.*

(29) Where a copy of a letter is filed without objection in the Court of first instance, and the writer of the letter is cross-examined as to it, the Lower Appellate Court should consider the copy as —— of the letter ... 267

EVIDENCE.—*(Continued.)*

(30) The fact of a party putting his name as a witness to his brother's signature to a deed of conveyance is —— against such party ... 293

(31) Under Section 13, Act II. of 1855, Government Survey maps are —— with regard to the physical features of a country and the other circumstances which the officers making them are specially commissioned to note down ... 300

(32) Where an Ameen is deputed to make a local inquiry, and obtains the —— on oath of some persons, and statements of others deterred by religious prejudices from taking an oath, his report with the original depositions is —— under Section 180, Code of Civil Procedure ... 312

(33) The admission of a defendant's vakeel in Court is legal —— of the receipt of money, and no other proof is needed ... 322

(34) A copy of a document cannot be admitted as ——, unless the absence of the original is properly accounted for ... 338

(35) A map, though prepared by the gomashtas of both plaintiff and defendant, is not —— of title, but only of possession ... *ib.*

(36) Government chittahs are admissible as —— in cases in Chittagong ... 340

(37) Pencil memoranda on a Government Survey Map are admissible as —— 343

(38) Survey Maps prepared under the authority of Government are —— of possession, and therefore of title... *ib.*

(39) Loazima and Thaka papers are legal —— *quantum valeat* ... *ib.*

(40) —— taken by a Commission under Section 178, and given on oath or affirmation, is admissible without consent of parties, on proof of the facts necessary for the purpose, under Section 179, Act VIII. of 1859 ... 385

(41) In a suit to recover money, where certain goods being attached by order of the Court, two other persons claim them as their property, and are made defendants, and the Lower Court finds that the proof of their partnership has failed: HELD, in appeal, that plaintiff's case cannot now be supplemented by examining parties or books not produced in the Court below ... 402

(42) The oral —— of persons able to testify as to certain lands being *mál* is not to be rejected as hearsay 446

(43) A recital in a decree in a suit not between the parties to the present suit is not —— to bind defendants 477

EVIDENCE.—*(Continued.)*

(14) In a suit for enhancement of rent, where defendant is not examined as to the genuineness of the receipts filed ... 490

See Application (1)
See Batwara.
See Chittah.
See Civil Ameen.
See Collusion.
See Decree (5)
See Documents.
See Execution (3)
See Fraud (2)
See Jumma wasil-bakee Papers (1) (2)
See Jurisdiction (28)
See Objection (3) (4) (5)
See Oral Statement.
See Procedure (8) (11)
See Remand (4)
See Review (8)
See Uniform Payment.
See Witnesses (3)

EXECUTION.

(1) Questions arising between the holder of a decree for maintenance and the heirs of her judgment-debtors cannot be determined in—— ... 93

(2) *Quære.*—Where the original judgment-debtor is alive, can the holder of a decree for maintenance enforce her claim by —— without a fresh suit for each instalment unpaid? *ib.*

(3) Where a case is decreed in one district, and property is attached and sold in—— in another, without application made by decree-holder or the certificate and other papers required under Sections 284 and 285, Act VIII. of 1859, the proceedings are without jurisdiction ... 137

(4) In taking out ——, a decree-holder is not bound to produce the original decree or even a copy ... 144

(5) Shows the difference between the two kinds of——in England, *viz.*, a writ of *elegit* and writ of *fieri facias* ... 154

(6) A decree against certain parties as representatives of a deceased party can only be executed against the property of the latter, unless defendants fail to show that all such his property has been duly applied 199

(7) The provisions of Act VIII., 1859, relative to —— against a living judgment-debtor are not applicable after he is dead ... *ib.*

(8) Where *tullubana* does not accompany application for ——, it is to be considered whether such application is merely colorable or *bonâ fide* 229

(9) A decree for arrears of rent of a saleable under-tenure cannot be executed by attachment of any immoveable property, except the tenure itself, before it is shown that satisfaction cannot be had against the person or moveable property of the debtor; and the other immoveable property is not attachable till after the sale of the under-tenure ... 341

(10) A Court cannot withhold the —— of a decree, and abstain from selling because the decree-holder refuses to pay the cost of advertising. Such costs are not required to be paid in advance ... 354

(11) Where a decree-holder, seeking to execute his decree, is opposed by the judgment-debtor on the ground of having become the purchaser of it at a sale in——of a decree of the Deputy Collector's Court: HELD that these proceedings amount to an adjustment out of Court, and cannot be recognized unless certified to by the judgment-creditor ... *ib.*

(12) A Court charged with the ——of a decree has no other discretion with regard to noticing a transfer thereof than that given by Section 208, Act VIII., 1859 ... *ib.*

(13) There is no authority of law for setting aside an ——sale of immoveable property on the ground that the party whose interests are sold had no interest at all, or less than was supposed ... 365

(14) Decree-holders seeking *khas* possession of property already in possession of a surbarakar should apply for his removal to the Court appointing him ... 444

See Act X. of 1859 (2)
See Amendment (2)
See Application (3)
See Damages (6)
See Decree (6)
See Fraud (1)
See Jurisdiction (26) (38) (41) (50)
See Procedure (18) (22)
See Sale (9)

EXECUTOR.

The appointment of an infidel —— does not invalidate a Mahomedan will ... 185

EX-PARTE DECREE.

(1) A Collector may alter or rescind an ——passed by his predecessor, when defendants apply under Section 58, Act X., for a revival of the suit, showing good cause for their non-appearance and a failure of justice ... 156

(2) In the case of an ——, the proper course is an application for review, not a special appeal ... 348

See Evidence (26)

F.

FAMILY PROPERTY.
See Manager.
FARMER.
See Ejectment (1)
FINE.
See Jurisdiction (27)
See Right of Appeal (3)
FORECLOSURE.
(1) Where, in proceedings held before the issue of Circular Order of 22nd of July 1813, a mortgagor admitted that the mortgagees were not paid off, and that an extension of the year of grace had elapsed without his performing the conditions necessary to prevent ——: HELD that the proceedings were sufficient to effect a ——, if such was their purpose ... 478
See Mortgage (6) (7) (11)
See Procedure (5)
FOREIGN TERRITORY.
A special bailiff cannot be sent to serve civil process in a —— ... 349
FRAUD.
(1) Where a decree-holder, in taking out execution, imputes —— to judgment-debtor, the Court executing must examine the allegations ... 144
(2) The relationship between parties to a conveyance of property is not immaterial where the question is whether the purchase is true or fraudulent; and the mere handing over of purchase-money before strangers, and registration, are not sufficient proof of a *bonâ-fide* transaction ... 445
See Bona Fides (2)
See Deed.
See Limitation (17)
See Locus Standi.
See Onus Probandi (7) (15) (16)
See Sale (7)

G.

GHATWAL.
(1) A plaintiff is not entitled to recover possession of a ghatwalee mehal in that part of the country where the services of —— s are no longer required by Government ... 179
(2) A Commissioner of Revenue is not warranted, on the demise of a ——, to consider the eligibility of rival claimants, or reject the natural heir on purely moral considerations 401
See Minor (3)
See Title.
GOVERNMENT LESSEE.
See Limitation (15)
GUARDIAN.
(1) A deed of sale by a member of a Hindoo family acting *de facto* as —— of minor brothers is not invalid by reason of the father being alive ... 100
(2) Where a —— sells part of an estate, using the money in a suit for the benefit of the whole property, the sale is valid ... *ib.*
(3) Under Section 3, Act XL. of 1858, and under the Hindoo Law generally, a mother may ordinarily be ——of her minor son without either certificate or special order of Court 425
See Minor (2)

H.

HIGH COURT'S POWERS.
See Interference.
See Jurisdiction (2)
HINDOO LAW.
(1) Under the Mitakshara Law, a father can dispose of self-acquired property, and unequally distribute it among his heirs ... 287
(2) A Hindoo widow has full right to alienate any portion of the estate in her possession, if the benefit of her husband's soul requires such a sacrifice, even though the act to be performed must be done by a male member ... 309
(3) The adoption of an only son is contrary to the ——, and is invalid ... 347
(4) A betrothed daughter does not inherit her mother's *streedhun* ... 488
See Byragee.
See Guardian (3)
See Joint Hindoo Family (5)
See Onus Probandi (10)
See Partition (1)
See Presumption (3)
HINDOO WIDOW.
(1) Leases given by a —— cannot be interfered with unless the lessees are making waste ... 73
(2) Where property descends to the brothers of a deceased Hindoo, his widow has a right of subsistence on condition of residing as a member of their family ... 359
See Act XV. of 1856.
See Hindoo Law (2)
See Limitation (6) (23)
See Objection (1)
See Petition.
See Waste.
HORTICULTURAL CULTIVATION.
See Jurisdiction (46)
HOUSE RENT.
The purchaser at an execution-sale of a house in the occupation of a lessee at a fixed rate has no right to rent at any particular rate he may fix in

HOUSE RENT—*(Continued)*.

a notice to the lessee. If not content with the rate in the lease, he may get such a sum as the Court thinks fair ... 267

I

INDENTURE IN ENGLISH FORM.

See Arrears of Rent (3)

INDIAN SUCCESSION ACT.

See Probate.

INFRACTION OF RIGHT.

In a suit for reduction of an embankment, plaintiff must establish not only injury, actual or prospective, but an injury caused by an —— possessed by plaintiff ... 435

INHERITANCE.

See Mahomedan Law (7)

INTEREST.

(1) When a bond under Section 52, Act XVI. of 1864, is enforced as a decree, no —— is to be allowed if the bond does not provide for —— after the date on which the debt is payable ... 175

(2) A decree for —— on mesne-profits from the date on which they are ascertained, means from date of ascertainment by the Court, not by an Ameen ... 391

See Mesne Profits (3)

INTERFERENCE.

(1) The High Court has no power to interfere with the discretion of a Deputy Collector refusing to add another person to the record, except the refusal is capricious, or the addition is necessary for justice ... 108

INTERMEDIATE HOLDERS.

See Enhancement (14)

INTERVENOR.

(1) How the claim of an —— should be investigated in a suit against a ryot for rent in which the landlord attaches growing crops under Section 16, Act VI. (B. C.) of 1862 ... 21

(2) An —— must, under Section 77, Act X. of 1859, prove not only receipt but enjoyment of rents ... 67

(3) Where, in a suit for rent, the defendant pleads that he is not in possession, having sold his jote to a third party, he should be allowed to prove his plea; and where the joint putneedar with plaintiff, to whom the third party contends a part of the rent is due, is not allowed to appear as ——, the third party should be allowed so to appear ... 110

INTERVENOR—*(Continued)*.

(4) Where a third party has given to defendant a farm of her share of the estate, she cannot appear as an —— in a suit for rent of lands held by defendants as tenants in plaintiff's zemindary ... 331

(5) Persons not likely to be affected by the result of a suit have no right to intervene ... 368

See Act X. of 1859 (1)

See Jurisdiction (49)

See Kubooleut (2)

See Onus Probandi (3)

INTERVENTION.

(1) The nature of the —— contemplated by Section 77, Act X. of 1859, defined ... 13

(2) Section 77, Act X., does not allow an intervenor to set up an allegation of receipt of rent against a recent declaration of title ... 320

(3) —— cannot be allowed in a suit for rent on account of land that has newly accreted to defendant's old jote ... 330

INUNDATION.

See Enhancement (12)

IRREGULARITY.

See Plaint (2)

ISSUE.

(1) Where, in a suit for enhancement of rent, there is a point on which the parties are at —— requiring further evidence, the Collector should not only frame such ——, but fix a convenient day for the trial of it... 169

(2) Where a defendant pleads limitation on the simple fact of possession for 12 years and upwards, and the —— is found against him, he cannot in special appeal object that the finding did not dispose of the —— 389

See Onus Probandi (2)

J.

JOINT CLAIM.

In a suit putting forward a —— the *joint* claim must be established ... 261

See Limitation (22)

JOINT HINDOO FAMILY.

(1) Where a member of a —— claims to participate in property alleged to have been acquired from the proceeds of the joint estate, and the family property is found to be not sufficiently large to leave surplus funds, the *onus* lies on plaintiff to prove his allegation ... 122

(2) The fact of defendant having received his education from the joint estate does not entitle plaintiff to participate in every property acquired by defendant by the aid of such education ... *ib.*

JOINT HINDOO FAMILY—*(Continued)*.

(3) A Hindoo pleading self-acquisition is not bound to show the source from which the money came ... 122

(4) A plaintiff failing to prove property claimed by him to have been the separate property of his vendor, cannot have a decree for the share to which the vendor is entitled as a member of a —— ... 243

(5) Separate holding and enjoyment of distinct shares are all that is necessary under the Hindoo Law of the Benares School, to constitute legal partition of a joint estate ... 273

(6) Every member of —— has an indefeasible right to demand a partition of his own share ... *ib.*

(7) Where property is purchased by a member of a ——, the fact of his living jointly is no presumption as to the source of the purchase-money ... 328

(8) Before it can be presumed from the fact of commensality, that certain property was purchased from joint funds, plaintiff must show that there were joint funds, or ancestral property from which they could be derived ... 333

See Partition (1)

JOINT JUDGMENT.

A —— for damages obtained by several persons, some of whom die, may be executed by the survivors alone for the benefit of all interested. They may, at any rate, proceed under Section 207, Act VIII. of 1859 ... 95

JOINT PROPERTY.

(1) A co-sharer in landed property cannot alter the condition of the —— without the consent of the co-sharers ... 171

See Cause of Action (4)

See Onus Probandi (9) (10)

See Right of Suit (5)

JUMMABUNDEE.

See Jurisdiction (51)

JUMMA-WASSIL-BAKEE PAPERS.

(1) —— produced by zemindar at the citation of defendant himself, are sufficient evidence against the latter in rebutting the presumption under Section 4, Act X., 1859 ... 193

(2) —— are corroborative evidence, not independent testimony ... 291

(3) *Quære.*—Can —— be dealt with as a "book," or be described as "kept in the regular course of business," within the meaning of Section 43, Act II., 1855 ... *ib.*

JURISDICTION.

(1) Where a suit under Clause 6, Section 28, Act X. of 1859 is substantially against tenants in possession 5

JURISDICTION—*(Continued)*.

(2) Where a respondent in a Collector's Court, after allowing the appeal to be heard without objection, applies in special appeal to the High Court

(3) In a suit to recover rents collected by a naib without his principal's authority ...

(4) Where plaintiff seeks a decree to break up and remove certain thatched huts, or obtain their value to the extent of Rs. 29-4 ... 2

(5) A Deputy Collector guiding his mind to a conclusion on the issue arising under Section 77, Act X. of 1859, in a suit for arrears in which an intervenor opposes plaintiff's claim, and giving his opinion as on matters of title, cannot be said *to determine* a question of title ... 38

(6) In a suit for arrears of rent where a claim to eject under Clause 5, Section 23, Act X. of 1859, is inserted in the plaint, but is not made the subject of an issue ... *ib.*

(7) Where a plaintiff claiming to be reinstated under Section 6, Act X. of 1859, wishes to join others with the zemindar, and obtain his remedy against them jointly ... 49

(8) In a suit of a zemindar against a naib or gomastah for papers, accounts, and moneys collected ... 51

(9) A Deputy Collector deciding between a plaintiff and intervenor as to beneficial ownership, settles an interest in land, and the decision is appealable to the Judge ... 67

(10) In a suit by a farmer against a jotedar for the value of a portion of the rice saved from the wreck of a boat, left on the bank as "*huk semindary*" ... 79

(11) In a suit by a co-sharer to recover collections in defendant's charge, and which he is under agreement to pay to the other co-sharers ... *ib.*

(12) In a suit to recover rents collected by a tehsildar bound by an agreement under security ... 83

(13) With respect to an application to file a private arbitration award relating to a debt not exceeding the amount cognizable by a Small Cause Court 85

(14) The question of the right to enjoy the joint profits accruing from the performance of the ceremonies at the burning of Hindoo bodies, is cognizable by a Civil Court ... 114

(15) A suit for damages on account of a false and malicious charge brought in a Criminal Court, is not cognizable by a Court of Small Causes ... 115

(16) In a suit for abatement of rent, where the holding has diminished since the tenant received possession from the landlord ... 120

JURISDICTION — *(Continued).*

(17) Where a plaint asks either that defendant might be ordered to fill up an excavation at his expense or that plaintiff might have 25 rupees as damages ... 130

(18) In a suit stated in the plaint to be for possession and wassilat, but in reality for recovery of possession and arrears of rent ... 134

(19) In a suit by a decree-holder to establish judgment-debtor's right to property seized in execution, but subsequently released to a claimant under Section 246, Act VIII., 1859 141

(20) In a suit against an Agent to the Governor-General on the part of Government ... 142

(21) The High Court is competent to look into the grounds given by a Judge for admitting an appeal after the period limited by the Procedure Code ... 178

(22) The —— given to Collectors by Section 27, Act X., 1859, is not exclusive but concurrent; Civil Courts taking cognizance of suits to enforce rights of a civil nature, unless expressly barred ... 197

(23) A suit to recover the value of a share in certain produce raised under a contract does not come within the meaning of Section 10, Act X, 1859, and may be enforced by the Small Cause Court ... 203

(24) Redress for any sum wrongfully taken by a partner in a concern is to be obtained by a suit for accounts, which cannot be entertained by a Small Cause Court ... 214

(25) Where on application for the appointment of a manager to a deceased Rajah's estate, a Zillah Judge, notwithstanding a contention as to extent of minor's interest, passes an order strictly within the provisions of Section 12, Act XL. of 1858, his successor acts without —— in specifying the shares of the minor ... 218

(26) A Deputy Collector under Act X. can only sell in execution of a money decree such moveable property as may be manually seized, process against immoveable property being issued only when the person cannot be seized or the moveable property sold ... 224

(27) A Judge has no —— to inflict a fine on a witness avoiding a service of summons ... 233

(28) A Deputy Collector is competent to depute an officer of his Court to take evidence on commission within his —— ... 236

(29) In a suit against a woman living under the protection of her husband ... 240

JURISDICTION—*(Continued).*

(30) In suits to recover cesses over and above the rent ... 257

(31) Where a judgment-creditor purchases huts sold in execution of his decree, and not being allowed to remove them, sues to recover ... 258

(32) Of an Appellate Court where a decree of a Court of first instance affects all the defendants ... 285

(33) Where an application, complaining that defendants having obtained a decree against a third party are interfering with plaintiff's possession, is rejected by the Court of first instance, and, on appeal to the Judge, is remanded for trial under Section 229, Act VIII. of 1859: HELD that the objection in special appeal that the proceedings were illegal, is not taken too late; that plaintiff's claim cannot be made under Section 220; and that the error affects the —— of the Court of first instance to take summary cognizance of the case ... 318

(34) A Zillah Judge cannot oblige a pleader to leave a Court in which he has been practising, and go to another ... 332

(35) Where a Judge, after rejecting an appeal from a Deputy Collector's decision on the ground of want of ——, finds that an order of the High Court quashing the proceedings of the Collector who admitted the appeal, virtually declares his ——, he may admit an application for review; but not having done so, he may treat the appeal as one filed after time, on sufficient reasons being assigned for the delay... 334

(36) How determined in a suit as to land where the Court of first instance finds that the land is in Rungpore, and the Judge in appeal that it is an accretion to an estate in Gowalparah ... 335

(37) Of Revenue Courts under Act X. of 1859 ... 341

(38) Where a Deputy Collector having decreed a suit for ejectment on proof of arrear due, holds in execution that the arrear having been paid up within 15 days, the tenant cannot be ejected ... 345

(39) An agreement to remain for ever in a particular community cannot be enforced by a suit in Court ... 349

(40) In a suit to set aside a decree of a Small Cause Court, where no defect of —— is manifest, and there is no reason to suppose fraud or collusion 352

(41) In respect of the sale of *B's* right, title, and interest in his decree, where *A* obtains a decree in a District Court against *B* who had pre-

JURISDICTION—*(Continued).*
viously obtained a decree in a different district against another party ... 357
(42) In a special appeal in a suit in which the demand for mesne-profits does not exceed Rs. 500 ... 375
(43) A native camp-follower attached to a European Regiment is amenable to the Mutiny Act ... 386
(44) In respect of appeal, where the Deputy Collector's judgment does not turn on any title to or interest in land ... 390
(45) In respect of an appeal from the decision of arbitrators ... 398
(46) Where in a special appeal in a suit for kubooleut at an enhanced rate, the High Court finds that the land was originally taken for horticultural cultivation ... 403
(47) Of a Collector, where a zemindar refuses to receive the amount of rent deposited by a ryot on the ground that the rent due is *less* than the amount deposited ... 423
(48) In the case of an appeal from a Deputy Collector in a suit to recover rent involving no question of title to, or interest in, land as between parties with conflicting claims ... 431
(49) Of a Revenue Court in a suit for rent, to enquire into the conflicting rights of plaintiff and intervenors ... 433
(50) Of a Revenue Court in executing a decree for arrears of rent ... 434
(51) In respect of the preparation of the jummabundee and adjudication of a suit for rent on the basis of a jummabundee made under the provisions of Section 10, Act VI. (B.C.) of 1862; and in respect of all proceedings under Section 10 when a sub-division has been placed under the —— of a Deputy Collector ... 454
See Appeal (3)
See Attachment (6)
See Breach of Contract.
See Enhancement (11)
See Resumption Decree.
See Withdrawal of Claim.

K.

KHAS POSSESSION.
See Execution (14)

KINGDOM OF AVA.
The —— is not the territory of a Native Prince or State in alliance with the British Government ... 385

KUBOOLEUT.
(1) Where a plaintiff fails to make out his title to a —— at the rent claimed, his suit should be dismissed 77

KUBOOLEUT — *(Continued).*
(2) In a suit for a —— at higher rates, the Court's determination between plaintiff and an intervenor under Section 77, Act X. of 1859, on a matter of title, ought not to govern its decision between plaintiff and defendant ... 97
(3) Where a plaint asks for a —— without specifying the date from which the term is to commence, the Court may fix the proper term ... 362
(4) A landlord is entitled to a —— only from his tenants, and cannot compel a trespasser to execute one ... 407
(5) An auction-purchaser cannot compel the holder of a tenure in perpetuity to execute a —— acknowledging himself to be a tenant for one year at an enhanced rent ... 421
See Arrears of Rent (3)
See Construction (2)
See Contract (1)
See Enhancement (8) (10)
See Objection (2)
See Procedure (10)
See Right of Suit (8)

L.

LAKHERAJ TITLE.
(1) A question as to whether land claimed as lakheraj lies within a co-sharer's share or not, does not come under Regulation XXXIX. of 1793, and registration is not necessary to make the alleged —— valid. Where possession under a —— is title, the question is whether the *onus* should not fall on the party claiming as *mál* ... 91
(2) The production of a lakheraj sunnud is not necessary to prove that land is held rent-free: this may be legally established by long and uninterrupted possession without payment of rent ... 461
See Onus Probandi (8) (14)
See Possession (2)

LAND FOR PUBLIC PURPOSES.
See Possession (1)

LANDLORD AND TENANT.
The payment of rent by defendant to a third party does not prove that the relation of —— did not exist between him and plaintiff, where the payment was made under a deed of assignment from plaintiff's father 495

LEASE.
(1) Where a father, paying the consideration-money out of his own funds, obtains a —— in the name of his wife and son, and, on the decease of the former, in the joint names of the same son and his daughter by the deceased: HELD that the pro-

LEASE—*(Continued).*
perty was given to his wife and children for their maintenance ... 277
(2) Plaintiff taking a sub —— from a lessee under a proprietor, who, without receiving possession, surrenders his rights by a deed of *estafa* executed subsequently to the sub-lease, has no right of action against the proprietor ... 367
(3) Where *A*, taking a putnee to the prejudice of *B*, has notice of an agreement between *B* and the zemindar, he cannot in equity maintain the —— ... 414
(4) Where a —— is granted in perpetuity at a fixed rent, no reversionary interest being reserved, the lessees are entitled to the ownership of the trees ... 419
See Hindoo Widow (1).

LEGAL INFERENCE.
See Co-Sharer (2)

LEGAL NECESSITY.
(1) The mere fact that sales of ancestral property took place in execution of decrees against the ancestor does not show that the sales were for necessary or justifiable purposes... 57
See Objection (1)
See Onus Probandi (4)

LEGAL REPRESENTATIVE.
(1) The purchaser from a mortgagor is a —— under Regulation XVII. of 1806 ... 86

LIABILITY.
(1) In a suit for contribution —— may be decreed in lump against one of the heirs of the deceased, although he has various representatives ... 31
(2) A defendant in a suit by a mortgagor, who had no interest in the property and had received none of its profits, is not liable to pay contribution ... *ib.*
(3) A Collector managing a lunatic's estate on behalf of the Court of Wards, is not necessarily liable to pay the latter's personal debts; and the acknowledgment of an agent for the management of a zemindar's property is not the acknowledgment of the principal under Section 4, Act XIV., 1859 ... 175
See Criminal Prosecution.
See Decree (4)
See Enhancement (5)

LIEN FOR DOWER.
(1) An heir to a share of a deceased Mahomedan's estate cannot recover possession from the widows as long as any part of the dower remains unsatisfied and is not entitled to mesne-profits. He may sue for an account of what is due as dower, praying to be put into possession on satisfaction of that amount ... 369
See Mahomedan Widow.

LIMITATION.
(1) How applied under Section 20, Act XIV. of 1859 ... 5
(2) Where a decree is not a joint one against all the defendants, but a separate one as against each batch 10
(3) How applied in a case in which a talookdar buying in an under-tenure let by himself and sold for arrears of rent, sues a trespasser who has held possession for more than 12 years ... 15
(4) How applied in a suit by a plaintiff in possession to contest a thakbust award and map made under Regulations VII. of 1822 and IX. of 1825 ... 22
(5) In a suit for confirmation of title by one who has been in possession for more than 3 years after a revenue award ... *ib.*
(6) As applied to a suit by a reversioner brought before the death of a Hindoo widow for recovery of property alienated by her, she being entitled to retain it during her lifetime ... 30
(7) How applied in a suit for contribution ... 31
(8) Where the dismissal of a ryot's suit contesting a notice of enhancement has been confirmed in special appeal in May, and the landlord in the December following sues for enhanced rent according to notice 41
(9) Where a survey award relates to land belonging to parties whose rights and interests are distinct and separate, and one of the parties appeals, how —— applies to the other party ... 48
(10) How applied in a suit to contest the justice of a survey award and obtain declaration of title, where both the Commissioner and Board of Revenue have declined to go into the merits of the case ... 51
(11) How applied in a suit to recover money advanced on deposit of title-deeds, and how where the creditor seeks to have his lien realized 56
(12) As applied by the rulings of the High Court to any stage of the proceedings in a case ... 59
(13) Where a plaintiff sues not only for the cancelment of a survey award, but also to be restored to possession of land from which he has been subsequently dispossessed ... 71
(14) How applicable to a suit for possession by plaintiff between whom and

LIMITATION — *(Continued).*

an intervenor an issue as to title was decided in a suit for rent heard in a Civil Court before the passing of Act X. of 1859 ... 75

(15) In a suit for recovery of immoveable property, where the cause of action arose 12 years previously, and plaintiff claims as lessee under Government ... 76

(16) As applied to the cause of action against a lessee who by agreement, having for some time made annual payments out of the rent in liquidation of lessor's debt, withholds them while a balance of the debt is still due, and the creditor gets a decree against the lessor ... 80

(17) How applicable as against the purchaser, where a decree-holder, after selling a decree and substituting the purchaser's name for his own, fraudulently receives moneys under it ... 104

(18) In a suit to recover advances for work and on other accounts, money being entrusted to defendant to be accounted for by him ... 174

(19) In a suit to establish proprietary right as against a mokurrureedar 192

(20) How applied in the case of appeals ... 209

(21) In respect of parties claiming as heirs of property sold without their consent, and held by the purchaser in adverse possession ... 249

(22) How applied in a suit putting forward a joint claim ... 261

(23) In a suit by a Hindoo widow to recover the undivided half of her husband's estate, after defendant has been allowed to hold possession for more than 12 years ... 264

(24) How applied in the suit of a reversioner to set aside an alienation by a Hindoo widow with a life interest only ... 276

(25) In a suit to recover a balance on account of indigo advances made on a kubooleut, where the discontinuance of the cultivation is the act of the plaintiff ... 293

(26) How applied to a claim to malikana ... 302

(27) How applied to the adjudication of a claim to attached property after its rejection on the ground of having been presented too late ... 305

(28) In a suit for damages on account of a false and malicious statement made by defendant before a Magistrate, in consequence of which criminal proceedings were taken against plaintiff ... 308

(29) In a suit to set aside the sale of certain lands, in which plaintiff brought his action against the decree-holder who attached and sold them, and the supposed auction-purchaser, and then finding his supposition erroneous, applied to have the real purchaser made a party, and the heirs of the decree-holder (who had died) substituted as defendants ... 317

(30) In a suit for money to be recovered by the sale of mortgaged property where plaintiff asks for a decree against the person of the borrower and the property pledged ... 379

(31) A plea of —— not pressed by appellants on evidence before the Lower Appellate Court cannot be admitted in special appeal ... 425

(32) In respect to an application to set aside a decree dismissing an appeal for default of prosecution ... 437

(33) As applied to redemption where a mortgage has not legally been put an end to ... 478

See Appeal (2)

See Issue (2)

See Possession (6)

See Right of Occupancy (3)

LIS PENDENS.

(1) A decree pending a suit is not to be got rid of by a sale by one of the parties while the suit is pending... 469

LOAN.

Where *B* recovers money lent in his name to *C*, but contributed in shares by himself and *A*, *A* is entitled to share in what is recovered; and *B*, in suing, sues for all the lenders ... 45

LOAZIMA AND THAKA PAPERS.

See Evidence (39)

LOCUS STANDI.

(1) A person exposing a gross fraud practised on a Court with a view to evade an order directing a minor's guardian to account, has a —— in Court and a right to be heard ... 372

LORD'S DAY ACT.

(1) The —— does not extend to criminal cases in British Burmah; and a conviction is not bad on account of accused being arrested on Sunday 350

M.

MAHOMEDAN LAW.

(1) A marriage arranged by the mother and grandmother of a Mahomedan minor is lawful in the absence of a nearer guardian ... 12

(2) The acknowledgment of the father renders the son a legitimate son and heir ... 45

(3) Where several purchase from one, the *shafee* may take the proportion of any one of them; but where one purchases from several, the *shafee*

MAHOMEDAN LAW—*(Continued).*

may take or relinquish the whole, but not any particular share ... 111

(4) To entitle a person otherwise favourably situated to the right of pre-emption, he must, on being informed of the sale, *immediately* declare his intention to assert his right, and (as soon after as possible) make the demand on the premises in the presence of witnesses ... 119

(5) An heir, like an executor, may sell portions of deceased's estate, if necessary, in the course of a due administration ... 216

(6) The daughters of a deceased brother of a person who demises, cannot take any share of such person's property so long as a brother and sister, or only a brother, survives ... 306

(7) Where surviving kindred are related in like degree to a deceased party, the males are entitled to a double share of the inheritance ... 315

(8) Where a will is put in issue showing more than one-third of deceased's estate to be endowed for charitable purposes, the Lower Appellate Court should find whether the heirs are consenting parties ... 375

(9) A widow's title to succeed to her husband's estate is not barred by her being childless ... 462

See Executor (4)
See Pre-emption (5) (6) (9)

MAHOMEDAN WIDOW.

(1) A —— is entitled to a lien for whatever dower remains due to her, although, there may be a dispute as to the amount actually due ... 369

See Lien for Dower.
See Mahomedan Law (9)

MAINTENANCE.

See Execution (1) (2)
See Hindoo Widow (2)
See Lease (1)

MALIKANA.

See Limitation (26)

MANAGER.

(1) A——of a family-estate who receives the rents has no power to sell the property of an adult member ... 303

See Waste.

MARRIAGE.

See Mahomedan Law (1)

MAP.

See Evidence (35)

MERGER.

(1) *Quære*—Whether the doctrine of—— applies to lands in the Mofussil in this country ... 15

MESNE PROFITS.

(1) —— do not exist as an obligation to be discharged, but are only *payable* when due under an order of Court ... 62

(2) A decree of the High Court, technically for possession only, which re-instates a party, also gives a right to —— on ascertainment in execution ... 131

(3) No difference should be made between —— paid in kind and —— paid in cash ... 209

(4) —— of land should be assessed, not with reference to the manner in which plaintiff held possession, but in respect to what defendant did with the land when in possession; the rule laid down by the Full Bench (9 W. R., p. 445) being applicable ... 463

(5) Where, in a suit for possession —— are not treated as a matter in issue, the question cannot be regarded as a cause of action "heard and determined" under Section 2, Act VIII., 1859 ... 486

(6) Where the amount of —— cannot be ascertained till after the end of the year, the cause of action does not arise till then ... *ib.*

(7) Parties in possession are liable for—— to the legal owners, although there is no *mala fides* on their part ... *ib.*

See Jurisdiction (42)
See Procedure (5)
See Zur-i-peshgee Lease.

MINOR.

(1) A person under legal disability when right of action accrues, has an additional three years allowed him for suing, from date of attaining majority ... 44

(2) A guardian's relinquishment of a hereditary jote is binding on a—— only when it is shown to have been made for the ——'s benefit ... 59

(3) Where, in the case of a ghatwalee mehal, the resumption and settlement proceedings have been cancelled, the——son holds his former position ... 179

See Deed of Sale.
See Guardian (1) (3)
See Jurisdiction (25)
See Right of Suit (4)

MOKURRURER LEASE.

(1) Where a mokurrureedar resigns his tenure, the dur-mokurrurees created by him come to an end; but this does not affect ryots holding rights of occupancy ... 408

See Admission (1)
See Enhancement (1) (3)
See Onus Probandi (1)

MONEY DECREE.
See Bond (1)
See Mortgage (9)
See Sale (3)

MOONSIFF'S POWERS.
(1) A Moonsiff may examine any of the parties to a suit and compel their attendance, or, if they fail to comply, to deal with the suit under Section 170, Act VIII., 1859. He also has power to examine any other person as a witness ... 280

MORTGAGE.
(1) A putneedar obtaining a pottah from a mortgagor subsequent to the —— and in violation of its conditions, cannot hold possession against the purchaser of the rights and interests of the mortgagor sold in execution of a decree ... 151
(2) The purchaser of an equity of redemption is entitled to redeem and obtain possession of the land if the —— debt has been liquidated before the plaint is signed, or upon paying into Court, within one month, the balance remaining due 167
(3) The purchaser of property sold under a decree obtained on a —— bond, purchases not only the rights and interests of the debtor, but also the right brought to sale by mortgagee by virtue of the decree ... 291
(4) A registered —— takes priority over an unregistered——of earlier date, and a purchaser under a decree on the former has a preferable right to the purchaser under the execution of a decree on the latter ... *ib.*
(5) Where the usufruct of mortgaged property is to be enjoyed in lieu of interest, it cannot be inferred that any portion of the debt, save the interest, is paid off from it ... 301
(6) Where, during the currency of the year of grace, the mortgagor and mortgagee file petitions in the foreclosure proceedings setting forth an arrangement they have come to for the payment of the debt, it is not their intention to substitute a new contract, or that the proceedings should drop ... 326
(7) Where, after notice of foreclosure, and before expiry of the year of grace, a mortgagee allows mortgagor six months to redeem, and the mortgagor subsequently dies, it is necessary to issue a fresh notice of foreclosure ... 359
(8) In a redemption suit under the old law for the possession of land, the subject of an usufructuary——, the plaintiff is entitled to an account 367
(9) Where plaintiffs have not, in the decree in execution of which a property is sold, obtained from the

MORTGAGE—*(Continued.)*
Court a declaration of their rights as mortgagees, the plea that they have a lien on the property discloses no sufficient defence ... 468
(10) In a suit based on a deed of conditional sale to recover property obtained by mortgagor in lieu of that contained in the deed : HELD, that plaintiff has no lien on property he did not purchase ... 475
(11) Where several parties have an interest in a ——, it is not competent for one to foreclose in respect of his share ... 476
(12) A party suing for a share of mortgaged property on the ground of an interest in the —— must show that the mortgagee had notice of such interest ... *ib.*
See Bond (1)
See Cause of Action (2)
See Evidence (19)
See Limitation (33)
See Procedure (5)

MOVEABLE PROPERTY.
See Act XI. of 1865 (1) (2)

MOWRUSSEEDAR.
Where a tenant under a ——, on being sued by a zemindar for a kuboolent, gives the —— notice to appear the latter is not bound to appear... 324

MULTIFARIOUSNESS.
(1) Where several causes of action had been improperly joined together in one suit which was fully tried below, the High Court in appeal declined to dismiss it ... 45

N.

NAZIR.
See Evidence (2)

NEKASI PAPERS.
See Procedure (15)

NEW ISSUE.
See Remand (14)

NEW PLEA.
See Enhancement (13)

NEW TRIAL.
See Res Adjudicata (2)

NOTICE.
(1) Where, in a suit by a zemindar for rent on account of newly formed land which had accreted to the old jote, the Civil Court has decreed the rent, no —— under Section 13, Act X. of 1859, before rent can be demanded, is necessary ... 330
See Arrears of Rent (2)
See Evidence (2)
See Lease (3)

O.

OBJECTION.

(1) —— taken for the first time in special appeal in a case in which plaintiff claims as his inheritance what has been sold by his mother in liquidation of his father's debts is too late; and the fact that a more advantageous arrangement might have been made does not nullify a a sale to a *bonâ-fide* purchaser ... 8

(2) An —— founded on law only may be made by a party to a suit in the Court of Appeal, although it has not been made in the Court below 77

(3) An —— not taken in the Lower Court against the admissibility as evidence of khusrah butwarra papers cannot be allowed in special appeal ... 91

(4) —— taken for the first time in special appeal to the evidence of documents inadmissible as legal evidence, and not bearing on the point to be decided, must be accepted ... 124

(5) The objection that papers admitted as evidence are not legally admissible is not by itself sufficient ground for reversal of decree or for remand ... 130

(6) Where plaintiff obtains a decree in a suit for the recovery of money on a bond alleged to be an asset of a factory purchased by him, and it is objected for the first time in appeal that he had filed no evidence to prove his allegation, he ought to have an opportunity of adducing proof ... 332

OFFICIAL ASSIGNEE.

See Attachment (4)

OLD DOCUMENTS.

See Evidence (1)

ONUS PROBANDI.

(1) In a suit to recover land under a mokurruree lease, in which the zemindar (defendant) admits the validity of the lease, but the other defendant also claims a mokurruree interest 9

(2) In a suit for a declaration of a judgment-debtor's rights in certain joint-property, defendant pleading self-acquisition ... 28

(3) In a suit to recover possession of property from plaintiff's vendor, where a third party claims, and is made defendant ... 52

(4) Where a reversionary heir sues to recover property on the allegation that it has been improperly alienated ... 94

(5) In a suit to assess land proved to be purchased as lakheraj, and of which defendant is in possession ... 117

ONUS PROBANDI.—*(Continued.)*

(6) In a suit on a bond which recites the fact of due consideration having been paid at the time of execution, defendant denying the payment... 132

(7) Where the reversionary heir of a former proprietor sues for land in the possession of a third party, who obtained it by purchase at a sale in execution of a decree on a bond, both bond and decree being alleged to be fraudulent ... 172

(8) Where plaintiffs sue for declaration that certain lands are *lakheraj* on the ground that defendant obtained a decree in the Collector's Court against them for rent ... 188

(9) In a suit for a share of certain joint property claimed under a family-arrangement said to have been reduced to writing as an ikrarnamah 194

(10) In a suit to recover property on the ground that it is purchased as vendor's undivided share in joint property, defendants averring it to be the self-acquired property of the elder brother who is not plaintiff's vendor ... 198

(11) In a suit for enhancement of rent, where defendant pleads that a parcel of it is *debutter* land, the property of another ... 204

(12) Where plaintiff claims as mokurrureedar, but does not establish his allegation that defendant is his tenant ... 211

(13) Where plaintiff files documents relating to lands not identified with the land in dispute ... 237

(14) In a suit to recover lands alleged to be lakheraj, where plaintiffs purchased the land as lakheraj, and were admittedly in possession for a very long time ... 278

(15) In a suit against a purchaser to set aside a sale in execution of a decree on the ground of fraud ... 280

(16) Where a decree-holder, in a suit to establish his claim to certain property as that of his judgment-debtor, alleges that the deed of sale conveying it to defendant was fraudulently executed ... 321

(17) Where a plaintiff in a civil suit relies on a *kobala* held by a Small Cause Court to be *malâ fide* ... 412

(18) In a suit for confirmation of right and possession in respect of lands alleged to be within plaintiff's permanently-settled talook ... 413

(19) In a suit to recover advances alleged to be due from a discharged gomashta who pleads acquittance ... 421

(20) In a suit for the sale of property in satisfaction of a decree, where the judgment-debtor made it over

ONUS PROBANDI.—*(Continued.)*
to his wife in lieu of dower, and she transferred it to defendant ... 423
(21) Where plaintiff prays for possession by reversal of sale, alleging that she and her deceased husband's minor brother had, with his other three surviving brothers, held joint possession, but that these three had wrongfully sold the land ... 436
(22) In a suit for damages for malicious prosecution, where it is proved that plaintiff had been convicted of theft before the Magistrate, but acquitted by the Sessions Judge ... 439
See Ancestral Property.
See Bond (3)
See Contract (2)
See Joint Hindoo Family (1) (8)
See Lakheraj Title (1) (2)
See Possession (1)
See Proceeding (2)

ORAL STATEMENT.
The —— of a pleader is not enough to satisfy a Judge, acting as a Judge of fact, that certain documents are beyond the power of the parties wishing to use them as evidence ... 237

P.

PAROL CONTRACT.
See Registration (7)

PARTITION.
(1) A —— can take place notwithstanding the majority of some of the coparceners, and there need not be more than one adult member. The law of —— applies to all joint-families, whatever the number of members or the nature of their relationship ... 273
(2) A private —— of a joint-estate is not inconsistent with subsequent survey proceedings ... 336
(3) Where plaintiff charging defendant No. 1, who is jointly interested with him in the land, with collusion with the other defendants, asks for ——, and it is found that he is entitled to only a small portion of the share he claims: HELD that he is not entitled to a ——, but may have relief by a decree awarding him joint-possession with defendant No. 1... 487
See Joint Hindoo Family (6)
See Pre-emption (7)
See Rent (4)

PAUPER.
(1) A —— is liable to pay any further stamp-duty or penalty in respect of a document on which he relies, to render it admissible as evidence ... 357

PAUPER.—*(Continued.)*
(2) A —— seeking remission or mitigation of penalty under the stamp-law should himself make timely application under Clause 6, Section 15, Act X. of 1862 ... 35

PAYMENT.
A wrongful —— by order of Court may be recovered by means of a suit in the Civil Court ... 48
See Attachment (5) (8)
See Sale (5)

PERMANENTLY-SETTLED ESTATES.
Act I. of 1841 and Act XXIII. of 1861 are not applicable to —— in Sylhet or (unless extended) to the estates in any district in Bengal... 16

PERSONAL DEBT.
See Decree (4)

PETITION.
A mere —— by a widow to the effect that she has relinquished her title to certain property is no legal relinquishment of her share therein 96

PLAINT.
(1) Where a —— discloses no cause of action as regards one of the plaintiffs, there can be no decree in his favor ... 49
(2) Where a —— is filed in the name of a deceased party in ignorance of his death, but the heir and representative is at once put on the record as plaintiff instead, the irregularity is immaterial ... 127
(3) Where a ——charges defendants with putting plaintiff's title in jeopardy by reason of a decree in the Collector's Court, the Lower Appellate should enter upon the merits of the real issue between the parties... 460

PLEA.
See Onus Probandi (2)

PLEADER.
See Jurisdiction (34)
See Review (2)
See Small Cause Court.

POSSESSION.
(1) Where a Railway Company takes land for public purposes, the party in —— is *primâ facie* entitled to the money paid for it until some one else establishes a prior claim... 48
(2) —— of land without payment of rent for 12 years establishes lakheraj title ... 61
(3) Where a Judge merely decrees —— of a share in an undivided estate with wassilat, without specifying the share or the land representing it, plaintiffs are not entitled to be put in —— of any specific lands 96
(4) In a suit to recover —— of land that had been entered upon under a

POSSESSION.—*(Continued.)*

lease, the Court need not go into plaintiff's title, until there are found grounds for believing that defendant's case is a good one ... 102

(5) In a suit to recover —— and mesne-profits of alleged *istemoorari* lands as plaintiff's father was in quiet ——, and plaintiff himself had been in quiet —— until dispossessed by defendant without sufficient title, plaintiff is entitled to a decree ... 189

(6) Where a plaintiff, alleged by defendant to be a benameedar, and never to have been in ——, sues for immoveable property under a kobala more than 12 years old, he must prove, not only title, but —— within 12 years of filing of suit ... 239

(7) —— by a tenant does not in itself lead to any inference as to the character of the tenant ... 477

(8) Where a party originally a mortgagee out of —— is put into —— by the act and permission of the mortgagor, he obtains a new title different from that possessed before ... 478

See Collusion.
See Confirmation of Title.
See Limitation (13)
See Mesne-profits (2)
See Partition (3)

POSSESSORY SUIT.

Where a plaintiff, suing to recover certain property as *wuqf*, lies by for nearly 12 years from the time when the vendees purchased and were put in possession, he is not entitled to the assistance of the Court ... 458

See Onus Probandi (21)
See Res Adjudicata (5)

POTTAH.

A —— need not be attested or registered ... 374

See Evidence (22)
See Purchaser (3)
See Registration (4)

PRE-EMPTION.

(1) A Civil Court has no power to make a decree-holder's right of —— depend on payment of the purchase-money within a specified time ... 53

(2) Where a plaintiff sues to enforce her right of —— in property sold as belonging to several co-sharers, some of whom are minors, and in appeal withdraws her claim so far as the minors are concerned, such withdrawal entirely invalidates her claim to enforce her right of —— 111

(3) The law of —— cannot apply to an execution-sale by public auction... 165

(4) A plaintiff suing for right of —— on the ground of co-partnership cannot obtain a decree by right of vicinage ... 189

PRE-EMPTION.—*(Continued.)*

(5) A pre-emptor need not tender the price at the time of making his claim ... 211

(6) Under Mahomedan law, the right of —— does not arise until the seller's right of property is extinguished... 246

(7) Where, notwithstanding a division of certain julkur and neemuksaher, the immunities and appendages are still held in co-parcenary, the owner of one puttee has a right of —— over a stranger in respect of the other puttee which is sold ... 314

(8) The right of —— is limited to parcels of land, &c., and does not give the right to purchase a separate estate, because part of it is continuous with that of the *shuffe* ... 356

(9) A person entitled to —— has a right to take over a bargain in its entirety, but not to have it divided ... 379

See Mahomedan Law (4)

PREMATURE SUIT.

See Bond (2)

PRESUMPTION.

(1) Where —— is claimed under Section 4, Act X. of 1859, the question is whether the rent has been changed or not for 20 years previous to the suit ... 117

(2) Jummas being derived in part or in whole with the consent of the landlord, and subsequently consolidated, does not deprive the ryot of the benefit of the —— arising where the rent has not been changed ... *ib.*

(3) Separation in dwelling and food would give rise in Hindoo law to a —— of separation in estate ... 148

(4) Defendant's sworn declaration that his rent has not varied for more than 20 years, corroborated by the records of the Collectorate showing the rent to have been the same that it was more than 30 years ago, is sufficient to warrant —— under Section 4, Act X., 1859 ... 364

(5) In order to bring himself within Sections 3 and 4, Act X. of 1859, a ryot need only show that the particular land, the subject of the suit, has been held at an unchanged rent ... 429

See Abatement (2)
See Contract (2)
See Joint Hindoo Family (7) (8)
See Lakheraj Title (2)
See Onus Probandi (10)
See Remand (12)

PRIVATE ARBITRATION AWARD.

See Jurisdiction (13)

PROBATE

—— may be granted of a Buddhist's will made after 1st January 1865 ;

PROBATE.—*(Continued.)*
but the will need not be executed according to the formalities required by the Indian Succession Act... 417

PROCEDURE.
(1) The —— of Revenue Courts does not admit third parties into the record excepting under Section 77, Act X. of 1859 ... 54
(2) Where one son of a deceased party sues another who has obtained a certificate under Act XXVII. of 1860 for his share of the deceased's estate, the Recorder's Court cannot transform the suit into a general administration-suit, but may order all necessary parties claiming a share in the subject-matter to be made parties ... 86
(3) A reversioner, suing to set aside alienations by the heiress in possession, wrongly seeks immediate possession, and the Principal Sudder Ameen decrees only such relief as she is entitled to. The course adopted by the Principal Sudder Ameen not being made the ground of appeal to the Judge, the High Court refuses in special appeal to set aside the decree ... 133
(4) A Judge may refuse to summon a plaintiff as a witness, and that discretion will not be interfered with in special appeal, unless shown to be exercised illegally ... 134
(5) In an action for mesne-profits of land decreed in a suit for possession after notice of foreclosure, where defendants, not having been ignorant of the real party with whom they had been dealing, were in no wise prejudiced by the disclosure that the ostensible plaintiffs were not really interested, the parties in whose name the suit is brought may be regarded as trustees for the person beneficially interested ... 145
(6) A suit cannot be dismissed and justice denied on the technical ground that the party beneficially interested has failed to verify his plaint ... *ib.*
(7) Under Section 170, Act VIII. of 1859, the Court may pass any order it thinks proper in regard to a plaintiff disobeying a summons; it being no ground of special appeal that further steps were not taken by the first or Lower Appellate Court ... 174
(8) Where the Lower Appellate Court finds that the depositions of plaintiff's witnesses, uncorroborated by documentary evidence, cannot prove his statements, the High Court will not interfere in special appeal ... 204
(9) A suit found by a Lower Appellate Court, to be undervalued when its proper value would have placed it beyond the jurisdiction of the first Court, should be dismissed ... 207
(10) Where, in a suit for a kubooleut at enhanced rates, plaintiff obtains a decree, although he is found not entitled to the rate of rent claimed, the High Court, of its own motion in special appeal, reverses the decree ... 213
(11) A Judge examining in appeal a defendant who failed to give material evidence which he might have given in the Court below acts erroneously ... 228
(12) A Judge's statement should be taken as accurate until there is good ground for supposing it an error... 232
(13) An appeal on paper insufficiently stamped, being admitted and heard, must be dealt with on its merits, and relief cannot be limited to so much of the subject in suit as seems covered by the amount in respect of which the stamp is given ... 242
(14) Where, in a suit for damages on account of value of crops cut, defendant denies plaintiff's title to the land, and adjudication on this point becomes necessary, the latter ought not to be compelled to put in an additional stamp to represent the value of the land ... 272
(15) In decreeing a suit for the delivery of nekasi papers, it is not enough to give an order that the claim be allowed; but there should be a specific order for the delivery of the papers ... 279
(16) Where plaintiff rests her claim solely on the deposition of defendant, to be taken by his placing his hand on a particular text of the Koran, and the claim is not proved: HELD that the Lower Court may properly examine the defendant in the way sanctioned by the —— of the Court ... 284
(17) Where plaintiff rests her claim solely on the deposition of defendant, she is not allowed to examine further witnesses and to re-open the case. *ib.*
(18) A Judge, finding that he has struck off an execution-case improperly, may restore it to the file, and need not proceed *de novo* ... 380
(19) The rule in the original side of the High Court is not to compel a party to a suit to give up to the receiver possession of property, unless an order of Court has previously been made upon him ... 430
(20) Gives instruction as to how debts should be attached ... 447
(21) The ordinary rule of —— applicable to civil suits before final judgment.

PROCEDURE.—*(Continued.)*

will apply to an appeal arising out of an order made in execution ... 450

(22) A question already decided by a Court of special jurisdiction cannot be tried again in course of executing the decree of that Court ... 485

See Cause of Action (3) (8)

See Cross-appeal.

See Damages (4)

See Execution (7)

PROCEEDING.

(1) Steps taken towards placing the assignee of a decree in the position of the original decree-holder do not constitute ——s within the meaning of Section 20, Act XIV. of 1859 ... 127

(2) The receipt of the proceeds of a sale in execution is a —— within the meaning of Section 20, Act XIV. of 1859. The party impugning the *bona fides* of a —— in execution must furnish proof ... 224

(3) A dispute between a purchaser of a decree and a third party and the ——s connected therewith are ——s under Section 20, Act XIV., 1859 ... 240

(4) Decision of Full Bench at 98 of Vol. VI., W. R., applies to any *bonâ-fide* ——, whether successful or not ... 248

(5) Resistance to legal ——s taken by another person will count as a —— for the purposes of Section 20, Act XIV., 1859 ... 248

(6) The transmission by the Court of one district to the Court of another of a copy of its decree and certificate under Sections 285 and 286, Act VIII. of 1859, is a —— within the meaning of Section 20, Act XIV., 1859 ... 373

See Civil Ameen.

PRODUCE.

See Rights of Cultivators.

PROPERTY.

See Hindoo Law (1)

PROPRIETARY RIGHT.

See Limitation (19)

See Settlement.

PUBLIC POLICY.

See Contract (3)

PUBLICATION.

Where a letter defaming plaintiff is received and read by him alone, this does not constitute —— ... 184

PURCHASER.

(1) A defaulting tenant purchasing his own tenure sold in execution of a decree against himself cannot claim the benefit of the law relating to auction ——. Where he has sold to a third party, he is bound to recognize the purchase ... 202

PURCHASER.—*(Continued.)*

(2) The —— at a sale in execution of a decree on a bond mortgaging property has no preferential title over a prior ——, where the liability of the property under the mortgage is not declared in the decree ... 309

(3) A —— of property sold under a decree in favor of a mortgagee cannot claim to set aside a ticca pottah granted before his rights came into existence ... 325

(4) Where a plaintiff, purchasing from defendant an estate attached under a decree held by another party against him, pays the amount of the decree and interest to prevent a sale in execution, she is entitled to recover from defendant the amount she has paid ... 380

(5) A —— of the rights of a co-sharer comes into all arrangements as to collections ... 441

See Cause of Action (2)

See House rent.

See Legal Representative.

See Right of Appeal.

See Sale (3) (8)

PUTNEEDAR.

See Compensation (1)

R.

RECEIPTS:

See Evidence (44)

RECEIVER OF HIGH COURT.

A Receiver of an estate has no title as of right to the immediate possession of the property, and no right to sue in another Court in his own person to receive possession 430

See Procedure (19)

RECITAL.

See Evidence (17) (43)

RECORDER'S COURT.

See Procedure (2)

REDEMPTION.

See Mortgage (2) (8)

REGISTRATION.

(1) A lease registered under Act XVI. of 1864 has priority as against an unregistered conveyance of an earlier date ... 36

(2) Section 50, Act XX. of 1866, does not vitiate titles acquired prior to that Act merely because the instruments are not registered ... 65

(3) The —— of a ryotee tenure in a talookdar's sheristah is not necessary under Section 27, Act X. of 1859 ... 101

(4) Where, on allegation of failure in a contract, plaintiff sues for possession on the footing that a *byna-*

REGISTRATION.—*(Continued.)*
namah is a mowrosee pottah: HELD that the deed is a pottah, and under Clause 2, Section 17, Act XX., 1866, an instrument whose registration is compulsory, and which unregistered cannot hold its ground against a registered pottah 177
(5) An unregistered contract of sale, though not absolutely needing —— to be admissible as evidence, cannot have priority over an authentic instrument executed afterwards by the vendor, and registered ... 196
(6) Priority of —— gives priority of title under Act XIX. of 1843, only when the authenticity of the document is proved ... 215
(7) Where two parties claim the same property under registered deeds of sale, plaintiff, whose purchase and —— are of anterior date, is entitled to a decree, and defendant cannot set up a *parol* sale against plaintiff's registered *kobala* ... 231
(8) The —— of a bond for repayment of money in which land is pledged as collateral security is not compulsory under Section 13, Act XVI., 1864 ... 252
(9) Where a Registrar refuses to register a deed of sale under Section 17 of Act XVI. of 1864, the applicant cannot sue the vendor to enforce ——, unless there is an express contract to register ... 313
(10) A suit does not lie to compel —— of a lease executed when there was no law making such —— necessary ... 360
(11) —— in a Collector's books is not of itself a proof of title ... 393
(12) Where a zemindar takes rent from a party as holder of a tenure, he cannot ignore the position of the party, even though he has not been registered in the zemindar's office 466
(13) The remedy for refusal to register an instrument is by a petition under Section 84, Act XX., 1866 483
See Construction (1)
See Mortgage (4)

REGULATION VIII. OF 1859.
CLAUSE 4, SECTION 13. *See Deposit* (1)
SECTION 11. *See Purchaser* (1)

REGULATION XI. OF 1825.
In Clause 4, Section 4, "subject to the provisions stated in the first Clause of the present Section," only applies to the owner's rights in relation to the Government ... 86

REGULATION XIX. OF 1793.

REGULATION XVII. OF 1806.
See Legal Representative.

REGULATION XXXIX. OF 1793.
See Lakheraj Title (1)

REIMBURSEMENT.
Where *G*, after purchasing a putnee tenure sold in execution of a decree, saves the estate from being sold for arrears of rent which had accrued prior to his purchase, by paying the amount due, and *S*, who has in the meanwhile appealed against the decree under which the land was sold, obtains a reversal of it, *G* may recover from *S* the amount paid to save the putnee from being sold ... 115

RELINQUISHMENT OF TITLE.
See Petition.

REMAND.
(1) Where, in a case decided on pure questions of fact, no point being left undetermined, the Judge in appeal endorses the opinion of the first Court without detailed reasons, the High Court will not —— the case for the reasons ... 100
(2) A Judge acts with strict propriety in remanding a case to a Court of first instance for the trial of an issue it was directed to try, but did not ... 236
(3) The object of a —— is not to try the issues on the evidence already taken, but to take evidence for the determination of the issues ... 244
(4) Where a case is remanded for some special evidence, the Court receiving the order of —— cannot take additional evidence ... 303
(5) Where a rent-case is remanded with a view to ascertain whether an ummulnamah produced by plaintiff is the same as a pottah filed in a survey-case, and the Judge, finding that it is the same, also finds that the pottah is not the one given to plaintiff to file, and reverses the decree for rent: HELD that the additional finding is not opposed to the order of ——, and that the Judge has authority to award damages without appeal on that point ... 339
(6) Where a Lower Appellate Court, having before it all the evidence in a case, decides on a preliminary point, it cannot —— the case ... 374
(7) An Appellate Court ought not to receive additional evidence not before the Court of first instance without a special reason which should be recorded ... 378
(8) An Appellate Court ought not to send back a case for re-trial merely because the Lower Court has disposed of it on a preliminary point, unless evidence of fact has been

REMAND.—*(Continued.)*
excluded essential to the rights of the parties ... 378
(9) An order remanding a case for additional evidence, which has been tried by the Lower Court on its merits, is in opposition to the terms of Section 352 of the Civil Procedure Code ... 388
(10) Where a suit for rent is dismissed by the Lower Court on the issue whether plaintiff's title to sue could be made out, the Lower Appellate Court is not competent to —— the case for trial on its merits ... 410
(11) Where a Lower Appellate Court finds that a suit substantially under Section 230, Act VIII. of 1859, is dismissed on a point not arising under that Section, the case should be remanded for decision under that Section ... 438
(12) In a suit for enhancement of rent remanded to the Lower Appellate Court with the instruction that sufficient evidence had been produced as presumption of uniform payment, the Judge may direct the first Court to hear further evidence upon the point ... 442
(13) After a case is closed in the Lower Court, the superior Court cannot —— it for re-trial on fresh evidence, on the ground that one of the issues was not tried, but must decide it itself under Section 353, Act VIII. of 1859 ... 469
(14) Where a case is remanded for the trial of an issue not laid down by the Court which tried the case, the parties are entitled to give evidence on it ... 491
See Objection (5)

RE-MARRIAGE.
See Act XV. of 1856.

RENT.
(1) The tender of——followed by a deposit under Act VI. (B. C.) of 1862 is legal and sufficient ... 101
(2) A suit for——on account of a holding let out to several ryots must embrace all ... 304
(3) In a suit on the part of the Durbungah Rajah for unpaid instalments of——, where defendant holds his zemindary under an agreement to pay his Government revenue into the Collectorate through the Rajah: HELD that the rule applying to ordinary tenants paying month by month does not apply to the defendant ... 368
(4) The plea of partition of the land set up by joint tenants in a suit for —— cannot avail if not shown to be recognized by the plaintiffs... 392

RENT.—*(Continued.)*
(5) A talookdar instituting a suit against a ryot for arrears of —— and ejectment after the sale of his right and interest in the tenure in execution of a decree ought to make the execution-purchaser a party to the suit ... 494
See Intervenor (3)
See Notice.
See Under-tenure (1)

REPRESENTATIVE.
Where the widow of a judgment-creditor refuses to make her daughters co-plaintiffs, she cannot recover their share ... 397
See Cause of Action (9)
See Execution (6)
See Right of Suit (6)

RES ADJUDICATA.
(1) A Collector's refusal to assist under Section 25, Act X. of 1859, is not a determination by a competent Court in a former suit within the meaning of Section 2, Act VIII., 1859 ... 6
(2) A Civil Court loses jurisdiction over a suit after a final decision, and can hold a new trial only when, under the Procedure Act, the first trial appears to have been unfair 42
(3) A suit once dismissed by a Court of competent jurisdiction cannot again be entertained by the Civil Court 325
(4) Where, on a petition under Section 84, Act XX. of 1866, a competent Court has decided that defendant was entitled to have obtained registration of a kobala, plaintiff cannot sue to have it declared fictitious and void as against himself... 329
(5) A possessing suit for lands for the possession of which plaintiff has already obtained a decree from defendants and others is barred; plaintiff should resort to the provisions of Section 223 of the Procedure Code ... 396
(6) The *bona fides* of pottahs respecting which no issue was raised in former suits cannot be regarded as a—— 403
(7) A suit to recover possession, as part of her own talook, of land which plaintiff had claimed in a former suit as *towfeer* reclaimed and occupied, is barred by Section 2, Act VIII. of 1859 ... 426
(8) A former suit brought by *H*, *R*, *L*, and *K*, is not between the same parties as a subsequent one by *O*, *R*, and *L*; and, not having been brought by parties under whom the present plaintiffs claim, is not barred by Section 2, Act VIII. of 1859 ... 457
(9) Where, in a suit for rent, an issue raised by defendant as to an arrange-

RES ADJUDICATA.—*(Continued.)*

ment for tenancy has been determined adversely to him, he cannot in a new suit in the same Court set up the same arrangement ... 465

See Act X. of 1859 (3)
See Estoppel (2) (3) (4)
See Mesne-profits (5)

RESUMPTION.

When land is resumed as invalid lakheraj, the Government is not compelled to make a settlement with the ex-lakherajdar ... 296

RESUMPTION-DECREE.

The ruling of the late Sudder Court as to the final and conclusive character of a —— does not apply to what is subsequently done administratively by a settlement-officer ... 103

See Minor (3)

REVERSAL OF DECREE.

See Objection (5)

REVERSIONER.

See Limitation (6)
See Onus Probandi (4) (7)
See Procedure (3)
See Right of Suit (4)
See Waste.

REVIEW.

(1) A difference between the High Court's construction of the law and that laid down in the decision admitting a case to——is no excuse for delay beyond the prescribed time in the application for—— ... 26

(2) Junior pleaders of the High Court should be cautious how they certify for a —— in cases that have been in the hands of experienced members of the bar and pleaders... 54

(3) An error on a point of law is a ground for a —— of judgment ... 143

(4) Section 367 of the Code of Civil Procedure authorizes ——s in respect to decrees and orders which are not decrees ... 345

(5) Where a Lower Appellate Court, after affirming a decree to set aside an execution-sale of the right and title of a judgment-debtor in certain property, reviews its own judgment, the circumstance of the ——being heard in the absence of the plaintiff is not an irregularity to be complained of ... 365

(6) Where a Lower Court granting a —— re-opens the original case, takes fresh evidence, and upholds its former decision, an appeal will lie 387

(7) Where an application for——of the judgment of a Divisional Court which turned on the construction of a "*teep*" is rejected, and a Full Bench in appeal puts a construction on a similar "*teep*" the second application for —— should be made within 90 days of the Full Court's decision ... 415

(8) A Judge ought not to admit a —— to receive fresh evidence, unless that evidence was not known to the applicant, or could not be obtained at the original trial ... 432

See Ex-parte Decree (2)
See Jurisdiction (35)
See Limitation (32)
See Res Adjudicata (2)

REVIVAL OF SUIT.

See Ex-parte Decree (1)

RIGHT OF APPEAL.

(1) A defendant disclaiming right or interest in the land in a suit is not thereby deprived of the ——, if judgment is given against him with costs ... 94

(2) The purchaser of a decree has a ——, even though not a party to the suit ... 205

(3) Section 365, Act VIII. of 1859, gives ——, from an order of a Civil Court fining a person for avoiding a summons as a witness ... 233

RIGHT OF CULTIVATORS.

Where the produce of land cultivated by plaintiff is taken away, he cannot recover value unless he has a right as against defendant to occupy the land, or is led by defendant to suppose so, or cultivates with defendant's knowledge ... 300

RIGHT OF OCCUPANCY.

(1) A ryot, by merely sub-letting his land, does not transfer, nor does his sub-lessee thereby gain, any——... 113

(2) A ryot with —— can be ejected in execution of a decree under the Rent Law ... 166

(3) Adverse holding for 12 years gives tenant —— against his predecessor, even though the latter's absence was involuntary in consequence of transportation ... 253

(4) In a suit to recover possession of land alleged to have been held for more than 12 years under a mokurruree lease which defendant failed to prove, the Court ought to find out the nature of the occupancy, and how long it has subsisted ... 360

See Mokurruree Lease.

RIGHT OF POSSESSION.

See Shareholder.

RIGHT OF PURCHASE.

The purchaser of the rights and interests of a mortgagor at a sale in execution of a decree buys them as they stood at the time of hypothecation, not at the time of sale ... 151

RIGHT OF SUIT.
(1) Where certain lands belonging to *G*, after being included in a suit in which he was made a defendant, are released from the claim, and plaintiff, who obtains a decree against the other defendants, has *G's* lands measured as part of the decreed lands, *G* must be considered as a stranger, and permitted to bring an action to establish his title ... 191
(2) A benameedar has no —— in a Civil Court for property in which he has no beneficial interest ... 220
(3) A suit will not lie against a jagheerdar holding a service-tenure, on account of arrears of rent unpaid by his predecessor ... 255
(4) Those whose rights are inchoate and remote cannot sue to set aside improper alienations by a widow ... 301
(5) Where a third party is recognized as joint-proprietor of an estate, plaintiff is not entitled to sue for the whole rent in his own name ... 331
(6) Where the widow of one of three judgment-creditors fails to be made a party to the original suit under Section 73, Act VIII., 1859, she can sue for her share of the money received under the decree ... 397
(7) An obligation created by a kubooleut from a tenant to two parties jointly can only be enforced by a suit by those parties jointly ... 411
(8) A suit for a kubooleut cannot be maintained where there is no evidence that defendant agreed to hold the land or paid rent to plaintiff ... 438
(9) Two landlords jointly appointing an agent for the collection of rents can sue him separately under Section 24, Act X. of 1859, making the one not suing a defendant ... 495
See Act X. of 1859 (2)
See Assignment of Debt.
See Enhancement (8)
See Lease (2)
See Minor (1)
See Receiver of High Court.
See Registration (10)

RIGHT OF WAY.
(1) User during previous ownership is no evidence of a —— which relates to the land of another ... 298
(2) A plaintiff's claim to have a house pulled down, which was erected seven years before, on a path whereby he and others were accustomed to go across defendant's land, is unreasonable, and such as no Court of equity or good conscience should enforce ... 316
(3) A —— may be created by use for many successive years, even though such use is limited to one particular season of the year ... 363
(4) Where the enjoyment of a path-way across plaintiff's land has covered a period considerably more than 12 years, defendant has a —— as against the owner ... 452
See User.

S.

SALE.
(1) A — duly registered under Act XX. of 1866 does not prevail against the title acquired by a purchaser under an unregistered deed dating before the new Registration Law 65
(2) Where a decree held by judgment-debtors against a third party, after being sold by them to plaintiffs, is attached and sold in execution of the decree against them: HELD that no damage is done to the plaintiffs, as at time of the second sale the judgment-debtors had no rights or interest in the decree, and the auction-purchaser took nothing ... 66
(3) The purchaser of an estate sold in execution of a simple money-decree only buys the right and interest of the debtor, and, where the estate is burdened with debt, buys subject to that lien ... 88
(4) A *bonâ-fide* —— under a decree is binding, notwithstanding the decree may be set aside on review ... 154
(5) A party selling land may refuse to give delivery till consideration is paid; but having given delivery, he cannot retake it, and pay himself out of the usufruct ... 194
(6) Rents collected, and manufactured indigo taken away before the date of purchase of the rights and interests of certain parties in an indigo concern, cannot form part of the stores and assets sold to plaintiff, unless the —— had been as from some date prior to the date of purchase ... 311
(7) Where property claimed by defendant as purchased by him at an auction-sale is proved to have been fraudulently obtained with intent to defraud the plaintiff, the purchaser's title is invalid as against the plaintiff ... 362
(8) The purchaser at a —— in execution of the rights and interests of a judgment-debtor takes the land to which they relate subject to existing mortgages and leases ... 384
(9) Where plaintiff's ancestor having purchased in execution the right, title, &c., of *R*, and finding that, antecedently to the sale, the right, title,

SALE.—*(Continued.)*

&c., had been attached in execution of a decree against *D* (*R's* uncle and father of the two other defendants), prevents the sale by paying in the amount due: HELD that, as *R* was not legally bound to pay the amount due under the decree against *D*, and the payment was voluntary, plaintiff could not recover ... 400

See Act XXXII. of 1860.
See Attachment (1)
See Guardian (1) (2)
See Legal Necessity.
See Mahomedan Law (5)
See Mortgage (1) (3)
See Purchaser (2)

SALVAGE.
See Jurisdiction (10)

SEBAYET.
See Evidence (8) (9)

SECURITY.
See Decree (4)

SELF-ACQUISITION.
See Ancestral Property.
See Hindoo Law (1)
See Joint Hindoo Family (3)

SERVICE-TENURE.
In a suit to obtain khas possession of lands held by defendants upon a ——, and alienated by them without the acquiescence of the grantor: HELD that the defendants have forfeited their rights to hold the land at all ... 289

See Right of Suit (3)

SETTLEMENT.
When a temporary —— expires, the proprietor may claim as of right from the Government a permanent —— of the land, unless by his own conduct he has forfeited the right 395

See Limitation (21)
See Minor (3)
See Resumption.
See Resumption decree.

SHARE.
See Loan.
See Possession (3)

SHAREHOLDER.
The dates at which title and right to possession of any other ——accrue as against a —— who, after resumption, is the only one who appears and settles with Government in behalf of himself and certain co-sharers ... 14

SHIKMEE TENURE.
See Enhancement (6)

SIGNATURE.
See Act XIV. of 1859 (2)

SMALL CAUSE COURT.
The —— s included in Act XX. of 1865 were those established under Act XI. of 1865; and Mofussil pleaders are not, as such, entitled to practise in the —— at Calcutta ... 82

See Jurisdiction (15) (40)

SOCIAL AGREEMENT.
See Jurisdiction (39)

SPECIAL APPEAL.
(1) Difference of view between a Court of first instance and a Lower Appellate Court as to the reasonableness of the grounds of a charge on account of which damages are sued for is not a subject act for —— ... 164
(2) A —— lies from an *ex-parte* decision passed by an Appellate Court in regular appeal ... 450

See Amendment (3)
See Damages (1)
See Evidence (5)
See Ex-parte Decree (2)
See Limitation (31)
See Procedure (3) (7)

SPECIFIC PERFORMANCE.
See Breach of Contract.

STAMP.
Where defendants object that a plaint is undervalued, and a supplemental plaint with the required —— is put in and received, the irregularity does not affect the merits of the case, or call for a reversal of the Moonsiff's decision ... 286

See Procedure (13) (14)

STRIDHUN.
(1) Sowdaik —— created by the husband descends, not to his heirs, but to the heirs of his wife ... 139
(2) A woman's separate property, once devolving as —— upon an heir, no longer devolves as such ... 488

See Hindoo Law (4)

SUBSTITUTION.
See Limitation (29)

SUCCESSION.
See Dis-appearance of a Hindoo.

SUMMONS.
A —— cannot be sent by post to any place to which letters are not registered by a Post Office in India ... 349

See Foreign Territory.

SURVEY AWARD.
See Limitation (9) (10) (13)

SURVEY MAP.
See Evidence (31) (37) (38)

SURVEY PROCEEDINGS.
A general acceptance by the Collector of —— as correct is enough to make a survey-demarcation effective ... 336

See Partition (2)

T.

TEHSILDAR.

A —— is not a "servant" within the meaning of Clause 2, Section 1, Act XIV. of 1859 ... 260

TENANT.

(1) A —— holding land for a term and under-letting it parts with his own interest to the extent of the interest created by the under-lease, and cannot determine the interest of his under——by surrendering his own term ... 384

(2) A party wishing to make known to a zemindar his rights to a tenure of which the zemindar refuses to take rent from him should give distinct notice of the interest which he claims ... 466

See Kubooleut (4)
See Mowrusseedar.
See Possession (7)
See Registration (12)

TITLE.

Where, in a suit to establish right to, and recover possession of, an ancestral ghatwalee mehal, plaintiff fails to prove possession and ouster, she is entitled to go into the question of —— ... 179

See Abatement (1)
See Accretion (2)
See Confirmation of Title.
See Evidence (9)
See Mahomedan Law (5)
See Possession (4) (6)
See Procedure (8)
See Purchaser (2)
See Registration (11)
See Shareholder.

TRANSLATIONS.

See Evidence (23)

TRANSPORTATION.

See Right of Occupancy (3)

TREES.

See Lease (4)

TRESPASSER.

See Kubooleut (4)

TRUST.

See Limitation (18)

TRUSTEE.

See Procedure (5)

TULLUBANA.

See Execution (8)

U.

UNDER-TENURE.

(1) The suspension of payment of rent, whilst in the hands of the former proprietor, on account of an —— with fixed rent, does not affect the rights of his successor or the fixity of the rent ... 212

(2) Shareholders with a tenant are primarily liable with him to the zemindar who is not bound to recognize their holding as separate; his taking rent from them not amounting to a recognition under Section 16, Act VIII., 1865, of the Bengal Code ... 467

UNIFORM PAYMENT.

(1) To establish —— for 20 years, evidence must go back that distance at least, and be reasonably conclusive ... 256

USER.

Quære.—Ought a Court to infer from —— alone that a right of way has been conferred by the owner on the person exercising the —— ? ... 452

See Right of Way (1) (3) (4)

USUFRUCT.

See Mortgage (5)

V.

VAKEEL.

The principle regulating the relation of client and attorney applies equally to the relation of —— and client ... 469

VALUATION OF SUIT.

See Procedure (9)
See Stamp.

VERIFICATION.

See Procedure (6)

VICINAGE.

See Pre-emption (4)

W.

WASTE.

Where —— is proved against a widow, a reversioner should not be put in possession, but a manager (who may be the reversioner) appointed ... 73

See Hindoo Widow (1)

WIFE.

See Jurisdiction (29)

WILL.

Where a —— executed and registered by the alleged testator is inofficious, it is essential to enquire into the circumstances of the execution and registration ... 32

See Mahomedan Law (8)

WITHDRAWAL OF CLAIM.

A plaintiff may withdraw his claim at any time between the institution of the suit and the decree. The Court should then confine itself to the question of costs ... 373

WITNESS.

(1) The general duties of the Lower Courts with respect to the examination of ——es pointed out ... 280

(2) The credibility of ——es is a matter for the Court of first instance and the Court hearing a regular appeal; and the decision of these Courts cannot be set aside by the High Court ... 365

(3) A party calling a —— on his behalf is not bound by his evidence; but if such evidence is at variance with the truth of his case, the clearest testimony is necessary before its truth can be established ... 469

See Evidence (20)
See Procedure (4) (16)

WUQF.

See Arbitration.

Z.

ZUR-I-PESHGEE LEASE.

A decree-holder paying the debt due by his judgment-debtor to the zur-i-peshgeedar in possession, and realizing the rents, cannot demand wassilat from the judgment-debtor for the same period ... 390

See Limitation (16)

TABLE OF CASES

(CIVIL RULINGS).

A.

Abdool Azim *vs.* Khondkar Hamid Ali ... 356
Abdool Guffoor *vs.* Mussamut Noor Banoo 111
Abdool Juleel *vs.* Khellat Chunder Ghose... 165
Abdool Khyrat *vs.* Jumalooddeen Hossein 244
Abraham, prisoner ... 350
Achumbit Thakoor *vs.* Choonee Lall Chowdhry ... 27
Ador Mohun Chuckerbutty *vs.* Thakoormonee Dabee ... 70
Aga Mahomed Jaffer Tehranee *vs.* Mirza Nuzeeroollah Shirazee ... 385
Ahmed Hossein *vs.* Mussamut Khodeja ... 369
Ahsuna Begum *vs.* Kheerun Singh ... 360
Ajoodhya Pershad *vs.* Esharee Dyal ... 219
Anar Mollah *vs.* Hills ... 139
Angopura Chowdhry *vs.* Meah Bibee ... 207
Assoo Meah *vs.* Rajoo Meah ... 76

B.

Baboo Jan *vs.* Mahomed Noorool Huq ... 375
Bacharam Paul *vs.* Asgur Fukeer ... 423
Bama Kallee Dossee ... 4
Bama Soonduree Dossee *vs.* Bama Soonduree Dossee ... 133
Bama Soonduree Dossee *vs.* Kaloo Peadah 395
Bama Soonduree Dossee *vs.* Kaminee Bewah ... 352
Bamun Doss Banerjee *vs.* Huro Lall Shaha 140
Banee Madhub Chatterjee *vs.* Bholanath Banerjee ... 164
Banee Madhub Doss *vs.* Ram Joy Rokh... 316
Banee Pershad *vs.* Reet Bhunjun Singh ... 325
Bawa Misser *vs.* Bishen Prokash Narain Singh ... 287
Becharam Banerjee *vs.* Thakoormonee Debia ... 114
Beebee Misrain *vs.* Gopal Lall Doss ... 376
Beejoy Gobind Burral *vs.* Bheekoo Roy ... 291
Beejoy Gobind Singh *vs.* Sunkur Dutt Singh 367
Beejoy Gobind Sircar *vs.* Radha Benode Misser ... 348
Bengal Coal Company *vs.* Koylas Chunder Dass ... 293
Bhagmonee Kowar *vs.* Lalla Byjnath Pershad ... 380
Bharotee Debea *vs.* Kurroona Moyee Dassia 229
Bharut Chunder Roy *vs.* The Nawab Nazim 354
Bheekoo Singh *vs.* The Government and others ... 296
Bhenuck Singh *vs.* Tugger Singh ... 299
Bhobanee Chunder Mitter *vs.* MacNair ... 464
Bholanath Sircar *vs.* Baharam Khan ... 392
Bhora Roy *vs.* Abilack Roy ... 476
Bhubo Tarinee Dossia *vs.* Prosunno Moyee Dossia ... 304
Bhugwan Doss *vs.* Upooch Singh ... 185
Bhurruck Chunder Sahoo *vs.* Golam Shuruff 458
Boikuntonath Sett *vs.* Russick Lall Burmono ... 231
Bowman *vs.* Mrs. Shawe ... 240
Brojo Beharee Sahoy *vs.* Kewal Ram ... 5
Brojo Kishoree Dossia *vs.* Mahomed Suleem 151
Brojo Lall Puramanick *vs.* Ram Tarun Gossain ... 127
Brojonath Paul Chowdhry *vs.* Heera Lall Paul ... 120
Brokobhanoo Dossia *vs.* Huro Soonduree Dossia ... 264
Bromo Gopal Adhikaree *vs.* Bholanath Poddar ... 309
Budreenath Jha *vs.* Imrit Sahoo ... 126
Buduroonissa Chowdhrain *vs.* Chunder Coomar Dutt ... 455
Budural Huq *vs.* The Court of Wards ... 302
Buhal Singh Chowdhry *vs.* Beharee Lall... 318
Bulo Ram Sircar *vs.* Ram Narain Banerjee 242
Bungo Chunder Chuckerbutty *vs.* Ram Kanaye Bhawal ... 256
Bunwaree Singh *vs.* Ramanoogra Singh... 14
Buzloor Ruheem *vs.* Abdoollah ... 359
Byjnath Pershad *vs.* Badhoo Singh ... 486
Bykunt Coomar *vs.* Chunder Mohun Chowdhry ... 189
Bykuntnath Chatterjee *vs.* Shaikh Nuzurooddeen ... 171

C.

Cassim Azim Dooplay *vs.* Cassim Mahomed Baroocha ... 349
Chadee Singh *vs.* Beharee Tewaree ... 91
Chowdhry Junmeejoy Mullick *vs.* Rasmoyee Dossee ... 309
Chowdhry Sib Narain Pohraj Mandhata *vs.* Chowdhry Kishore Narain ... 131
Chowdhry Teeluck Pershad Singh *vs.* Deg Narain Singh ... 75
Chinta Monee Bapoolee *vs.* Digambur Mitter ... 409
Chundee Churn Chatterjee *vs.* Bidoo Buddun Banerjee ... 48
Chundee Churn Chuckerbutty *vs.* Korban Ali ... 362
Chunder Coomar Roy *vs.* Moulvie Kubeerooddeen ... 332
Chunder Coomar Roy *vs.* Wilkins ... 311
Chunder Kant Bhuttacharjee *vs.* Judooputty Chatterjee ... 224
Chunder Nath Nag Chowdhry *vs.* Assanoollah Mundul ... 438
Collector of Shahabad *vs.* Ram Buddun Singh ... 400
Collector of Tirhoot *vs.* Raj Coomar Deo Nundun Singh ... 218
Cowie and another *vs.* Elias ... 43

D.

Dabee Doss Neogy Chowdhry *vs.* Gobind Mohun Ghose ... 213
Dabjee Sahoo *vs.* Shaikh Tumeezooddeen... 102
Deanutoollah *vs.* Nawab Nazim of Bengal 341
Debee Pershad Chatterjee *vs.* Ram Coomar Ghossal ... 443
Debnarain Banerjee *vs.* Banee Madhub Banerjee ... 232
Deen Dyal Puramanick *vs.* Ram Coomar Chowdhry ... 345
Deen Dyal Puramanick *vs.* Surendurnath Roy ... 77
Dhunookdharee Lall *vs.* Gunput Lall ... 122
Dhunput Singh *vs.* Russomoyee Chowdhrain 461
Dhunput Singh *vs.* Tohul Singh ... 66
Dole Gobind Sing *vs.* Chamoo Sing ... 312
Domun *vs.* Shubul Koolall ... 253
Dookhee Ram Sircar *vs.* Gowhur Mundul 307
Doongrussee Byde *vs.* Gridharee Mull Doogur ... 439
Doorga Churn Thakoor *vs.* Kally Churn Hazrah ... 463
Doorga Dabee *vs.* Issur Chunder Chatterjee 367
Doorga Narain Roy Chowdhry *vs.* Kishen Mohun Doss ... 54
Doorga Soonduree Debia *vs.* Shibessuree Debia ... 391
Drobo Moyee Dabee *vs.* Bipin Mundul ... 6
Drobo Moyee Gosmanee *vs.* Dhurmo Doss Koondoo ... 197
Durban Fukeer *vs.* Nobin Chunder Mojoomdar ... 217
Dwarkanath Chowdhry *vs.* Beejoy Gobind Burral ... 323
Dwarkanath Chowdhry *vs.* Komul Lochun Doss Mundul ... 414
Dwarkanath Shaha *vs.* Ram Lochun Biswas 92
Dyal Kishen Deb *vs.* Kalleenath Kur ... 67

E.

Elam Puramanick *vs.* Sefaetullah Sheikh... 85
Eshan Chunder Doss *vs.* Rokeemooddeen Sowdagur ... 412

F.

Fazil Sirdar *vs.* Chemun Biswas ... 237
Fegredo *vs.* Mahomed Modessur ... 267
Forbes *vs.* Sheikh Dyanutoollah ... 415
Fukeer Chand Ghose *vs.* Heera Lall Seal 403
Futtick Chunder Banerjee *vs.* Golam Ali Chowdhry ... 453
Futtoo Bibee *vs.* Bhurrut Lall Bhukut ... 299
Fuzeelun Bibee *vs.* Omdah Bebee and another ... 469

G.

Gandharee Debea *vs.* Sonatun Panday ... 215
Gireebala Debia *vs.* Dinonath Mookerjee... 431
Girendronath Tagore, The Representatives of, *vs.* Huronath Roy ... 455
Gobind Chunder Roy *vs.* Poorno Chunder Sein ... 36
Gobindnath Roy Chowdhry *vs.* Kishen Kant Roy ... 254
Gobindnath Sein *vs.* Gobind Chunder Sein 393
Gocool Chunder *vs.* Ali Mahomed ... 6
Godayi Joardar *vs.* Mears ... 50
Golam Ali Chowdhry *vs.* Futtick Chunder Bundopadhya ... 460
Golam Dustageer *vs.* Juggur Singh ... 86
Golam Guffoor *vs.* Ekram Hossein Chowdhry 357
Golam Mustafa Khan *vs.* Sheo Soonduree Burmonee ... 187
Goluck Chunder Dutt *vs.* The Court of Wards ... 127
Gonoomonee Dossia *vs.* Parbutty Dossia... 326
Gopal Chunder Chuckerbutty *vs.* Uooddoy Lall Dey ... 115
Gopal Chunder Dey *vs.* Purnoo Beebee ... 104
Gopal Chunder Gooho *vs.* Juggodumba Dossia ... 411
Gopal Pershad *vs.* Mussamut Nuzzeranee 252
Gooroodoss Dhur *vs.* Bejoy Gobind Bural 171
Gour Beharee Ram Bhuggut *vs.* Sheo Ruttun Koonwar ... 243
Gour Chunder Roy *vs.* Rash Beharee Dutt 43
Gour Kishore Chowdhry *vs.* Mahomed Hassim Chowdhry ... 191
Gour Mohun Doss *vs.* Ram Roop Mozoomdar ... 84
Gouree Pershad Koondoo *vs.* Prannath Surmah ... 365
Grant *vs.* Modhoo Soodun Singh ... 79
Grant *vs.* Ram Tonoo Bhoomick ... 83
Greesh Chunder Chatterjee *vs.* Mohesh Chunder Nyalunkar ... 173
Gridharee Singh *vs.* The Court of Wards... 368
Grija Singh *vs.* Greedharee Singh ... 65
Grish Chunder Sein *vs.* The Eastern Bengal Jute Manufacturing Company ... 492
Gudadhur Banerjee *vs.* Ranee Premomoyee Debia ... 286
Gudadhur Lall *vs.* Ram Jhan Gunderee ... 212
Gujadhur Pershad Narain Singh *vs.* Jugdeo Narain ... 233
Gujraj Singh ... 355
Gunga Bishen Chund *vs.* Mahatab Chand Bahadoor ... 224
Gunga Gobind Naek *vs.* Kalee Prosunno Naek ... 206
Gunga Gobind Singh *vs.* Joy Gopal Panda. 105
Gungamala Chowdhrain *vs.* Madhub Chunder Nag ... 413
Gunganarain Bose *vs.* Mr. Cornell, Collector of Bullooah ... 442
Gunga Pershad *vs.* Phool Singh ... 106
Gureeboollah Puramanick *vs.* Fukeer Mahomed Kholoo ... 203

H.

Habeel Beparee *vs.* Choalmun Mah ... 263
Hameed Ali *vs.* Afaoodeen ... 213
Haradhun Dutt *vs.* Radhanath Shaha ... 398
Haran Chunder Ghose *vs.* Gooroo Churn Sircar ... 421
Haran Chunder Paul *vs.* Mookta Soonduree 113
Hemanginee Dossee *vs.* Ram Nidhee Koondoo ... 185

Heera Chand Banerjee *vs.* Banee Madhub Chatterjee ... 164
Heeramonee *vs.* Gunganarain Roy ... 384
Hills *vs.* Aradhun Mundul ... 389
Hollick, In the Matter of ... 447
Holloway *vs.* Asman Roy ... 325
Hossein Ali Khan *vs.* Syud Burkut Ali ... 372
Hunooman Chowbay *vs.* Bindhoo Toraba... 336
Hureehur Mookerjee *vs.* Judoonath Ghose. 153
Huree Kishore Ghose *vs.* Koomodinee Kant Banerjee ... 41
Hureenath Doss *vs.* Tara Chand Sircar ... 295
Huree Narain Mytee *vs.* Ojoodhya Ram Sein ... 308
Hurendur Kishore Bahadoor *vs.* Kedarnath Mitter ... 188
Hurrish Kishto Doss *vs.* Motee Chand ... 444

I.

Imrit Lall Thakoor *vs.* Nuckshed Suhaye... 100
Indro Chunder Baboo *vs.* Dunlop (Agra and Masterman's Bank) ... 264
Indro Chunder Doogur *vs.* Cochrane ... 353
Indro Lochun Ghose *vs.* Grish Chunder Roy Chowdhry ... 134
Issur Chunder Chuckerbutty *vs.* Assan Sirdar ... 134

J.

Jagun Kooer *vs.* Rughoonundun Lall Sahoo 148
Jan Ali *vs.* Jan Ali Chowdhry ... 154
Jehan Khan *vs.* Mandy ... 185
Jhootee Singh *vs.* Komul Roy ... 119
Jokhee Lall *vs.* Mussamut Huns Kooer ... 167
Joog Maya Debia *vs.* Ram Chunder Chatterjee ... 378
Jorawur Singh *vs.* Hakeem Khyrat Ali ... 360
Juggadumba Dossee *vs.* Haran Chunder Dutt ... 108
Jugg Jeebun Lall *vs.* Rughoonath Kopath 383
Juggodanund Misser *vs.* Hamid Russool ... 52
Juggunnath Paul *vs.* Bidianund Dutt ... 172
Juggut Narain *vs.* Toolsee Ram ... 99
Jugobundhoo Deb *vs.* Goluck Chunder Holdar ... 228
Jumarut Mundul *vs.* Nil Kant Sircar ... 110
Junmajoy Mojoomdar *vs.* Keshub Laul Ghose ... 484

K.

Kadumbinee Dossee *vs.* Bhugobutty Churn Ghose ... 7
Kalee Chunder Sandyal *vs.* Bhoobunessuree Dabee ... 26
Kalee Coomar Roy *vs.* Gunga Narain Dutt Roy ... 250
Kalee Dass Ghosal *vs.* Muddoosoodun Roy 465
Kaleekanund Bhuttacharjee *vs.* Gireebala Debia ... 322
Kalee Kishore Bose *vs.* Prosunno Chunder Roy ... 248
Kalee Kisto Chunder *vs.* Hureehur Chuckerbutty ... 160
Kaleenath Ghossal *vs.* Chundee Churn Sircar ... 51
Kalloogam Baboo *vs.* Doorganath Talookdar 175
Kaloo Shaikh *vs.* Gureeboolah Shaikh ... 12
Kartick Chunder Mookerjee *vs.* Mookta Ram Sircar ... 21
Kartick Surmah *vs.* Bydonath Saeenee ... 205
Kashee Chunder Dutt *vs.* Judoonath Chuckerbutty ... 29
Kashee Chunder Roy Chowdhry *vs.* Gour Kishore Gooho ... 139
Kasheenath Lushkur *vs.* Bama Soonduree Debia ... 429
Kedarnath Mahatah *vs.* Kadumbinee Debia 239
Kenaram Shamunt *vs.* Gopeenath Geeree ... 130
Kheedao Roy *vs.* Hurro Pershad Sing ... 252
Khema Debia *vs.* Kumola Kant Bukshee ... 10
Khelut Chunder Ghose *vs.* Koonj Lall Dhur 333
Khoffeh Jan Beebee *vs.* Mahomed Mehdee 211
Kishen Chunder Dass *vs.* Mahomed Afzul *alias* Mahomed Mirza ... 51
Kishen Doss *vs.* Hurry Jeebun Doss ... 324
Kishore Singh *vs.* Pookhun Singh ... 432
Kisto Chunder Kurmokar *vs.* Rughoonath Kurmokar ... 326
Kisto Churn Chuckerbutty *vs.* Muggun Chuckerbutty ... 491
Kisto Churn Mojoomdar *vs.* Dwarkanath Biswas ... 32
Kisto Kishore Ghose *vs.* Soorjonath Sircar 354
Kisto Mohun Kurmokar *vs.* Noyan Tara Dossea ... 389
Koh Poh *vs.* Moung Tay ... 143
Ko Kya Daine, In the Matter of ... 417
Komul Chunder Bose *vs.* Nobin Chunder Ghose ... 184
Komul Lochun Doss *vs.* Dwarkanath Chowdhry ... 254
Kool Chunder Surmah *vs.* Ramjoy Surmona ... 8
Koomaree Dossee *vs.* Bama Soonduree Dossee ... 202
Koomodenee Debia *vs.* Poorno Chunder Mookerjee ... 300
Koonj Beharee Lall *vs.* Gridharee Lall ... 189
Koylas Chunder Biswas *vs.* Biressuree Dossee ... 408
Koylas Chunder Roy *vs.* Heera Lall Seal... 403
Koylashessur Bose *vs.* Sremutty Narainee Dossee ... 303
Kripa Ram *vs.* Bhugwan Doss ... 100
Kristo Dhun Pundit *vs.* Mahomed Nukee Kotwal ... 495
Kuseemonissa Beebee *vs.* Hoorunissa Bibee ... 468

L.

Lall Dharee Roy *vs.* Brojo Lall Singh ... 401
Lalla Roodro Pershad *vs.* Binode Ram Sein 321
Land Mortgage Bank of India *vs.* Elias ... 43
Leake *vs.* Daniel ... 337
Luchmeeput Sing Doogur *vs.* Woomanath Mundul ... 490
Luleet Mohun Roy Chowdhry *vs.* Sowtra Beebee ... 42
Lyakut Ali *vs.* The Court of Wards ... 423
Lolitta Dossia *vs.* Rutton Mollee Bhuttacharjee ... 208

M.

Madhub Chunder Paul *vs.* Hills ... 197
Mahaboob Hossein *alias* Horee *vs.* Mussamut Putasoo Koomaree ... 179

Maharajah Mahatap Chand Bahadoor *vs.* The Bengal Coal Company ... 391
Maharajah of Burdwan *vs.* Wooma Soonduree Dossee ... 12
Mahomed Amed *vs.* Alibur Gazee ... 337
Mahomed Fedye Sirdar *vs.* Ozeeooddeen... 340
Mahomed Gazee Chowdhry *vs.* Laul Beebee ... 103
Mahomed Jakee *vs.* Gopee Roy ... 5
Mahomed Manaff, Petitioner ... 332
Mahomed Mubson *vs.* Sumputee Sahoon Chowdhrain ... 305
Mahomed Saleh *vs.* Mussamut Muriamoonissa ... 284
Mahomed Samee Bhooya *vs.* Alahee Buksh Chowdhry ... 346
Mahtab Singh *vs.* Ram Tahal Misser ... 314
Manick Lall Baboo *vs.* Ram Doss Mozoomdar ... 132
Matadeen Roy *vs.* Mussoodun Singh ... 293
Meheroonissa Bibee *vs.* Hur Churn Bose... 220
Mirtunjoy Sircar *vs.* Gopal Chunder Sircar 466
Mirza Syfoollah *vs.* Bhuttun *alias* Butessur 68
Mofuzul Hossein *vs.* Golam Ambiah ... 196
Moha Moya Dossee *vs.* Joodishtir Deb ... 112
Mohendronath Mullick *vs.* Rakhal Doss Sircar ... 344
Mohesh Chunder Doss *vs.* Madhub Chunder Sirdar ... 388
Mohima Chunder Chuckerbutty *vs.* Raj Coomar Chuckerbutty ... 22
Mohin Chunder Chuckerbutty *vs.* Chundee Churn Gooho ... 452
Mohoranee *vs.* Nuddu Lall Misser ... 73
Mohun Lall Mitter *vs.* Buhoo Soonduree Debia ... 145
Mohunt Jalha *vs.* Koylash Chunder Roy... 407
Mohunt Pursoo Ram *vs.* Byjnath Lall ... 475
Mohunt Rung Lall Gossain *vs.* Gouree Mundul ... 285
Mooktakashee Debia *vs.* Luchmeeput Singh Doogur ... 137
Moula Buksh Khan *vs.* Koshoram Pandey 249
Mowra Bewa *vs.* Soorundarnath Roy ... 178
Mozuffer Ali *vs.* Grish Chunder Doss ... 71
Mudhoosooddun Gossamee *vs.* Hills ... 242
Muneekurneeka Chowdhry *vs.* Annund Moyee Chowdhry ... 245
Munnoo Lall *vs.* Pigue ... 379
Munrakhun Roy *vs.* Juggut Doss ... 124
Musaram Doss Kurmokar *vs.* Gridharee Ram Doss ... 278
Mussamut Azeegunnissa and another *vs.* Moonshee Ruhmanoollah ... 306
Mussamut Benda Bibee *vs.* Lalla Ram Surun Singh ... 299
Mussamut Buzmoonissa *vs.* Bebee Rowshun Jahan ... 397
Mussamut Deo Bunsee Kooer *vs.* Dwarkanath ... 273
Mussamut Jumeelun *vs.* Wullee Ahmed... 31
Mussamut Moharanee *vs.* Nuddu Lall Misser ... 73
Mussamut Reazoonissa *vs.* Tookun Jha ... *ib.*
Mussamut Sham Soondur Kooer *vs.* Rajendur Misser ... 390
Mussamut Soondur Kooer *vs.* Lalla Rughoobur Dyal ... 246
Mussamut Soornum Butty *vs.* Mussamut Boodhessuree ... 31
Mussamut Zahoorun *vs.* Tayler and another ... 38
Musserooddeen *vs.* Khoda Bux ... 38

N.

Narain Acharjee Chowdhry *vs.* Mohamaya Debia Chowdhrain ... 240
Narain Doss Chela *vs.* Maharajah Mahatab Chunder Bahadoor ... 174
Nesoo Sircar *vs.* Phillipe ... 454
Netye Roy *vs.* Odeet Roy ... 241
Nidhoo Sircar *vs.* Phillippe ... 153
Nilmoney Singh Deo *vs.* Bukronath Singh 255
Nimaye Churn Sein *vs.* Ram Monee Beebee 152
Nitye Shaha *vs.* Shoobul Shaha ... 349
Nobeen Kishore Roy *vs.* Jogesh Prokash Gangooly ... 272
Nowab Jan *vs.* Munnoo Lall ... 433
Nuffur Chand Paul Chowdhry *vs.* Sandes 432
Nujmoodeen Ahmed *vs.* Beebee Zuhoorun 45
Nukchad Singh *vs.* Hunooman Dutt Singh. 69
Nund Coomar Banerjee *vs.* Ishan Chunder Banerjee ... 130
Nund Coomar Singh *vs.* Gunga Pershad Narain Singh ... 94
Nund Pandah *vs.* Gyadhur ... 89
Nund Ram Ghose *vs.* Mannoo Bibee ... 177

O.

Obhoy Churn Dutt *vs.* Nobin Chunder Dutt ... 298
Obhoy Churn Sein *vs.* Ram Huree Odhikaree ... 300
Oh Ling Tee *vs.* Awkinifee ... 86
Okhorah Soot *vs.* Bheden Barianee ... 35
Oman *vs.* Coomar Promothonath Roy ... 256
Omanath Roy Chowdhry *vs.* Suroop Chunder Bose ... 485
Omed Ali *vs.* Prosunno Coomar Chowdhry. 97
Oodoy Chand Lushkur *vs.* Nobocoomar Poramanick ... 428
Oojagur Roy *vs.* Ram Khelawun Singh... 384
Ooma Churn Koondoo *vs.* Bhoobun Mohun Pal Poddar ... 98
Oomur Shah *vs.* Rumzan Ali ... 363
Oomur Sulima Bibee *vs.* Lukhee Prea Dabee ... 47
Orjoon Sahoo *vs.* Anund Singh ... 257
Oroon Chunder Mundul *vs.* Romanath Rukheet ... 260

P.

Palanoo Khamaroo Doss *vs.* Mozuhur Ali 211
Pearee Mohun Bose *vs.* Gobind Chunder Addy ... 56
Pearee Mohun Dutt *vs.* Radha Mudhub Mookerjee ... 427
Phookun Pandey *vs.* Mussamut Sookhia ... 436
Phoolabutty Kooer *vs.* Gossain Luchmun Doss ... 81
Pitambur Kurmokar *vs.* Ram Tunoo Roy 123
Poorno Chunder Roy *vs.* Stalkart ... 362
Poushong *vs.* Mussamut Moonia Halwain 128
Pran Bundhoo Sircar *vs.* Surbo Soondree Debia ... 434

Pran Kishen Bhuttacharjee *vs.* Bukshee Cazee ... 26
Pran Kishen Deb *vs.* Lokenath Sing Mozoomdar ... 445
Pran Kisto Banerjee *vs.* Nuddea Chand Chatterjee ... 115
Prankisto Roy *vs.* Huro Chunder Roy ... 435
Prem Chand Barik *vs.* Brojonath Koondoo Chowdhry ... 204
Premoo Beebee *vs.* Dassoo Debia ... 93
Prem Sonduree Dossia *vs.* Grish Chunder Bhuttacharjee ... 194
Proladh Misser *vs.* Oodit Narain Singh ... 291
Promothonath Roy *vs.* Tripoora Sonduree Dabee ... 463
Prosunno Moyee Debia *vs.* Chundernath Chowdhry ... 361
Prosunno Moyee Dossee *vs.* Bhubo Tarinee Dossee ... 494
Prosunno Narain Deb *vs.* Romonee Dossee 236
Protap Narain Mookerjee *vs.* Kartick Chunder Mookerjee ... 192
Puddolochun Sein *vs.* Lall Chand Goopto ... 283
Puddo Monee Dossee *vs.* Bistno Chunder Biswas ... 495

R.

Radha Churn Dey *vs.* Muddun Mohun Paul 45
Radha Rumon Koondoo *vs.* Phool Koomaree Bibee ... 28
Raesunnissa Begum *vs.* Ranee Khujoorunnissa ... 462
Rajah Opendur Lall Roy *vs.* Ranee Bromo Moyee ... 347
Raj Chunder Doss *vs.* Dhurmo Chunder Bose ... 416
Raj Doollub Gomashtah *vs.* Mohessur Bhutt. 364
Rajeeb Lochun Sawunt *vs.* Mohessuree Dossee ... 365
Raj Kishore Mookerjee *vs.* Hureehur Mookerjee ... 117
Rajkristo Bhuttacharjee *vs.* Nobeen Chung. 13
Raj Mohun Neogee *vs.* Anund Chunder Chowdhry ... 166
Rakhal Chunder Tewaree *vs.* Kinooram Haldar ... 442
Ram Beharee Singh *vs.* Sitara Khatoon ... 315
Ram Buksh Chutlangea *vs.* Hridoy Monee Debia ... 446
Ram Buksh Chutlangee *vs.* Maharajah Bunwaree Gobind Bahadoor ... 357
Ram Chand Mookerjee *vs.* Kameenee Debea 236
Ram Chunder Mitter *vs.* Kisto Kaminee Dossee ... 194
Ram Chunder Paul *vs.* Becharam Dey ... 329
Ram Chunder Surmah Chowdhry *vs.* Dagoo Khan ... 339
Ram Churn Bysak *vs.* Mrs. Ripsimah Harmi 373
Ram Churn Pattuck *vs.* Khoor Panday ... 176
Ram Comul Chuckerbutty *vs.* Nund Ram Coolal ... 261
Ram Coomar Mundul *vs.* Brojohuree Mirdha 410
Ram Coomar Sircar *vs.* Kalee Coomar Dutt. 279
Ram Dhun Biswas *vs.* Kefal Biswas ... 141
Ram Dhun Doss *vs.* Ram Ruttun Dutt ... 425
Ramdhun Rukhit *vs.* Punchanun Chuckerbutty ... 144
Ram Doss Sein *vs.* Stephenson and another. 366
Ramdyal Gangooly *vs.* Huro Sonduree Dossia ... 272
Ramessur Mookerjee *vs.* Ishan Chunder Mookerjee ... 457
Ram Gopal Chuckerbutty *vs.* Chundernath Sein ... 289
Ram Gutty *vs.* Mumtaj Bebee ... 280
Ram Jeewan Lall *vs.* Arjun Chowbey ... 303
Ram Joy Sein *vs.* Nundo Moyee Debia ... 374
Ram Lall Jha *vs.* Issur Chunder Dey ... 451
Ram Lochun Doss *vs.* Munsoor Ali ... 96
Ram Lochun Sircar *vs.* Hogg ... 430
Ramnath Singh *vs.* Gondee Singh ... 441
Ram Pearee Debia *vs.* Dinonath Mookerjee 375
Ramsoondur Tewarree *vs.* Sreenath Dewasi and the Bengal Coal Company ... 215
Ramsurn Muhton *vs.* Jinonath Bhuggut ... 396
Ranee Surno Moyee *vs.* Doorga Monee Dossee ... 335
Rash Beharee Lall *vs.* Burmessur Nauth ... 30
Rohiny Kant Ghose *vs.* Mahabharuth Nag. 258
Roop Narain Singh *vs.* Juggoo Singh ... 304
Roopun Tewaree *vs.* Buckle, Agent to Governor-General at Moorshedabad ... 142
Rosseau *vs.* Pinto ... 54
Roy Mohun Lall Mitter *vs.* Buhoo Sonduree Debia ... 140
Rucha Muhtoon *vs.* Mohun Lall ... 395
Rughoo Mohinee Dossee *vs.* Kasheenath Roy Chowdhry ... 156
Rughoonath Dobey *vs.* Puresh Ram Mahata 9
Rughoonath Doss *vs.* Luchmee Narain Singh 407
Rughoonath Pershad *vs.* Huree Mohunt ... 37
Rughoonath Roy *vs.* Anundo Paura ... 387
Rughoonundun Pershad Singh *vs.* Chuttur Saul Singh ... 335
Rughoo Nundun Singh *vs.* Mujbooth Singh 379
Runjeet Narain Singh *vs.* Mussamut Shureefunissa ... 478
Rustum Ally *vs.* Ahmed Ally Soudagur ... 487

S.

Sabir Khan *vs.* Ram Luckhee Chowdrain ... 438
Sandys *vs.* Setul Mundul ... 420
Satooram Mojoomdar *vs.* Preonath Banerjee 424
Scanlan *vs.* Herrold ... 295
Shah Ali Ahmed *vs.* Oodraj Ram ... 79
Shah Enaet Hossein *vs.* Syud Rumzan ... 216
Shah Koondun Lall *vs.* Noor Ali ... 3
Shaikh Reazoodeen *vs.* The Collector of Cuttack ... 175
Sharoda Soondari Debia *vs.* Gonee Sheik 419
Sheo Dyal Pooree *vs.* Mohabeer Pershad. 477
Sheo Golam Singh *vs.* Burra Singh ... 198
Sheo Pershad Singh *vs.* Muthoora Pershad. 31
Shib Pershad Doobey *vs.* Promothonath Ghose ... 193
Showdaminee Dossee *vs.* Ram Chand Baido 38
Shumboo Chunder Chowdhry *vs.* Modhoo Kyburt ... 56
Shurfun Bebee *vs.* The Collector of Sarun ... 199
Shurrut Chunder Kur *vs.* Ram Shunkur Surmah ... 214
Shushee Mookhee Dossee *vs.* Bissessuree Debee ... 343
Shushee Bhoosun Bhadooree In the matter of 82
Sooney Ram Marwaree *vs.* Byjnath Kooer ... 88.

Sreehurec Mundul *vs.* Judoonath Ghose ... 169
Sreekant Bhuttacharjee *vs.* Raj Narain Bhuttacharjee ... 1
Sreekant Roy Chowdhry *vs.* Kitabooddeen Sirdar ... 49
Sreekant Shaha *vs.* Kaltoo Doss ... 134
Sreekishen Chowdhry *vs.* Ram Kristo Bhuttacharjee ... 317
Sreemutty Gour Monee *vs.* Huree Kishore Roy ... 338
Sreemutty Obhoya *vs.* Hurry Krishto Gope 285
Sreemutty Raye Kishoree Dossee *vs.* Bonomally Churn Mytee ... 209
Sreenath Chuckerbutty *vs.* Sreemunto Lushkur ... 467
Sreenath Gangooly *vs.* Surbo Mongola Debia 488
Sreenath Singh Chowdhry *vs.* Sreemutty Hureeprea ... 449
Sree Pershad *vs.* Rajgooroo Treemubuknath Deo ... 44
Staves *vs.* Mrs. Dias ... 444
Stephen *vs.* Stephen ... 90
Sujeewun Singh *vs.* Runpal Singh ... 351
Sujjeewan *vs.* Gopal ... 149
Suntokhee Thakoor *vs.* Mussamut Balasee Koonwur ... 276
Syfoollah *vs.* Bhuttun *alias* Buttessur ... 68
Syud Ahsan Ali *vs.* Sabokee Beebee ... 53
Syud Lotfoollah *vs.* Mussamut Nuseebun ... 24

T.

Tarachand Ghose *vs.* Anund Chunder Chowdhry ... 450
Tara Chand Hajrah *vs.* Doorga Churn Hajrah ... 205
Tarakalee Dabee *vs.* Nitya Moyee Dabee. 437
Teja Singh *vs.* Pokhur Singh ... 95
The Representatives of Girendronath Tagore *vs.* Huronath Roy ... 455
Toolsee Ram Doss *vs.* Mahomed Afzul *alias* Mahomed Mirza ...
Toolsee Sahoo *vs.* Mohadeo Doss ... 48
Troylokhonath Ghose *vs.* Nubo Coomar Roy 20
Troylukhonath Chuckerbutty *vs.* Jhaboo Shaikh ... 33

U.

Umbica Churn Nag *vs.* Mussamut Shibo-soonduree Debea ... 32

V.

Velaet Ali Khan *vs.* Matadeen ... 40

W.

Waselun Huq *vs.* Gowhuroonissa Bibee ... 10
Watson and Co. *vs.* Aujunna Dossee ... 107
Watson and Co. *vs.* Brojo Soonduree Dabee 395
Watson and Co. *vs.* Neel Kant Sircar 330, 33
Watson and Co. *vs.* Nidhoo Digwar ... 87
Watson and Co. *vs.* Nobin Mohun Baboo. 73
Watson and Co. *vs.* Sham Loll Pandah ... 74
Watson and Co. *vs.* Sreedhur Mundle ... 421
Wooma Churn Chowdhry *vs.* Nitumbinee Debia ... 359
Wooma Churn Sett *vs.* Huree Pershad Misser ... 101
Wooma Tara Dabee *vs.* Unnopoorna Dossee 426
Woomesh Chunder Goopto *vs.* Raj Narain Roy ... 15
Woomesh Chunder Roy *vs.* Nobin Chunder Mojoomdar ... 457

Z.

Zeemut Ali *vs.* Mussamut Alimoonissa ... 277
Zoolfee Begum *vs.* Ram Surun Roy ... 80

INDEX

(FULL BENCH RULINGS).

A.

ABATEMENT.

Where in a former suit, plaintiff, a putneedar, sued his zemindar for —— of rent and for a refund of consideration-money and rents paid by him for 3 years, it was held that a suit for a refund of rent for 3 subsequent years was not barred under Section 7, Act VIII. of 1859 41

See Jurisdiction.

ACT XL. OF 1858.

See Minority.

ACT VIII. OF 1859.

Section 7. *See Abatement.*
Section 21. *See Purdanasheen Women.*
Section 243. *See Appeal* (1)
Section 284. *See Execution* (3)
Section 347. *See Appeal* (2)

ACT X. OF 1859.

Section 13 is applicable not merely to ryots having a right of occupancy, but to all under-tenants and ryots ... 33

Section 13. *See Enhancement.*
Section 78. *See Lease.*

ACT XI. OF 1859.

Section 33. *See Butwara.*

ACT XXIII. OF 1861.

Section 11. *See Appeal* (1)

ACT XX. OF 1866.

Section 84. *See Registration.*

APPEAL

(1) Held by the majority (*L. S. Jackson, J., dissenting*), that under Section 11 of Act XXIII. of 1861, an —— lies from an order passed under Section 243 of Act VIII. of 1859, giving the judgment-debtor time to raise the amount of debt due under the decree against him ... 5

(2) No —— lies against an order rejecting an application for the re-admission of an —— under Section 347, Act VIII. of 1859 ... 39

ARREST.

See Purdanasheen Women.

B.

BUTWARA.

A —— was decreed by the Civil Court which made provision in its decree for the payment of the expenses of partition by certain co-sharers indicated. On proceedings taken before the Collector in pursuance of the decree, he called upon certain co-sharers (not being those who were by the Civil Court ordered to pay the expenses) to pay the expenses (Ameen's fees) remaining due; and on failure by such co-sharers to comply with this direction, the Collector put up their share for sale as for an arrear of Government revenue. The co-sharers whose share was sold, without making an appeal to the Commissioner of Revenue under Section 33, Act XI. of 1859, brought a suit to set aside the sale and to recover the property, alleging that there was nothing due which was recoverable as an arrear of Government revenue, and that the provisions of the Act did not apply to the case.

HELD, that the suit would lie, and was cognizable by the Civil Court 66

C.

CONTRACT.

See Registration.

D.

DECREE.

A party taking by assignment a —— obtained by *A* against *B* takes it subject to a set-off on account of a cross-decree in the same Court obtained by *B* against *A* ... 32

E.

ENHANCEMENT.

A landlord cannot recover rent at an enhanced rate from a ryot who has not a right of occupancy, unless he proves the existence and the reasonableness of the grounds stated in his notice served under Section 13, Act X. of 1859 ... 33

EVIDENCE.

See Registration.

EXECUTION.

(1) A judgment-creditor obtained a decree on the 31st August 1859, and took out proceedings in the following order of time: *first*, on the 20th August 1861, when an effectual notice was served on the judgment-debtor; *secondly*, on the 13th September 1865, when a similar notice was served; and, *thirdly*, on the 13th of August 1866, when application was made to arrest the person of the judgment-debtor:

HELD, that as the execution of the decree was barred by limitation when the application after 13th September 1865 was made, the last application on the 13th August 1866 was within the terms of Section 20, Act XIV. of 1859 ... 8

(2) When a decree is, under Section 284 and the following Sections of Act VIII. of 1859, transmitted from one Court to another Court for execution, the Court to which the decree is transmitted has jurisdiction to determine whether or not execution of the decree is barred under Act XIV. of 1859 ... 10

(3) Where a decree of one Court has been transmitted, under Section 284 *et seq.* of Act VIII. of 1859, to another Court for ——, and when that Court has struck off for default the first proceedings in —— of the judgment-creditor, the Court to which the decree has been transmitted has jurisdiction to allow the proceedings to be revived ... 46

See Appeal (1)

F.

FORECLOSURE.

See Mortgage.

G.

GOMASHTA'S SUNNUD.

A sunnud which authorizes a gomashta to attach rents and to sue for them must be stamped: if a general power of attorney authorizing him to collect and sue for rents, it must bear a four rupee stamp under Article 43, Schedule A, Act X. of 1862 ... 39

H.

HIGH COURT'S CHARTER.

Section 39, *See Practice.*

HINDOO LAW.

(1) In the absence of nearer relations, a man may be heir to his mother's brother as regards property subject to the Mitakshara ... 76

(2) HELD, confirming the judgment appealed from, that, according to the law in Lower Bengal, the widow of a son who left no property cannot compel her father-in-law to make her a pecuniary allowance in lieu of maintenance if she refuses to reside in his house as a member of his family ... 89

J.

JURISDICTION.

A suit brought not simply for an abatement of rent, but also for a specific performance of a contract to refund, under certain conditions, excess of rent and of consideration-money, is not a suit for abatement of rent within the meaning of Act X. of 1859, and the Civil Court has —— to try such a suit, mixed up as it is with a claim for a refund of excess of consideration-money ... 41

K.

KUBOOLEUT.

(1) Where a landlord sues to obtain from his ryot a —— at a given rate of rent, and the Court finds that that rate exceeds the rate which, in the judgment of the Court upon the evidence before it, would be fair and equitable, the plaintiff is not entitled to a decree for a —— at the lower rate, but his suit should be entirely dismissed ... 14

(2) If, in a similar case, the plaint mentions no date for the commencement of the ——, the plaint does not disclose a sufficient cause of action and ought to be returned. The Court may, however, supply the omission by specifying in its decree the time from which the —— ought to commence ... *ib.*

L.

LEASE.

(1) HELD, that in a suit for the cancelment of a —— on account of a breach of its conditions, the breach complained of consisting in the non-payment of rent for a particular period specified in the ——, the lessee is entitled to avail himself of the proviso in Section 78, Act X. of 1859, that Section applying to *all* suits for the ejectment of a ryot or for cancelment of —— for non-payment of rent ... 12

LIMITATION.

See Execution (1) (2)

M.

MAINTENANCE.

See Hindoo Law (2)

MINORITY.

Every person (not being a European British subject) who has not attained the age of 18 years is a minor for the purposes of Act XL. of 1858, even though proceedings are not taken in the Civil Court for the care of his person or the protection of his property. If he is a proprietor of an estate paying revenue direct to Government, and has been taken under the protection of the Court of Wards, he is still a minor up to the age of 18 years. (Section 2, Regulation XXVI. of 1793.) ... 36

MORTGAGE.

The period of one year allowed by Section 8, Regulation XVII. of 1806, to a mortgagor to deposit the amount of the —— debt before the —— can be finally foreclosed, is to be reckoned from the date of the service upon him of the notice to redeem, and not from the date of the is sue of such notice ... 27

P.

PLAINT.

See Kuboolent.

PRACTICE.

(1) HELD *(L.S. Jackson, J., dubitante)*, that an order made by the High Court on an application to review its judgment in a case of appeal to the Privy Council previously heard, is not an order made on appeal within the terms of Clause 39 of the Court's Charter, so as to enable the Court to admit an appeal against such order to Her Majesty in Council. ... 1

(2) HELD, *nem. con.*, that in a case where an appeal to the Privy Council has been admitted against a regular decree made in appeal, such proceedings as applications for review of the judgment, and the order of the Court thereon ought not to form part of the records to be transmitted to England ... *ib.*

PRIVY COUNCIL APPEAL.

See Practice.

PURDANASHEEN WOMEN.

——, or women who, according to the usage of the country, ought not ordinarily to be compelled to appear in public, are not exempt from arrest and imprisonment in execution of decrees either by Section 21, Act VIII. of 1859, or under any other rule of law. ... 21

R.

REGISTRATION.

A suit was brought to establish the plaintiff's right to certain lands alleged to have been purchased by him. A written *kobala*, or bill of sale, had been executed; but it was refused registry, because the defendant appeared at the Registry Office and declared that the contract had not been completed. The plaintiff claimed to prove the contract of sale by oral evidence, and sued for possession of the property covered by the contract.

HELD by the majority *(Mitter, J., dissenting)*, that the suit could not be maintained so long as the *kobala* remained unregistered; and that secondary evidence of its contents was not admissible; and that the plaintiff should have taken steps to establish his rights to have the written contract registered under the provisions of Section 84 of the Registration Act XX. of 1866 ... 51

REVIEW.

See Practice.

S.

STAMP.

See Gomashta's Sunnud.

SUCCESSION.

See Hindoo Law (4)

EVIDENCE.

See Registration.

EXECUTION.

(1) A judgment-creditor obtained a decree on the 31st August 1859, and took out proceedings in the following order of time: *first*, on the 20th August 1861, when an effectual notice was served on the judgment-debtor; *secondly*, on the 13th September 1865, when a similar notice was served; and, *thirdly*, on the 13th of August 1866, when application was made to arrest the person of the judgment-debtor:

HELD, that as the execution of the decree was barred by limitation when the application after 13th September 1865 was made, the last application on the 13th August 1866 was within the terms of Section 20, Act XIV. of 1859 ... 8

(2) When a decree is, under Section 284 and the following Sections of Act VIII. of 1859, transmitted from one Court to another Court for execution, the Court to which the decree is transmitted has jurisdiction to determine whether or not execution of the decree is barred under Act XIV. of 1859 ... 10

(3) Where a decree of one Court has been transmitted, under Section 284 *et seq.* of Act VIII. of 1859, to another Court for ——, and when that Court has struck off for default the first proceedings in —— of the judgment-creditor, the Court to which the decree has been transmitted has jurisdiction to allow the proceedings to be revived ... 46

See Appeal (1)

F.

FORECLOSURE.

See Mortgage.

G.

GOMASHTA'S SUNNUD.

A sunnud which authorizes a gomashta to attach rents and to sue for them must be stamped: if a general power of attorney authorizing him to collect and sue for rents, it must bear a four rupee stamp under Article 43, Schedule A, Act X. of 1862 ... 39

H.

HIGH COURT'S CHARTER.

Section 39, *See Practice.*

HINDOO LAW.

(1) In the absence of nearer relations, a man may be heir to his mother's brother as regards property subject to the Mitakshara ... 76

(2) HELD, confirming the judgment appealed from, that, according to the law in Lower Bengal, the widow of a son who left no property cannot compel her father-in-law to make her a pecuniary allowance in lieu of maintenance if she refuses to reside in his house as a member of his family ... 89

J.

JURISDICTION.

A suit brought not simply for an abatement of rent, but also for a specific performance of a contract to refund, under certain conditions, excess of rent and of consideration-money, is not a suit for abatement of rent within the meaning of Act X. of 1859, and the Civil Court has —— to try such a suit, mixed up as it is with a claim for a refund of excess of consideration-money ... 41

K.

KUBOOLEUT.

(1) Where a landlord sues to obtain from his ryot a —— at a given rate of rent, and the Court finds that that rate exceeds the rate which, in the judgment of the Court upon the evidence before it, would be fair and equitable, the plaintiff is not entitled to a decree for a —— at the lower rate, but his suit should be entirely dismissed ... 14

(2) If, in a similar case, the plaint mentions no date for the commencement of the ——, the plaint does not disclose a sufficient cause of action and ought to be returned. The Court may, however, supply the omission by specifying in its decree the time from which the —— ought to commence ... *ib.*

L.

LEASE.

(1) HELD, that in a suit for the cancelment of a —— on account of a breach of its conditions, the breach complained of consisting in the non-payment of rent for a particular period specified in the ——, the lessee is entitled to avail himself of the proviso in Section 78, Act X. of 1859, that Section applying to *all* suits for the ejectment of a ryot or for cancelment of —— for non-payment of rent ... 12

LIMITATION.

See Execution (1) (2)

M.

MAINTENANCE.

See Hindoo Law (2)

MINORITY.

Every person (not being a European British subject) who has not attained the age of 18 years is a minor for the purposes of Act XL. of 1858, even though proceedings are not taken in the Civil Court for the care of his person or the protection of his property. If he is a proprietor of an estate paying revenue direct to Government, and has been taken under the protection of the Court of Wards, he is still a minor up to the age of 18 years. (Section 2, Regulation XXVI. of 1793.) ... 36

MORTGAGE.

The period of one year allowed by Section 8, Regulation XVII. of 1806, to a mortgagor to deposit the amount of the —— debt before the —— can be finally foreclosed, is to be reckoned from the date of the service upon him of the notice to redeem, and not from the date of the is sue of such notice ... 27

P.

PLAINT.

See Kubooleut.

PRACTICE.

(1) HELD (*L.S. Jackson, J., dubitante*), that an order made by the High Court on an application to review its judgment in a case of appeal to the Privy Council previously heard, is not an order made on appeal within the terms of Clause 39 of the Court's Charter, so as to enable the Court to admit an appeal against such order to Her Majesty in Council. ... 1

(2) HELD, *nem. con.*, that in a case where an appeal to the Privy Council has been admitted against a regular decree made in appeal, such proceedings as applications for review of the judgment, and the order of the Court thereon ought not to form part of the records to be transmitted to England ... *ib.*

PRIVY COUNCIL APPEAL.

See Practice.

PURDANASHEEN WOMEN.

——, or women who, according to the usage of the country, ought not ordinarily to be compelled to appear in public, are not exempt from arrest and imprisonment in execution of decrees either by Section 21, Act VIII. of 1859, or under any other rule of law. ... 21

R.

REGISTRATION.

A suit was brought to establish the plaintiff's right to certain lands alleged to have been purchased by him. A written *kobala*, or bill of sale, had been executed; but it was refused registry, because the defendant appeared at the Registry Office and declared that the contract had not been completed. The plaintiff claimed to prove the contract of sale by oral evidence, and sued for possession of the property covered by the contract.

HELD by the majority (*Mitter, J., dissenting*), that the suit could not be maintained so long as the *kobala* remained unregistered; and that secondary evidence of its contents was not admissible; and that the plaintiff should have taken steps to establish his rights to have the written contract registered under the provisions of Section 84 of the Registration Act XX. of 1866 ... 51

REVIEW.

See Practice.

S.

STAMP.

See Gomashta's Sunnud.

SUCCESSION.

See Hindoo Law (1)

INDEX

(CRIMINAL RULINGS).

A.

ABETMENT OF FORGERY.
Where a prisoner, who appealed to the Commissioner from an order of an assessor under Act XXI. of 1867, filed stamp-paper for a copy of the assessor's decision after the period of appeal had elapsed, but on appeal averred that he filed the stamp-paper before the time for appealing had elapsed, and fraudulently obtained a certificate to that effect, which was antedated, it was held that he was guilty of having abetted the commission of forgery of a document within Section 463 and Clause 1, Section 464 of the Penal Code ... 23

ACCOMPLICE.
The High Court refused to interfere with the reception by the Sessions Judge of the uncorroborated evidence of an —— ... 63

ACCUSED PERSON.
The words "accused person" in Section 436 do not apply to a party who has been convicted by the Magistrate under Section 411, from whose sentence there is no appeal 16

ACQUITTAL.
See High Court (1)

ACT DONE BY THREATS.
To obtain the benefit of the exception allowed by Section 94 of the Penal Code, it must be shown that the prisoners were compelled to act as they did from apprehension that instant death would be the consequence of a refusal ... 48

ACT II. OF 1855.
Section 24. *See Privileged Communication.*

ACT III. OF 1857. *See Mischief* (1)

ACT VIII. OF 1859.
Section 24. *See Fabricating False Document* (1)

ACT X. OF 1859.
Section 145. *See Fraudulent Removal of Property.*

ACT XLV. OF 1860.
Section 29. *See Fabricating False Document* (2)
Section 57. *See Punishment* (1)
Section 59. *See Punishment* (1)
Section 79. *See Police-officer* (1)
Section 94. *See Act done by Threats.*
Section 104. *See Breach of the Peace* (4)
Section 105, Clause 5. *See Murder* (1)
Section 147. *See Breach of the Peace* (4)
Section 148. *See Sentence.*
Section 174. *See Jurisdiction* (1)
See Public Servant.
Section 179. *See Bail-bond.*
Section 192. *See Fabricating False Document* (1)
Section 193. *See False Evidence* (1)
Section 206. *See Fraudulent Removal of Property.*
Section 258. *See Punishment* (2)
Section 300, Clause 4. *See Murder* (4)
Exception 1. *See Murder* (2)
Exception 2. *See Murder* (1)
Section 314. *See Murder* (4)
Section 317. *See Murder* (3)
Section 324. *See Sentence.*
Section 339. *See Police-officer* (2)
Section 341. *See Wrongful Restraint.*
Section 361. *See Kidnapping.*
Section 363. *See Kidnapping.*
Section 376. *See Punishment* (1)
Section 378. *See Wrongful Restraint.*
Section 403. *See Criminal Misappropriation.*
Section 408. *See Criminal Breach of Trust.*
Section 411. *See Accused Person.*
Section 425. *See Mischief.*
Section 436. *See Accused Person.*
Section 463. *See Abetment of Forgery.*
See Fabricating False Document (2)
Section 464, Clause 1. *See Abetment of Forgery.*
Section 469. *See Fabricating False Document* (3)
Section 511. *See Punishment* (1)

ACT XXV. OF 1861.
Chapter XIV. *See Procedure* (4)
See Fine (2)
See Police-enquiry (1)
Chapter XV. *See Fine* (2)
See Procedure (2) (5)

ACT XXV. OF 1861.—*(Continued.)*
Chapter XXII. *See Breach of the Peace* (4)
Section 44. *See Compensation.*
Section 62. *See Breach of the Peace.*
See Nuisance (3) (5).
Section 67. *See Complaint* (1) (2)
See High Court (2)
Section 68. *See Jurisdiction* (1)
Section 100, Clause 5. *See Police-officer* (1)
Section 163. *See Punishment* (2)
Section 169. *See Procedure* (3)
Section 170. *See Civil Court* (1)
Section 212. *See Bail.*
Section 219. *See Bail-bond.*
Section 226. *See Commitment* (1)
Section 250. *See Charge.*
Section 262. *See Procedure* (6)
Section 265. *See Complaint* (2)
Section 266. *See Complaint* (2)
Section 270. *See Fine* (2)
Section 277. *See Jurisdiction* (4)
Section 282. *See Bond.*
See Breach of the Peace (2)
See Police-officer (2)
Section 291. *See Breach of the Peace* (2)
Section 308. *See Nuisance* (1) (2) (4) (5)
Section 318. *See Breach of the Peace* (1)
See Land-disputes.
Section 371. *See Dying Declaration.*
Section 403. *See Charge.*
Section 420. *See Full Bench Rulings* (3)
Section 434. *See Commitment* (2)
See High Court (2)
See Procedure (8)
Section 435. *See Commitment* (1)
ACT XX. OF 1866. *See Jurisdiction* (2) (3)
See Registration Act (1)

ANTEDATING A DOCUMENT.
See Abetment of Forgery.

APPEAL.
Having regard to Sections 46 and 411 of the Code of Criminal Procedure, it was held that, where the sentences passed on an accused by a Magistrate are awarded for separate offences committed on different occasions, there is no —— to the Sessions Judge by reason of the two sentences, each of which was within a limit of one month, having been passed at the same time, and being, together in excess of that limit ... 3
See Accused Person.

APPROVER.
The corroboration of the evidence of an —— should arise from other evidence relative to facts which implicate the prisoner in the same way as the story of the —— does 17
See Jury (3)

ARREST WITHOUT WARRANT.
See Police-officer (1)

ASSESSORS.
See Full Bench Rulings (1)

ATTEMPT TO COMMIT RAPE.
See Punishment (1)

B.

BAD CHARACTER (PREVIOUS).
See Jury (5)

BAIL
—— under Section 212 of the Criminal Procedure Code can be demanded only in cases where further enquiry is pending, and the accused has not been discharged ... 34

BAIL-BOND.
There is nothing in Section 219, Code of Criminal Procedure, which prevents an accused person who has forfeited his —— by default of appearance, from being proceeded against under Section 179 of the Penal Code, notwithstanding that his surety has paid the penalty mentioned in the recognizance ... 4

BOND.
A summons under Section 282 of the Code of Criminal Procedure to show cause why the person summoned should not enter into a —— to keep the peace can legally issue on information, if it be credible, contained in a case which was brought against the person summoned for illegal assembly, of which he was acquitted. The order directing that the defendant should enter into the —— cannot, however, be made until the Magistrate has taken fresh evidence, properly given, on the appearance of the accused before him (or of his agent), and before he has adjudicated judicially on such evidence that it is necessary for the preservation of the peace that a —— should be taken ... 1

BREACH OF THE PEACE.
(1) It is not necessary that an order issued by a Magistrate under Section 62 of the Code of Criminal Procedure, whereby a —— was prevented, should be supplemented by a proceeding under Section 318 of the same Code ... 1
(2) A Magistrate may, under Section 291 of the Code of Criminal Procedure, cancel an order passed by him under Section 282 of that Code, summoning a person to show cause why he should not enter into a bond to keep the peace ... 40

BREACH OF THE PEACE.—*(Continued.)*

(3) A report of an Inspector of Police and the evidence given by the same Inspector are not sufficient to justify an order binding a person to keep the peace ... 55

(4) In investigating a case of dispute as to land between two parties under Chapter XXII. of the Code of Criminal Procedure, a Magistrate found that one party was in possession; but there being a charge against both parties of rioting under Section 147 of the Penal Code, he punished both parties. HELD that the party in possession were protected by Section 104 of Penal Code in maintaining their possession, and the punishment inflicted on them was accordingly remitted ... 64

See Bond.
See Police-officer (2)
See Procedure (7)

C.

CANCELMENT OF ORDER BY MAGISTRATE.

See Breach of the Peace (2)

CATTLE-TRESPASS.

See Mischief.

CHARACTER OF ACCUSED.

See Jury (4)

CHARGE.

Where a Deputy Magistrate did not draw up a —— in accordance with Section 250 of the Code of Criminal Procedure, but gave the accused clearly to understand the nature of the charges made against them, the irregularity was held to fall within Section 403 of that Code ... 7

See False Evidence (1)
See Jurisdiction (2)
See Registration Act.

CIVIL ACTION.

A charge properly laid under the Penal Code should be investigated, even if the case be one in which a —— will lie ... 40

CIVIL COURT.

(1) Section 170, Code of Criminal Procedure, refers only to cases where a forged document has been put in evidence in a Civil or Criminal Court: in other cases, a Magistrate is competent *proprio motu* to enquire into allegations of forgery, and no sanction under Section 170, Code of Criminal Procedure, is necessary ... 5

(2) The —— in giving permission to prosecute under Sections 169 and 170, Code of Criminal Procedure, should, in a case of forgery, state distinctly what the document is for which a prosecution is to be entertained. The particular act or acts of forgery, and, in a case of perjury, the particular words which constitute the perjury, should be specified ... 41

See Fraudulent Removal of Property.
See Procedure (3)

COMMITMENT.

(1) The power of —— given to a Court of Session by Section 435, Code of Criminal Procedure, must be exercised judicially upon the evidence beforet he Court, and such Court ought not to order a —— unless the evidence appear to it sufficient for a conviction within the terms of Section 226. Where such discretion has been exercised, the High Court cannot enquire into the evidence, to see if it justifies the exercise of the discretion ... 25

(2) A Sessions Judge cannot alter a —— in a case which falls within the cognizance of a Magistrate, even though the Sessions Judge thinks the evidence proves that the accused was guilty of an offence beyond the Magistrate's cognizance. The High Court refused to interfere under Section 434, Code of Criminal Procedure, on a reference in which the Sessions Judge ordered a —— in such a case, although they considered that there was evidence to prove that the offence was one triable by the Court of Session ... 35

COMPENSATION

—— under Section 44 of the Code of Criminal Procedure cannot be awarded to any one, excepting the person who has directly suffered by the offence. It cannot be given to the heirs of a person who has been killed ... 39

COMPLAINT.

(1) A Magistrate has a discretion under Section 67 of the Criminal Procedure Code to dismiss a —— at once, and is under no obligation to go further ... 50

(2) A Magistrate may dismiss a —— under the provisions of Section 67 of the Code of Criminal Procedure, before issuing a summons for the attendance of the accused; but when all the parties are in attendance, he is bound to follow the procedure laid down in Sections 265 and 266, and cannot dismiss the —— without hearing the evidence ... 61

See Jurisdiction (2)
See High Court (2)
See Procedure (4)

CONFESSION.

The confessions of a prisoner in one case in which he was convicted cannot be used against him in another case, unless they are deposed to on oath, either by the person who took them down or by some one else who heard them ... 56

CONTEMPT OF COURT.
See Punishment (2)

CREDIBLE INFORMATION.
See Bond.
See Police-officer (2)

CRIMINAL BREACH OF TRUST.

A servant who receives money for a specific purpose, and does not use it for that purpose, and, on being called on to account for the money, falsely says that he used it for that purpose, is guilty of —— under Section 408 of the Penal Code ... 28

CRIMINAL MISAPPROPRIATION.

To bring a prisoner within Section 403 of the Penal Code, there must be actual conversion of the thing appropriated to the prisoner's own use. Where, therefore, the accused found a thing and merely retained it in his possession, he was acquitted of —— under the Section referred to ... 23

CROSS-EXAMINATION (BY ACCUSED).
See Preliminary Enquiry.

CULPABLE HOMICIDE.
See Murder (1)

D.

DEPUTY MAGISTRATE.
See Jurisdiction (6)

DISCRETION.
See Commitment (1)

DISMISSAL OF CHARGE.
See Procedure (4)

DYING DECLARATION.

In determining whether a declaration alleged to have been made by a deceased person is admissible as a —— under Section 371, Code of Criminal Procedure, a Sessions Judge ought to direct his attention to the point whether the declarant believed himself to be in danger of approaching death. The evidence of persons who cannot speak of their own personal knowledge to such declaration should not be admitted; and in deciding whether the accused is guilty of the charge of murdering the deceased declarant, the Court should confine itself to enquiring into the facts which occurred on the day of the murder ... 11

E.

EUROPEAN BRITISH SUBJECT.

Whether or not an accused is a —— is a matter of fact to be determined judicially by the Court of Session on the evidence, in the event of the prisoner raising that question ... 6

EVIDENCE.

(1) The —— as to the motives with which a prisoner commits an offence should be of the strictest kind ... 11

(2) The —— of a prisoner taken by a Collector cannot be used against him on his trial before a Magistrate ... 23

See Accomplice.
See Approver.
See Confession.
See Dying Declaration.
See Jury (3) (4) (6)

EXPOSURE OF CHILD.
See Murder (3)

F.

FABRICATING FALSE DOCUMENT.

(1) The accused put in an application, which he verified before a Judge of a Court of Small Causes, praying for a re-hearing of his case under Section 119, Act VIII. of 1859, and alleging that he was not aware that a suit had been instituted or a decree given against him, though he had authorized a pleader to defend the suit.

HELD (by *Loch, J.*) that the accused was not guilty of an offence under Section 192 of the Penal Code, nor liable to punishment under Section 24, Act VIII., 1859. The offence contemplated by the former law requires that the document containing the false statement should be made with the intention that it may appear in evidence. The latter law does not require that an application under Section 119, Act VIII., 1859, such as the accused made, should be verified.

HELD (by *Glover, J.*), *contra* ... 31

(2) The simple making of a false document constitutes the offence of forgery under Section 463 of the Penal Code, and it is not necessary that it should be issued or made known to the injury of a person's reputation, either by being presented in Court or shown to any person. A false document may be made in the name of a fictitious person ... 61

(3) Where a draft-petition was prepared with the intention of being used as evidence of a matter, it was held that it fell within the terms of

FABRICATING FALSE DOCUMENT—*(Contd.)*
Section 29 of the Penal Code; and, as it contained false statements calculated to injure the reputation of a person, the offence was held to fall within Section 469 of the Penal Code ... 61
See Civil Court (1)
See Forgery.

FALSE EVIDENCE.
(1) It is essential to a charge under Section 193 of the Penal Code, that the prosecution should make out that there was on the day stated in the charge a judicial proceeding pending, and that the prisoner in the course of that proceeding made the statement alleged to be false. The particular stage of the proceeding should be mentioned in the charge. ... 37
(2) Evidence should be given that the accused really made the statement which he is charged to have made. The knowledge by the Sessions Judge of the hand-writing of the presiding officer of the Court in which the statement was made is not legal evidence of such statement having been made ... *ib.*
See Civil Court (2)

FALSE STATEMENT.—*See Fabricating False Document.*

FINE.
(1) HELD that a Subordinate Magistrate of the first class has power to deal with the case of an offence provided for by a Special Law (in this case, Act III. of 1863, B. C.) when the punishment awardable is six months, ——, and —— only; Section 67, and not Section 65, of the Penal Code being applicable to such a case ... 30
(2) HELD that where a Magistrate is dealing with a charge which he has the power to dispose of finally under Chapter XV. of the Code of Criminal Procedure, although the charge, as originally laid, fell under Chapter XIV., he has a discretion to inflict a —— under Section 270 of that Code ... 49

FORGERY.
A conviction for —— under the Penal Code cannot be had unless it is proved that the accused *himself* made a document or part of a document with the intention of causing it to be believed that such document or part of a document was made by the authority of a person by whose authority he knew that it was not made ... 7
See Abetment of ——
See Fabricating False Document.

FRAUDULENT REMOVAL OF PROPERTY.
A person who fraudulently removes property, intending thereby to prevent that property from being taken in execution of a decree made by a Collector, commits an offence, and is punishable under Section 206 of the Penal Code, and not under Section 145, Act X. of 1869 46

FULL BENCH RULINGS.
(1) Where a prisoner pleads guilty, his conviction upon that plea is valid, although there are no Assessors ... 43
(2) The resistance of process of a Civil Court is punishable under the Code of Criminal Procedure. Previous ruling of Chunder Kant Chuckerbutty overruled ... *ib.*
(3) Where a difference of opinion arises between two Judges of the High Court in a criminal appeal, the opinion of the Senior Judge prevails under Section 36 of the Letters Patent, notwithstanding Section 420 of the Code of Criminal Procedure ... 45

G.

GENERAL EXCEPTION.
See Act done by Threats.
See Police-officer (1)

GUILTY.
See Full Bench Rulings (1)

H.

HAND-WRITING OF MAGISTRATE.
See False Evidence (2)

HIGH COURT.
(1) The —— as a Court of Revision has no power to interfere with or set aside a verdict of acquittal come to by a Jury, notwithstanding that such verdict has been come to in consequence of misdirection on the part of a Judge. The case of Gora Chand Gope (5 Weekly Reporter, 48) refers only to cases tried by Assessors ... 14
(2) HELD, that the High Court cannot interfere, under Section 434 of the Code of Criminal Procedure, in a case in which a Magistrate dismisses a complaint under Section 67 of that Code. ... 49
See Full Bench Rulings (3)

HOUSE TRESPASS.
See Murder (1)

I.

INJURY TO REPUTATION.
See Fabricating False Document (2) (3)

J.

JURISDICTION.

(1) A Deputy Magistrate not in charge of a division of a district has no —— to try a case under Section 174, Penal Code, which originated under Section 68, Code of Criminal Procedure, and which was not referred to him by the Magistrate of the district ... 4

(2) Under the Code of Criminal Procedure, a Magistrate has only —— to entertain a criminal charge, either when a complaint is made before him by a person properly qualified to complain and prosecute, or when he himself of his own knowledge and discretion starts the proceedings in cases in which he has such power given him. Where, therefore, a Registrar under Act XX. of 1866 transferred a complaint made before him to the Magistrate's Court, and afterwards himself sitting as Magistrate ordered the matter to be made over to the Police, it was held that this did not amount to the institution of a criminal charge under the Criminal Procedure Code. ... 21

(3) In the case of a prosecution under Act XX. of 1866, a Magistrate has full power to entertain and finally adjudicate on the charge, and is not bound to commit to the Sessions; the words in Section 95 of that Act, "all prosecutions under this Act shall be instituted before a person exercising the powers of a Magistrate," being interpreted to mean that the whole of a criminal trial from complaint to adjudication shall be carried out before and by the same person ... *ib.*

(4) Where a case is committed to a Magistrate under Section 277 of the Code of Criminal Procedure, the Magistrate alone has ——, and cannot commit to the Sessions on the ground that he considers the sentence which he is empowered to inflict insufficient ... 50

JURY.

(1) A summing up to the —— in which the Sessions Judge gave no aid to the —— in the arrangement of the facts which were spoken to by the witnesses, and himself found facts which he should have put to the ——, was pronounced defective, and a verdict founded thereon was set aside, and the prisoner ordered to be released ... 7

(2) A Judge should not leave it to the —— to find whether a communication is privileged or not, but should himself decide it as a point of law ... 14

(3) How Sessions Judge should direct the —— in treating the evidence of an approver ... 17

(4) Evidence of character and previous conduct of a prisoner being matters of prejudice, and not direct evidence of facts relevant to the charge against the prisoner, ought not to be allowed to go to the —— ... *ib.*

(5) In charging a ——, a Sessions Judge should not tell them that the prisoners had previously been bad characters. That fact might be taken into consideration by a Sessions Judge in passing sentence when the prisoners are convicted... 39

(6) The evidence of a person stating before the —— upon oath facts which he does not know of his own observation (facts which constitute the substance of the charge against a prisoner, and which the —— themselves have to enquire into and arrive at as their verdict) ought not to be allowed to go to the ——; and still less so when the person does not orally depose before the ——, but his evidence is presented to them in the form of a written deposition ... 75

See High Court (1)

K.

KIDNAPPING.

To support a conviction for —— under Sections 361 and 363 of the Penal Code, it must be shown that the accused *took* or *enticed away* from lawful guardianship the person kidnapped ... 33

L.

LAND DISPUTES.

It is not necessary that the proceeding required by Section 318, Code of Criminal Procedure, should be recorded in a particular form or on a separate sheet; it is sufficient if it be recorded ... 16

See Bond.

See Breach of the Peace.

See Police-officer (2)

LUNATIC.

Where a prisoner was declared by the Civil Surgeon to be insane at the time he was called on to make his defence, it was held that it was irregular to acquit him. The proceedings should have been stayed and the prisoner detained, pending the orders of Government ... 37

M.

MAKING A FALSE DOCUMENT.
See Forgery.

MISCARRIAGE.
See Murder (4)

MISCHIEF.
Section 425 of the Penal Code supposes that the destruction was caused with the *intention* to cause wrongful loss or damage, and does not apply to cases of mere carelessness; and Section 17, Act III. of 1857, supposes the —— (cattle-trespass) was done intentionally, and not by negligence ... 29

MOOKTEAR.
See Privileged Communication.

MOTIVE FOR COMMITTING CRIME.
See Evidence (1)

MURDER.
HELD that a case in which the accused pursued after a thief, and killed him after the house-trespass had ceased, did not fall within the 2nd Exception to Section 300 of the Penal Code, the right of private defence of property continuing under Clause 5, Section 105 of that Code, only so long as the house-trespass continues ... 9
(2) To give an accused the benefit of Exception 1, Section 300 of the Penal Code, it ought to be shown distinctly, not only that the act was done under the influence of some feeling which took away from the person doing it all control over his action, but that that feeling had an adequate cause ... 26
(3) HELD that, where, from the circumstances, it appeared that a child who had been exposed by the prisoner did not die in consequence of the exposure, except in a remote degree, the prisoner, though guilty under Section 317 of the Penal Code, could not be convicted of ——. That Section contemplates cases in which death is caused from cold or some other result of exposure ... 52
(4) To bring a case under Clause 4, Section 300 of the Penal Code, it must be proved that the accused, in committing the act charged, knew that it must, in all probability, be likely to cause death, or that it would bring about such bodily injury as would be likely to cause death. When a poisonous drug was administered to a woman to procure miscarriage, and death resulted, and it was not proved that the accused knew that the drug would be likely

MURDER.—*(Continued.)*
to cause death, &c., they were acquitted by the High Court of ——, and convicted of an offence under Section 314 of the Penal Code ... 59

N.

NUISANCE.
(1) HELD that a Magistrate cannot proceed to pass an order for the removal of a —— under Section 308 of the Code of Criminal Procedure, without calling on the party to show cause why the order should not be passed against him, and without hearing the objections, even if they are filed after the time fixed for their presentation, but before he takes up the case ... 27
(2) A Magistrate's power to fill up a tank is, by Section 308, limited to having it fenced in; but where the tank is proved to be injurious to the community, he may, under that Section, treat it as a public ——, and cause it to be filled up ... *ib.*
(3) Section 62 of the Code of Criminal Procedure does not authorize a Magistrate summarily to direct the owner of a tank in a dry bed of a river to destroy the banks, on the ground that they are an obstruction to the public in the lawful enjoyment of the river, and that the stopping of the water interferes with the health of the public ... 36
(4) The order of a Magistrate under Section 308, Code of Criminal Procedure, should be confined to a direction to remove the —— complained of. In the case of a tank, the Magistrate cannot order the proprietor to excavate it; but the proprietor ought to have a discretion allowed him as to the mode in which he will remove the —— caused by the tank. If a Magistrate is compelled to direct the excavation of the tank, the actual cost of excavation can alone be charged against the proprietor, at whose disposition the soil taken out in the course of excavation must be placed ... 51
(5) The powers of a Magistrate and the procedure to be observed by him in issuing orders under Sections 62 and 308 of the Code of Criminal Procedure discussed, and the difference between these Sections pointed out ... 53

O.

OBSTRUCTION.
See Nuisance (5)

P.

PLEA OF GUILTY.
See Full Bench Rulings (1)

POLICE-ENQUIRY.
HELD by *Loch, J.* (*Glover, J.*, dissenting), that a Magistrate has no authority to order a —— in a case under Chapter XIV. of the Code of Criminal Procedure ... 49

POLICE-OFFICER
(1) A —— not protected by Section 79 of Penal Code, and Clause 5, Section 100, Code of Criminal Procedure, if he does not act in good faith. The latter law refers to property proved to have been stolen, and not to anything which a —— may choose to imagine has been stolen 20
(2) Where —— refused to let a person go home until he had given bail, he was held to have been guilty of wrongful restraint under Section 339 of the Penal Code ... *ib.*
(3) The report of a —— is "credible information" within Section 282 of the Code of Criminal Procedure 41
See Breach of the Peace (3)

PRELIMINARY ENQUIRY.
An accused should be allowed at preliminary enquiries before a Magistrate to cross-examine the witnesses; but whether the accused himself shall be examined upon the matter of the charge by the Magistrate is left entirely to the discretion of the Magistrate, and such discretion should not be exercised when the Magistrate thinks that the evidence for the prosecution does not disclose any proper subject of criminal charge against the prisoner ... 25

PRIVILEGED COMMUNICATION.
Under Section 24, Act II. of 1855, there is no privilege as to communications between mooktears and their principals, the word "attorney" in that law being confined to attorneys of the High Court ... 14

PROSECUTION.
See Procedure (3)

PROCEDURE.
(1) The Court quashed the sentence which was passed upon a prisoner who had not been asked if he had any witnesses to call, although he was tried at the same time with others who had been so asked ... 7
(2) In a case under Chapter XV. of the Code of Criminal Procedure, it is expected that parties will bring their own witnesses with them. If they require the attendance of any witness, they should apply to the Magistrate to cause his attendance; and, where they do not so apply, it is sufficient if the Magistrate record in his judgment the substance of the defendant's answer ... 1
(3) Where the sanction to a prosecution accorded under Section 169, Code of Criminal Procedure, extended only to one of the persons charged, the High Court quashed the commitment, and directed the discharge of the persons to whom the sanction did not apply ... 24
(4) In a case falling under Chapter XIV. of the Code of Criminal Procedure, a Deputy Magistrate has no power to dismiss a complaint on account of the non-attendance of complainant, even if a summons, instead of a warrant, is issued in the first instance requiring the attendance of the complainant ... 31
(5) Section 266, and not Section 252, of the Code of Criminal Procedure, is applicable to a case under Chapter XV. of that Code; and under the former Section, a Magistrate is not bound to summon the witnesses for the defence ... 36
(6) In a case of forcibly rescuing cattle under Section 13, Act III. of 1857, in which the accused did not summon any witnesses, it was held that, even if the accused wanted them summoned, the Magistrate, under Section 262 of the Code of Criminal Procedure, need not have summoned them, unless persuaded that they were likely to give material evidence, and that they would not attend voluntarily ... 42
(7) HELD (by *Loch, J.*) that, in a case in which a person is called upon, under Section 282, Code of Criminal Procedure, to show cause why he should not give security to keep the peace, the accused should have the opportunity of having the evidence of the witnesses for the prosecution given in his presence, and of showing by cross-examination that no charge is made out against him ... 46
HELD (*Glover, J.*, dissenting) that in such a case it is not necessary that the Magistrate should adjudicate judicially as to the necessity for taking security on evidence given before him in the presence of the person summoned ... *ib.*
(8) A Sessions Judge, in referring a case under Section 434 of the Code of Criminal Procedure, should state reasons of his own for the reference,

PROCEDURE.—*(Continued.)*

and not merely send up the reasons which may have been left by his predecessor ... 50

See Bond.
See Breach of the Peace (1) (2)
See Charge.
See Civil Action.
See Commitment (1) (2)
See Complaint (1) (2)
See Confession.
See Evidence (2)
See False Evidence (1) (2)
See Full Bench Rulings (1)
See Jury (6)
See Lunatic.
See Nuisance (1) (5)
See Preliminary Enquiry.

PUBLIC SERVANT.

A conviction for non-attendance in obedience to an order from a —— under Section 174, Penal Code, cannot be had unless the person summoned was legally bound to attend, and refused or intentionally omitted to attend ... 33

See Punishment (2)

PUNISHMENT.

(1) Under Sections 57, 376, and 511 of the Penal Code, a sentence of 10 years' *transportation* or of 5 years' *rigorous imprisonment* may be passed for the offence of attempt to commit rape; but a sentence of 7 years' *rigorous imprisonment*, commutable under Section 59 of the Penal Code to 7 years' transportation, is illegal ... 10

(2) In a case of interruption to a public servant in a stage of a judicial proceeding under Section 228, Penal Code, a sentence of imprisonment cannot be passed under Section 163 of the Code of Criminal Procedure 47

See Bail-bond.
See Fine (1)
See Jurisdiction (4)

R.

REGISTRATION ACT.

A Registrar, under Act XX. of 1866, is competent, under Section 95, to institute a prosecution for any offence under that Act ... 5

See Jurisdiction (2)

RESISTANCE OF PROCESS OF CIVIL COURT.

See Full Bench Rulings (2)

RIGHT OF DEFENCE OF PRIVATE PROPERTY.

See Breach of the Peace (4)
See Murder (1)

RIOTING.

See Breach of the Peace (4)

S.

SENTENCE.

HELD that, where the prisoners were charged, under Section 148 of the Penal Code, of rioting armed with deadly weapons, and also, under Section 324, of voluntarily causing hurt by dangerous weapons, they should have been sentenced only under *one or other* of these Sections, the charges being, properly speaking, only alternative charges ... 63

See Jury (5)

SERVANT.

See Criminal Breach of Trust.

SESSIONS COURT.

See Commitment (1)
See European British Subject.

SPECIAL LAW.

See Fine (1)

SUBORDINATE MAGISTRATE OF FIRST CLASS.

See Fine (1)

SUMMING UP TO JURY.

See Jury.

SUMMONS.

See Bond.
See Procedure (4)

SURETY.

See Bail-bond.

T.

THEFT.

See Wrongful Restraint.

W.

WARRANT.

See Procedure (4)

WITNESS.

See Procedure (1) (2) (5) (6) (7)

WRONGFUL RESTRAINT.

Where the accused prevented the complainants from proceeding in a certain direction with their carts, and exacted from them a sum of money on a false plea: HELD that the accused were guilty of ——, and not of theft ... 35

See Police-officer (2)

TABLE OF CASES

(CRIMINAL RULINGS).

A.

Abdool ... 23
Akbar Tagudgeer *vs.* Punchoo Biswas ... 42
Araz Sircar ... 29
Ashanoollah ... 21

B.

Bagdee Manjee *vs.* Mohindro Narain ... 16
Balakee Jolahed ... 9
Batool Nushyo *vs.* Bhugloo Chowkeedar ... 50
Beelash *vs.* Makroo ... 61
Bhagai Duffadar ... 43
Bhickaree Mullick ... 50
Bhikha Roy *vs.* Dhotun Roy ... 36
Bhugwan *vs.* Doyal Gope ... 7
Bindabun Shaha ... 41
Bistoo Chunder Chuckerbutty ... 27
Bubram Khan ... 47
Bykuntnath Banerjee ... 17

C.

Chunder Kant Chuckerbutty ... 14
Chunder Pershad Singh ... 30

D.

Dina Sheikh ... 63

F.

Fokto Shah ... 49
Futteali Biswas ... 37

G.

Gholam Durbesh ... 36
Gobind Chunder Ghose ... 41
Gour Chunder Chuckerbutty *vs.* Kishen Mohun Singh ... 46

H.

Hakin Sirdar ... 35
Haran Mundul ... 31
Hothoor Laloong *vs.* Hindoo Singh Mouz... 49
Huri Giree ... 26
Huri Mohun Malo ... 53

J.

Joseph Merian ... 10
Jowahir Shah *vs.* Gridharee Chowdhry ... 35
Joykisto Mookerjee ... 53
Joyram Singh *vs.* Jugnarain Doobey ... 16

K.

Kalla Chand Gope ... 59
Kazeem Thakoor ... 45
Khodabux Fakeer *alias* Khudiram Fakeer 52
Khosal Singh *vs.* Toolshee Chowdhry ... 40
Kulum Sheikh ... 39

L.

Luteef Hossein ... 1

M.

Maghun Misser *vs.* Chummun Telee ... 46
Merian ... 10
Munger Bhooyan ... 56
Mussumat Anundee Kooer *vs.* Ranee Sooneet Kooer ... 40

N.

Neela Bebee ... 33
Nuggurdi Paramanick ... 3
Nund Lall Sootrodhor *vs.* Bhagirutty Sootran ... 13
Nursingh Narain ... 1

P.

Parks ... 6
Paul Doss ... 51

R.

Rajendro Kishore Roy Chowdhry ... 55
Ramdharry Singh ... 5
Ram Gopal Dhur ... 7, 57
Ramlall Tewaree *vs.* Soopha Ram ... 34
Romon Audhikaree ... 37
Roop Lall Singh ... 39

S.

Shama Sunker Biswas and another ... 25
Seefait Ally ... 61
Sheo Surun Sahai *vs.* Mahomed Fazil Khan ... 20
Sonoo ... 48
Sookmoy Ghose ... 23
Sree Kant Charal ... 43
Sreenath Ghose ... 33

T.

Tajvomuddy Lahoree ... 4
Toolsee Singh and others ... 64

W.

Watson & Co. *vs.* Golab Khan ... 28
Woodurnul Singh ... 24

Z.

Zuhir ... 11

CRIMINAL LETTERS.

No. 694.—Occupation and service of prisoners to be stated—Column 7 of Statement No. 4, and Column 6 of Statement No. 5, how to be filled up ... 1

No. 871.—Charge of theft or robbery cannot be maintained where person has taken article under a fair and honest claim of right in excess of what he is entitled to ... *ib.*

No. 990.—Prisoner committing two acts of perjury on different occasions should not be tried on one charge—Prisoner convicted not to be discharged without punishment ... 2

No. 1009.—Names of assessors and opinion of each assessor to be given in Column 6 of Statement ... *ib.*

No. 1012.—Assessors not to be directed as to opinion which they ought to give ... *ib.*

No. 1014.—Deposition given before Magistrate by witness whose residence is not known, may be admitted before Sessions Judge under Section 369, Code of Criminal Procedure ... 3

No. 1108.—Opinion of each assessor to be delivered separately, though not at great length—Case of a prisoner who has appealed from a sentence in a previous case not to be postponed till result of that case is known ... 3

No. 1123.—Amendment of charge to be made by Sessions Judge, only when the variation is material, and when the charge is absolutely defective ... 4

No. 1134.—Charges to be described in language of Penal Code—False personation—Evidence of child—Sections 14 and 15, Act II., 1855 ... 5

No. 1481.—How the entry in Column 7 of Sessions Statement No. 4 regarding the verdict, sentence, &c., should be filled up ... 7

No. 1490.—Assessors give their "opinion," not "verdict"—Grounds for postponing cases to be entered in Statement No. 3 ... *ib.*

No. 1553.—Complainant not to be designated co-prosecutor ... 9

No. 1565.—Murder—Act imminently dangerous ... *ib.*

CIVIL CIRCULAR ORDERS.

Memo. No. 2.—Exempts Nowab Syud Mahomed Zamiool Abdeen from personal attendance in the Civil Courts ... 1

Memo. No. 3.—Mode in which the average duration of civil suits is calculated to be shown in Annual Statement No. 6 ... *ib.*

No. 7.—Rescinds Circular Order No. 55, dated 17th November 1854 ... *ib.*

No. 8.—Points out that a Subordinate Judge on appeal cannot order a Judge of an inferior Court of original jurisdiction to make a local investigation ... 3

No. 9.—Circulates instructions regarding the escort of remittances to Collectorate Treasuries ... *ib.*

No. 10.—Enjoins rules for the production as witnesses in civil and criminal cases of persons confined in civil and criminal jails ... 5

No. 11.—Communicates the lists of books sanctioned for the libraries of the Lower Courts ... 7

No. 12.—Blank Statements not to be sent up with the Quarterly Statements ... *ib.*

Memo. No. 4.—Circulates Resolution of the Government of India regarding the execution, in Foreign States, of decrees of civil tribunals of British India ... 9

No. 13.—Notifies the holidays which are to be observed during 1869 in the Civil Courts subordinate to the High Court, until further orders are issued as regards the holidays in the Behar Districts ... 13

CRIMINAL CIRCULAR ORDERS.

No. 5 A.—Promulgates rules regarding the conduct of trials and preliminary inquiries before Magistrates ... 1

No. 6.—Directs discontinuance of Sessions Statement of Acquittals and the omission of referred cases from Statement of Convictions ... 4

No. 7.—Directs that the residence of persons convicted be entered in warrants issued to officers in charge of jails ... *ib.*

No. 8.—States how a charge is to be entered in the Statement of Convictions when a person is convicted of only one charge out of several ... 5

No. 1.—Circulates Full Bench Ruling that a conviction of a prisoner pleading guilty before a Sessions Court is valid, although there are no assessors ... 5

No. 9.—Appeals heard by Magistrates from orders of District Superintendents of Police, and cases of Ministerial Officers punished, not to be entered in the Magistrate's Statements ... 6

No. 2.—States how cases should be entered in the 1st Column of Sessions Statements III. and IV. ... *ib.*

No. 3.—Directs Sessions Judges not to indent for fly-leaves to Statement No. 4. *ib*

INDEX

(PRIVY COUNCIL RULINGS).

A.

ACT VIII. OF 1859.

Section 326. *See Arbitration-award* (1)

ACT OF STATE.

To question an ——, directly or indirectly, the contention must be raised in a suit duly instituted, to which the Government must be made a party ... 25

ADOPTION.

See Hindoo Widow (2) (3) (4)

ALIENATION.

See Succession (1) (2)

ARBITRATION-AWARD.

(1) According to the proper construction of the Code of Civil Procedure (that is to say, construing it with reference to the constitution of the Civil Courts of India and the abiding direction to them to proceed in all cases according to equity and good conscience), when persons have agreed to submit the matter in difference between them to the arbitration of one or more specified persons, no party to the agreement can revoke the submission to arbitration unless for good cause, and a mere arbitrary revocation of the authority is not permitted ... 51

(2) Where no time was originally fixed within which the award was to be made, it is open to either party to hasten the proceeding by giving notice to the arbitrators that the award must be made, and an umpire appointed, within a reasonable time; but where the time elapsing after the notice has been actively employed by the arbitrators, and the delay has been owing to necessity which they could not control, the parties cannot recede from their submission by reason of the notice. *ib.*

B.

BANDHUS.

See Succession (3)

BOND.

See Interest.

BREACH OF FAITH WITH COURT.

See Suit.

C.

CONSENT OF KINSMEN.

See Hindoo Widow (4)

CONTRACT.

See Lease (1)

CUSTOM.

See Succession (4)

D.

DISCLAIMER.

See Suit.

E.

EUROPEAN JUDGE (DUTY OF).

See Hindoo Law.

EVIDENCE.

See Gift.

EX-KING OF DELHI (ESTATE OF).

See Limitation.

F.

FALSE STATEMENT IN DEED.

See Solicitor.

FARMER.

See Lease (2)

FATHER'S MATERNAL UNCLE.

See Succession (3)

FINDINGS ON EVIDENCE BY LOWER COURTS.

See Practice.

G.

GIFT.

In establishing the validity of a deed of —— taken from a woman stricken with a mortal disease and in expectation of death, proof at least of equal strictness as is required to prove a testamentary disposition must be given, and the proof to support such a transaction ought to be sufficient to establish that she knew what she was about, and intended to make such disposition of her property ... 3

See Succession (1) (2)

GOVERNMENT OF INDIA.
See Limitation.

H.

HINDOO WIDOW.
(1) According to the Mitakshara, a —— may dispose of moveable property inherited from her husband, a power she does not possess under the law of Bengal; but by both laws she is restricted from alienating any immoveable property, whether ancestral or acquired, so inherited. On her death, the immoveable and the undisposed of moveable property pass to the next heirs of her husband ... 3
(2) The devolution of *stridhun* from a childless widow is regulated under the Mitakshara by the nature of her marriage; and if the marriage was according to the four approved forms, the *stridhun* goes to the collateral heirs of her husband ... *ib.*
(3) Power of a childless —— to adopt a son to her husband with or without his permission under the various schools of Hindoo Law considered. The difference between them relates rather to what shall be taken to constitute, in cases of necessity, evidence of authority from the husband, than to the authority to adopt being independent of the husband ... 17
(4) According to the doctrine of the Benares and Mahratta Schools, a —— can adopt a son without her husband's express authority, if the adoption be made with the consent of her husband's kindred. Rule indicated as to the kinsmen whose consent is essential ... *ib.*
See Onus Probandi.

HIGH COURT'S POWERS.
See Solicitor (2)

HINDOO LAW.
The duty of a European Judge in administering —— is not so much to enquire whether a disputed doctrine is fairly deducible from the earliest authorities, as to ascertain whether it has been received by the particular school which governs the district with which he has to deal, and has there been sanctioned by usage ... 17
See Mitakshara.
See Succession (3)

I.

INTEREST.
Where, in a previous suit on a bond, which suit was lost on account of want of jurisdiction, the plaintiff sued for a specific sum and for —— as from a certain date, he was declared, in a subsequent suit instituted by him on the same bond, entitled to —— on the bond, only from the date from which he sued for it in the first suit to the date of the present decree of the Judicial Committee ... 55

J.

JUNGLE LAND.
See Lease (1)

K.

KING.
See Succession (3)

L.

LEASE.
(1) Where an application for a —— for farming jungle-lands was in its nature general, but the answer was specific and clear, and granted the lease on certain conditions, the answer determined the contract, and was the only contract between the parties ... 13
(2) The word "farmer," as used in Regulation XVII. of 1827, is used, not as a cultivator of the ground, but as a farmer of public revenue, a person who would stand between the Government and the ryots as possessors of the ground ... *ib.*
(3) A lessee who sues, alleging that there has been an interruption to his lease to cut or sell the trees on the land included therein, must base his right, *first*, upon its being a necessary incident of the —— by reason of the objects of the ——; or, *secondly*, under some positive law; or, *thirdly*, under some custom to be incorporated in the ——; or, *fourthly*, under the express terms of the —— ... *ib.*

LIMITATION.
The Government of India, who took upon themselves to pay debts due against the estate of the Ex-King of Delhi out of the assets of the estate of the Ex-King, are entitled to avail themselves of the Statute of —— in a suit brought against the estate; but if a suit could, justly and in equity and conscience, be substantiated against the Ex-King, it ought to be allowed before the Government officers, irrespective of technical difficulties which might have attended legal proceedings against the King during his sovereignty ... 55

M.

MAHOMEDAN LAW.
See Succession (1) (2)

MAINTENANCE.
The *quantum* of —— to be awarded is a question with which the Courts in India are best able to deal, and the Judicial Committee will not interfere with the discretion exercised in this respect, unless on strong grounds ... 17

MITAKSHARA.
The Viromitrodataya is properly receivable as an exposition of what may have been left doubtful by the ——, and is declaratory of the law of the Benares School ... 31

O.

ONUS PROBANDI.
Where a party entitled to impeach an alienation by a widow of her husband's estate sues to set aside such an alienation, and the defendant establishes, not only that he had a charge on the estate in virtue of a mortgage-deed executed by the widow, but that the debt to him was on account of advances made to her for purposes for which she would have been entitled to alienate the estate as against the next heirs, it does not follow that, because plaintiff had a right to demand this peculiar proof, the ordinary rule which requires the party who alleges payment to prove payment is to be inverted in his favor, or that the debt is to be presumed to be satisfied, unless the contrary is shown by the creditor; and if he alleges that the mortgage-deed was not *bonâ fide*, the burthen lies on him to prove his allegation ... 47

OPINIONS OF PUNDITS.
Extent of authority to be given to the —— laid down ... 17

P.

PAYMENT INTO COURT.
See Voluntary Payment.

PRACTICE.
In a suit by *A* for possession of property which belonged to her uncle *B*, the defendants, *C* and *D*, each alleged herself to be the wife of *B*, and each said that the other was his concubine. *C* also set up a will in her favor by *B*. *C* admitted that she had once been *B's* concubine, but alleged that she had been subsequently married to *B*. The evi-

PRACTICE.—*(Continued.)*
dence was conflicting, and the Courts below pronounced against both the marriages and also against the will. *C* alone appealed to the Privy Council, who held that lapse of time and propriety of conduct, and the enjoyment of confidence with powers of management reposed in her, are not sufficient to raise the presumption that *A* was a lawful wife; and there was wanting in this case that clear indication of error in the finding which was necessary to take the case out of the rule laid down by the Privy Council, in a case cited, that the Judicial Committee would not interfere with the decision of the Courts in India, when they have concurred in opinion, merely on the effect of evidence or the credit due to witnesses 10

PRESUMPTION OF FRAUD.
See Solicitor (1)

PROTEST.
See Voluntary Payment.

PUNDITS.
See Opinions of ——.

R.

REVERSIONER.
See Onus Probandi.

S.

SOLICITOR.
(1) The rule that the intentional statement of a falsehood in a solemn deed taken by itself without explanation betokens fraud until the contrary is shown, and that it is the duty of a —— who has made such a statement to show convincingly the absence of fraudulent motive, can scarcely be applied when a fraudulent motive has not been alleged by any complainant, if the explanation offered be not simply incredible ... 43
(2) There is no such special authority in the High Court as would authorize the striking a —— off the rolls of the Court where such a step would not be sanctioned by the practice of the Courts in England ... *ib.*

STRIDHUN.
See Hindoo Widow (2)

SUCCESSION.
(1) Where a Mahomedan transferred certain property (Company' spaper) to his son, reserving the interest to himself for life, the object of the

SUCCESSION.—*(Continued.)*
disposition being to give the son a larger share of the father's property than would come to him by —— *ab intestato:*
HELD that the transaction could not be impeached on moral grounds as a design to alter the disposition of property so as to defeat a —— by an alienation which the law allows is simply a design to conform to the law while working out an unforbidden object ... 25
(2) HELD that the intention of the parties did not violate any provision of the Hedaya, and the transfer was complete and the gift valid ... *ib.*
(3) HELD that the list of Bandhus given in Article 1, Section 6, Chapter 2 of the Mitakshara, is not exhaustive, but simply illustrative of the proposition that there are three classes of Bandhus; and that a person's father's maternal uncle is a Bandhu, and as such entitled to inherit in preference to the king, who cannot take to the prejudice of a maternal uncle or a maternal grand-uncle ... 31
(4) The prevalence in any part of India of a special course of descent in a family, differing from the ordinary course of descent in that place of the property of people of that class or race, stands on the footing of usage or custom of the family; and the custom is capable of attaching and of being destroyed equally, whether the property be ancestral or self-acquired ... 35

SUIT.
A —— was brought by *A* to recover property in which, on appeal to the Privy Council, two questions arose, *viz.*, whether the property was to pass as divided and undivided property, and whether such property was conveyed away to *A's* father by a deed of testamentary disposition? The Lower Court had decided only the latter point, and the Privy Council remanded the case for determination of the former point. On a second appeal to the Privy Council, that Committee were about to enter upon the question as to the validity of the testamentary paper, when *A* gave up the point that the paper was in any sense testamentary in its character, and disclaimed having any title under it as a testamentary devise, and the Privy Council therefore did not decide that question.
HELD that a subsequent suit by *A*, in which he sought to recover the property by setting up the paper as a valid will and testament, was a suit instituted without *bona fides*, and could not be allowed to proceed, because, *first*, the nature of the paper was in issue in the former suit, and what was in issue must be taken to have been decided by the judgment; and, *secondly*, because *A* having used the document, and abandoned all right to it as a will, he could not again use it for a different purpose ... 1
See Limitation.

U.

USAGE.
Under the Hindoo system of law, clear proof of —— will outweigh the written text of the law ... 17

V.

VIROMITRODATAYA.
See Mitakshara.

VOLUNTARY PAYMENT.
Where money was deposited in Court by a judgment-debtor under protest, for the purpose of preventing an injurious sale, and the depositor declaring his intention to bring a regular suit to set aside the summary order rejecting his claim, prayed that the sum might be paid to the decree-holder, and the sale stayed, the payment was held not to be a —— ... 29

W.

WIFE.
See Practice.

WILL.
See Suit.

TABLE OF CASES

(PRIVY COUNCIL RULINGS).

A.

Augustus Stewart, In the matter of ... 43

C.

Cavaly Vencata Narainapah *vs.* The Collector of Masulipatam ... 47
Collector of Madura *vs.* Muttu Ramalinga Satthupathy, and the other causes ... 17

F.

Fatima Khatoon *vs.* Mahomed Jan Chowdhry ... 29

G.

Gridhari Lall Roy *vs.* The Government of Bengal ... 31

M.

Mussamut Jariut-ool-Butool *vs.* Mussamut Hosseinee Begum ... 10
Mussamut Thakoor Dayhee *vs.* Rai Balack Ram ... 3

N.

Narain Doss *vs.* The estate of the Ex-King of Delhi ... 55
Nawab Umjad Ally Khan *vs.* Mohumdee Begum ... 25

P.

Pestonjee Nusserwanjee *vs.* D. Manockjee and Co. ... 51

R.

Ruttonjee Eduljee Shet *vs.* The Collector of Tanna and Conservator of Forests ... 13

S.

Soorendronath Roy *vs.* Mussamut Heeramonee Burmonee and others ... 35
Sreemunthoo Raghonadha Perya Oodya Taver *vs.* Kattama Nauchear ... 1
Stewart, In the matter of Augustus ... 43

The Weekly Reporter.

APPELLATE HIGH COURT.

The 1st June 1868.

Present:

The Hon'ble J. B. Phear and C. Hobhouse, *Judges.*

Evidence—Rule as to old documents.

Case No. 2040 of 1867.

Special Appeal from a decision passed by the Principal Sudder Ameen of Nuddea, dated the 6th May 1867, reversing a decision passed by the Sudder Ameen of that District, dated the 14th August 1866.

Sreekant Bhuttacharjee (Plaintiff), *Appellant,*

versus

Raj Narain Bhuttacharjee (Defendant), *Respondent.*

Mr. W. A. Montriou and *Baboo Baneenath Bose* for Appellant.

Baboos Onookool Chunder Mookerjee, Ashootosh Dhur, and *Hem Chunder Banerjee* for Respondent.

When a document is so old that the parties to it and the witnesses have, in all probability, passed out of this world, and evidence cannot be produced to prove the *factum* of its execution, the rule in England as well as in this country is to compel the party who relies upon the document to show that it comes from the custody in which it would naturally be expected to reside, were it a real and authentic document.

Phear, J.—In this case the plaintiff seeks to eject the defendant from certain land, and to obtain a decree for possession thereof. It is, therefore, incumbent upon him to prove title. He relies upon a kubooleut which he says the ancestor of the defendants executed in favor of his predecessor, and also upon some admissions made upon different occasions by some of the defendants, of their holding this land as tenants to him (the plaintiff). He puts into Court as the kubooleut in question a document of which he does not pretend to prove the execution in the strictest way, and he accounts for his omission on this point by the very natural explanation that the term of the kubooleut having been 55 years, and that period having already elapsed, he is unable to bring into Court either the person who made the document, or any of those who appear on its face as witnesses to its execution. He does, however, as we understand, adduce some persons who pretend to be what are often termed *mujlisee* witnesses, that is, persons who profess to have been accidentally present in the assembly at the time that the document was executed. The Lower Appellate Court does not attach any value to the testimony of these witnesses; nor in the argument that we have heard before us, does it seem that the special appellant has made it matter of great complaint that the Lower Appellate Court has refused to give credence to them. The argument mainly has been that this document, being so old as at least 55 years, (in truth, according to the plaintiff's account, more nearly 60 years), proves itself.

The Lower Appellate Court, in its judgment, has given an explanation of what is the meaning in this country of the doctrine that an old document proves itself. It is true that the Principal Sudder Ameen seems to think that the ruling which he lays down

in this respect is different from that which is followed in the Courts of law in England, but we are bound to say that he is incorrect, in supposing that there is any difference of rule in the two countries, for the rule which he has stated correctly as the rule of procedure in our Courts here is none other than the rule which obtains in the English Courts of law. It is, of course, only matter of common sense that, when the document is so old that the parties to it and the witnesses have, in all probability, passed out of this world, it should not be taken as a fault in the party who relies upon it that he is not able to produce evidence for the purpose of proving the *factum* of its execution. But the next best thing that can be done in the way of establishing its authenticity is always rigidly exacted of him before he is allowed to use it, namely, he is compelled to show that the document comes from the custody in which, if it be a real and authentic document, it would naturally be expected to reside; and further, in elucidation of this question, it may be necessary for him to give evidence of its being in essential respects a living and operative document, and to show that, up to the last point of time to which it applies, the parties have acted, and facts have taken place, in accordance with it. Now, the only thing that the plaintiff has done in reference to adducing proof of this nature in support of the kubooleut is to say, what probably is apparent enough, that it comes last from the record of a certain suit in the Small Cause Court, and as we understand the judgment of the Lower Appellate Court, the Principal Sudder Ameen considers that this alone does not satisfy the rule of evidence which is applicable in this behalf; and we think that, if the Principal Sudder Ameen does say so, he is correct. Certainly, the record of a suit in the Small Cause Court is not the place where a document of this kind would naturally be, and therefore it lies upon the plaintiff to show distinctly how it came there. (Mr. Montriou, Counsel for the special appellants, interposing said that the document was not brought from the Small Cause Court, but was filed in the present suit by the plaintiff in the usual manner.)

The Lower Appellate Court states the matter thus: "In truth, the said kubooleut "did not come out of the hands of a proper "party, and on this point I have to re-"mark that it was filed in the Court of "Small Causes in the year 1861, a very long "time subsequent to its execution, by one "Komul Ghose, mortgagee from the plaint-"iff's mother." We understand from this that the document came from the files of the Small Cause Court, but whether we are mistaken on this point or not, it is admitted by the Counsel for the special appellant that the plaintiff did not give any testimony in Court, to the effect that he had had custody of this document for any time, definite or indefinite, before or after either the mortgage or the Small Cause Court suit. The document has simply appeared, from all that we can understand, among the documents upon the record of this suit by the ordinary process of filing, either by the plaintiff himself or some one on his behalf. There is no evidence, one way or other, as to the custody in which it was previously.

We have now mentioned to the best of our understanding all that has appeared in this case in the way of supporting this alleged kubooleut as an authentic document. The Lower Appellate Court has come to the conclusion in its discretion that this is not enough to prove it, and make it admissible as evidence between the parties, and we are of opinion that the Lower Appellate Court in this respect is right. It is manifest that the plaintiff might have done very much more to show that this document really is that which it purports to be, than he has done, if what we have described be a correct representation of all that has been done for this purpose. Indeed, it seems to us obvious that there is in all cases only one mode of showing at a trial the custody from which a given document comes, namely, by the evidence of sworn witnesses who can speak upon the point, and nothing of this kind has been attempted in the present instance. The Principal Sudder Ameen makes some observations as to the alleged mode in which this document got filed in the Small Cause Court. It does not seem to us to be necessary that we should pass any judicial opinion upon this point, if we think, as we have already said we do think, that enough had not been done by the plaintiff to make this alleged kubooleut evidence in this cause. But we are far from desiring to leave the impression that we consider the observations of the Principal Sudder Ameen, with regard to the Small Cause Court suit, which the plaintiff himself has chosen to make a material fact in the matter of this litigation, to be in any way unfounded or unreasonable.

The plaintiff, as we have already mentioned, also refers to the admissions made by the defendant upon different occasions—admissions of tenancy to the plaintiff or his predecessors. The learned Counsel for the special appellant has argued with very great force against the view which has been taken by the Lower Appellate Court in regard to the non-authenticity of the documents in which these admissions appear. We desire only now to say that we think that the conclusions of the Lower Appellate Court have been, as far as we can see, legitimately drawn from evidence before it, and whether or not, had we been sitting as Judges of the value of evidence, we should have arrived at the same results as those which the Lower Appellate Court arrived at, we feel that here in a special appeal there is not any ground of objection upon which we ought to interfere with the decision of the Court below on this head. It is not necessary that we should go further in detail in discussion of the judgment of the Lower Appellate Court. The only mode in which the plaintiff proposed to establish his title to the land as against the defendants was by proving that they were bound by the contract and admissions exhibited in the alleged kubooleut. If that document fails to be evidence, the whole of his structure of title necessarily falls to the ground, because the other admissions of the defendants, taking them to be real admissions, are so incomplete and so dependent upon reference to the undetailed contents of an unknown pottah, that it would be impossible to say, in our mind, that the Lower Appellate Court would be wrong in refusing to pass a decree in favor of the plaintiff upon these admissions alone, even assuming them to have been really and actually made. The Lower Appellate Court, however, not only did not say that these admissions had been made, but found as a fact that they had not been made, and, therefore, the hypothesis that we make would not be of itself sufficient to authorize our sending back the case for further trial. In our opinion, the plaintiff has, as the record stands after the rejection of evidence by the Lower Appellate Court, failed to make out a title to eject the defendants, and we think that there is no ground of objection to the decision of the Lower Appellate Court for having rejected from the record that portion of the evidence in respect of which the special appellant now complains. Consequently, we think that this special appeal should be dismissed with costs.

The 1st June 1868.

Present:

The Hon'ble Dwarkanath Mitter and C. Hobhouse, *Judges.*

Evidence—Nazir's return—Notice.

Case No. 132 of 1868.

Miscellaneous Appeal from an order passed by the Judge of Sarun, dated the 31st December 1867, affirming an order passed by the Principal Sudder Ameen of that District, dated the 4th May 1867.

Shah Koondun Lall (Judgment-debtor), *Appellant,*

versus

Noor Ali (Decree-holder), *Respondent.*

Mr. R. E. Twidale for Appellant.

Mr. M. L. Sandel for Respondent.

HELD (following the ruling of a majority of a Bench of three Judges) that a Nazir's return is no legal evidence of service of notice.

Hobhouse, J.—THE facts are admittedly as follows :—

In execution of a decree of date the 17th of August 1848, the decree-holders (respondents) were in time up to the 30th November 1861.

The next application for execution was made on the 23rd February 1863, and it is alleged that on this occasion service of notice was made on the judgment-debtors (appellants) on the 1st July 1863.

If this notice was duly served, it is admitted that respondents are in time; if it was not, it is admitted that execution was barred by the application of the Statute of Limitation.

The Courts below have found the notice duly served solely on the evidence of a Nazir's return to that effect, and in special appeal it is urged that this return is no legal evidence at all of the alleged service.

We observe that in the Courts below the appellants from the very commencement objected that no proceedings had been taken to enforce the decree since the 30th November 1861. It was, therefore, on respondents to show that proceedings had been taken since that period, and in this particular case, to prove service of summons on the 1st July 1863.

Respondent's case, then, is that the Nazir's return is *primâ-facie* evidence of service; and that, until appellants have rebutted this, service must be held to have been duly made; and this was the opinion of the Courts below; and in support of it Mr. Sandel for respondents relies on the cases reported in Volume VI., Weekly Reporter, pages 74 and 97, Miscellaneous Rulings, and Section 222 of the Civil Procedure Code.

In the two cases relied on, we observe that the Nazir's return, the evidence of service mentioned, was not in the first case apparently, and in the second case certainly, disputed, and Section 222 simply directs the Nazir to make a return, but does not, in our opinion, in any way constitute that return to be legal evidence, and certainly not when, as in this case, the return is disputed.

We think, therefore, that the cases and the law relied on for respondents do not support their contention.

On the other hand, there is a case on which Mr. Twidale relies for appellant to be found at page 11 *et seq.*, Weekly Reporter, Vol. III., Miscellaneous Rulings, which seems to us to be exactly in point, and which has our entire concurrence.

In this, the Chief Justice and Mr. Justice Loch, a majority of a Bench of three Judges, held that a Nazir's return (pages 14 and 15) was *per se* no legal evidence at all of service of notice. Applying this case, we find that appellant's objection is good, and that the service of notice in this case is not supported by any legal evidence.

We, therefore, remand the case to the Lower Appellate Court, with instructions to transmit it to the Court of first instance in order that either party may have the opportunity of showing by legal evidence whether notice was served on the 1st July 1863. If it was, the Court will permit execution to proceed, and, if it was not, will refuse such permission. Costs will follow the ultimate decision of the case.

The 1st June 1868.

Present:

The Hon'ble J. B. Phear and C. Hobhouse, *Judges.*

Certificate under Act XXVII., 1860.

Case No. 183 of 1868.

Miscellaneous Appeal from an order passed by the Judge of the 24-Pergunnahs, dated the 18th February 1868.

Bama Kallee Dossee, *Appellant.*

Baboo Bungshee Dhur Sein for Appellant.

To entitle an applicant to a certificate under Act XXVII. of 1860, it is not necessary for him to show that debts are actually due; it is sufficient, if circumstances render it possible, that debts may be due or may accrue within the jurisdiction of the Court.

Phear, J.—We think that it is not necessary, in order to entitle an applicant to a certificate under Act XXVII. of 1860, that he should satisfy the Court that debts are actually due at the time of the application. It is quite sufficient to show that there are assets, and that circumstances exist to render it probable or possible that debts may either be due as a matter of fact, or may eventually accrue due within the jurisdiction of the Court. It seems that the sole ground upon which the Judge has refused a certificate to the present applicant is, that she has failed to satisfy him that there are debts actually due to the estate of the deceased Huree Narain Mundul, and as we think him wrong upon this point, we reverse his decision, and direct that a certificate be issued to the applicant.

d

The 1st June 1868.

Present :

The Hon'ble J. B. Phear and C. Hobhouse, *Judges.*

Limitation—Construction of Section 20, Act XIV., 1859.

Case No. 145 of 1868.

Miscellaneous Appeal from an order passed by the Judge of Sarun, dated the 31st December 1867, reversing an order passed by the Moonsiff of that District, dated the 21st September 1867.

Brojo Beharee Sahoy (Decree-holder), *Appellant,*

versus

Kewal Ram and another (Judgment-debtors), *Respondents.*

Baboo Roopnath Banerjee for Appellant.

Baboo Tarucknath Dutt for Respondents.

The three years "preceding the application" allowed in Section 20, Act XIV., 1859, must be accounted for by excluding the day on which the application is made.

Phear, J.—We think that the application for execution is made within time. The words of Section 20, Act XIV. of 1859, are: "No process of execution shall issue, &c., "unless some proceeding shall have been "taken to enforce such judgment, decree, or "order, or to keep the same in force within "three years next preceding the application" for such execution. We think that "preceding the application" must mean preceding the date of the application for such execution, and consequently the three years must be accounted for by excluding the day on which the application was made. Now, the date of the final decree in the present case was the 9th July 1864, and this application for execution was made on the 9th July 1867; that being so, the application in this case was, in our opinion, made just within the three years. The case must, therefore, be remanded to the Lower Appellate Court with directions that it send it to the Court of first instance for execution.

The special appellant to be paid his costs in all Courts.

The 2nd June 1868.

Present :

The Hon'ble F. B. Kemp and E. Jackson, *Judges.*

Jurisdiction.

Case No. 2762 of 1867 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of Mymensingh, dated the 13th July 1867, reversing a decision passed by the Deputy Collector of that District, dated the 31st December 1866.

Mahomed Jakee (Plaintiff), *Appellant,*

versus

Gopee Roy and others (Defendants), *Respondents.*

Baboo Shushee Bhoosun Bose for Appellant.

Mr. J. S. Rochfort for Respondents.

In a suit brought under Clause 6, Section 28, Act X. of 1859, setting forth that plaintiff had been ousted from his homestead, and his crops had been plundered by his lessors in concert with their co-trespassers whom they had located on the lands, it was held that the suit was substantially against the tenants in possession, their lessors having been joined in the suit, and that the Collector had no jurisdiction.

Kemp, J.—This was a suit brought under Clause 6, Section 23, Act X. of 1859.

The plaint sets forth that the plaintiff, the tenant, was ousted from his homestead, and that his crops were plundered by his lessors (khas mehal lessees), acting in concert with their co-trespassers, whom they (the lessees) had located on the lands, and who are admittedly in possession.

The Lower Appellate Court has dismissed the plaintiff's suit on the ground that the Revenue Court had no jurisdiction. A decision published at page 20, Act X. Rulings, Weekly Reporter, Volume VI., was quoted by the Judge in support of his judgment.

In special appeal it is contended that the decision relied upon by the Judge does not apply to the present suit, and that the Judge

has misconstrued the plaint, which does not (the special appellant contends) state that the tenant was ousted by the landlord in conjunction with other individuals, but through the landlord's instrumentality alone.

We think that the suit is substantially one against the tenants who are in possession, their lessors having been joined in the suit.

If the plaintiff sued the lessors alone, his suit would be cognizable by the Collector alone, but he could not recover possession as against the tenants in possession under the Collector's decree. The full remedy can only be obtained by bringing a suit in the Civil Court against the dispossessing ryots joining the lessors as defendants.

The Collector has no jurisdiction as against all the parties in this suit, and it would encourage a splitting-up of causes of action, and tend to multiply suits, were we to hold that the plaintiff could proceed against the lessors in one suit under Act X. and against the joint-trespassers, the ryots, in another suit in the Civil Court.

The appeal is dismissed with costs and interest.

The 2nd June 1868.

Present:

The Hon'ble H. V. Bayley and W. Markby, *Judges.*

Jurisdiction—High Court's powers under Section 35, Act XXIII. of 1861, and Section 15 of 24 and 25 Vic., Cap. 104.

Lowazima Special Appeal from a decision passed by the Collector of East Burdwan, dated the 31st March 1868, reversing a decision passed by the Deputy Collector of that District, dated the 28th January 1868.

Drobo Moyee Dabee (Plaintiff), *Appellant,*

versus

Bipin Mundul and another (Defendants), and another (Intervenor), *Respondents.*

Baboo Kishen Sucea Mookerjee for Appellant.

No one for Respondents.

Where a respondent in a Collector's Court applied in special appeal to the High Court to exercise the general powers of supervision vested in it by Section 35, Act XXIII. of 1861, and Section 15 of 24 and 25 Vic., Cap. 104, to set aside the Collector's proceedings as without jurisdiction, it was held that, as he had allowed the appeal to be heard without objection, he was not entitled to the relief sought.

Markby, J.—This application must be refused. The applicant, who was respondent in the Collector's Court, allowed the appeal to be heard without objection. He now asks this Court to exercise the general powers of superintendence vested in it by Section 35 of Act XXIII. of 1861 and Section 15 of 24 and 25 Vic., Cap. 104, and to set aside the proceedings before the Collector as being without jurisdiction. Assuming them to have been so, still we think we ought not to interfere. The applicant took his chance of a decision in his favor in the Court of the Collector, without in any way protesting against the jurisdiction. And though his conduct in this respect will not give that Court jurisdiction, still it is, in our opinion, sufficient to prevent him coming before this Court, and asking it to exercise its extraordinary powers of relief in his favor, by setting aside proceedings of which he was willing enough to avail himself so long as there was a chance of their turning out to his own advantage. We think the decree of the Collector ought not to be set aside in order to relieve the petitioner. Upon the question whether or not it is a valid and binding decree, we express no opinion.

The 3rd June 1868.

Present:

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice,* and the Hon'ble Dwarkanath Mitter, *Judge.*

Res adjudicata— Section 2, Act VIII., and Section 25, Act X. of 1859.

Case No. 2738 of 1867.

Special Appeal from a decision passed by the Judge of Chittagong, dated the 20th July 1867, affirming a decision passed by the Moonsiff of that District, dated the 19th February 1867.

Gocool Chunder and others (Plaintiffs), *Appellants,*

versus

Ali Mahomed (Defendant), *Respondent.*

f

Baboo Chunder Madhub Ghose for Appellants.

Baboo Hem Chunder Banerjee for Respondent.

A Collector's refusal to give assistance under Section 25, Act X. of 1859, is not a determination by a Court of competent civil jurisdiction in a former suit within the meaning of Section 2, Act VIII., 1859.

It has been decided by a Full Bench of this Court that an application to the Collector, under Section 25 of Act X. of 1859, for assistance to eject a tenant is not a suit, and that the order of the Collector in such a case is not one from which an appeal lies to the Civil Court. Following that decision, it was held in the case No. 2313 of 1862, reported in Sutherland's Full Bench cases, page 126, that Section 25 of Act X. of 1859 does not preclude a zemindar or other person in receipt of rent from suing in the Civil Court for the ejectment of a tenant after the expiration of his lease, instead of applying to the Collector for assistance. It follows that a refusal by a Collector to give assistance under Section 25 is not a determination by a Court of competent jurisdiction *in a former suit* within the meaning of Section 2 of Act VIII. of 1859. If the plaintiff had not made application to the Collector, he might, according to the Full Bench decision to which I have referred, have sued in this action in the Civil Court. The fact of his having applied for assistance to the Collector, or of the Collector's having refused to render him assistance, is not a bar to the maintenance of this action.

The case is distinguished from the case cited by the Judge reported in Wyman's Journal, Vol. I., page 58, which is also reported in V. Weekly Reporter, page 3, Act X. Rulings. The decision of the Judge is reversed, and the case is remanded to him to be decided upon the merits. The costs of the appeal will abide the result of the ultimate decision in the case.

In determining this case upon the merits, the Judge will have to consider whether the plaintiff had duly determined the jote by notice or otherwise, even if it was merely a jote from year to year. We make this remark merely to call the attention of the Judge to the point.

The 3rd June 1868.

Present :

The Hon'ble F. B. Kemp and E. Jackson, *Judges.*

Jurisdiction—Suit to recover rents collected without landlord's authority.

Case No. 2822 of 1867.

Special Appeal from a decision passed by the Judge of Hooghly, dated the 21st June 1867, reversing a decision passed by the Sudder Ameen of that District, dated the 23rd March 1867.

Kadumbinee Dossee (Plaintiff), *Appellant,*

versus

Bhugobutty Churn Ghose and another (Defendants), *Respondents.*

Baboo Kishen Kishore Ghose for Appellant.

Baboo Nil Madhub Sein for Respondents.

Where a naib, without authority from his principal, had collected rents from ryots, and the principal's suits to recover his rents from the ryots were dismissed with costs, in consequence of the admission of the naib that he had received the money sued for, it was held that a suit against the naib and another acting in collusion with him, to recover the moneys collected, and damages, was cognizable by the Civil Court.

Kemp, J.—This was a suit against two defendants: one is styled as a discharged naib of the plaintiff's, the other as acting in collusion with the said naib.

It is alleged in the plaint that the naib (defendant), though his sunnud of appointment did not empower him to do so, collected certain moneys from certain ryots; that, on plaintiff suing sixty-four ryots for rent, they pleaded payment to the naib: that, in consequence of the admission of the naib that he had received the money sued for in these suits, the suits were all dismissed, and plaintiff had to pay his own costs in all those suits, as well as bear all the costs of the ryots.

The present suit is to recover the moneys so collected, and the costs of the suits which were dismissed, in the shape of damages. The Judge held that this suit was not cognizable by the Civil Court.

We think that the Judge is wrong. This is not a simple suit against an agent or his surety for money received in the course of the employment of such agent, but a suit for moneys received as not within the scope of his authority to receive, and for damages which the plaintiff alleges he has sustained by having to pay costs in sixty-four suits which he brought for rent against his tenants. A third party is also arrayed amongst the defendants, who is not a surety for the agent. This defendant is charged with collusion. The suit is cognizable by the Civil Court, and is remanded for trial. Costs to follow the result.

The 3rd June 1868.

Present:

The Hon'ble G. Loch and F. A. Glover, *Judges.*

Objection first taken in special appeal—Sale by Hindoo widow—Legal necessity.

Case No. 2425 of 1867.

Special Appeal from a decision passed by the Judge of Sylhet, dated the 27th July 1867, reversing a decision passed by the Moonsiff of that District, dated the 8th March 1867.

Kool Chunder Surmah (Plaintiff), *Appellant,*

versus

Ramjoy Surmona (Defendant), *Respondent.*

Baboo Gopal Lall Mitter for Appellant.

Baboo Greesh Chunder Ghose for Respondent.

Where plaintiff claimed as his inheritance what had been sold to defendants by his mother to liquidate debts due by his late father, it was held, *1st*, that it was too late in special appeal to raise doubts as to his mother having been plaintiff's guardian, when the objection had not been taken below at any stage of the proceedings; and, *2ndly*, that there was such an apparent necessity as would justify the purchase, and that the mere fact of the widow having been able to make a more advantageous arrangement would not nullify a sale to a *bonâ-fide* purchaser for value.

Glover, J.—With regard to the 8-annas share said to have been purchased by the special appellant from Luckhee Kant Surmah, no objection is taken to the Judge's finding in the grounds of special appeal. The Judge's decision, moreover, on this part of the case, is distinctly one of fact with which there would be no interference possible in special appeal.

There remains the 8-annas share which the plaintiff claims as his inheritance, and which the Judge has found to have been legitimately sold to the defendants by the plaintiff's mother to liquidate debts due by his late father.

In special appeal, the plaintiff objects to this decision on two grounds :—

1st.—Because his mother, Sunkuree Debia, is not shown to have been his guardian, and therefore had no right to sell his patrimony under any circumstances.

2nd.—Because, even if she did act as his guardian, her alienation would not be valid, unless shown to have been for the benefit of the minor.

The first objection does not appear to have been taken below at any stage of the proceedings. It seems to have been tacitly conceded by both parties that the mother had authority to act for her son, and it appears to us too late now to raise doubts as to her having been his guardian. The special appellant has been of age for many a year; and had his mother not been his guardian, he would hardly have let slip such a certain means of defeating his adversaries' claim, for he would not have been bound by any act of his mother, unless she had been duly appointed his guardian under Act XL. of 1858. (*Vide* Sreenath Koondoo *versus* Huree Narain Mudduck, 7 Weekly Reporter 399.)

With regard to the second objection, it is argued that the mere fact of the special appellant's father dying in debt would be, *per se*, no sufficient reason for selling his estate. It would have to be seen what proportion his debts bore to his assets, and

h'

whether or not the widow could have paid them off from the income. In short, the special appellant wishes to place upon the purchaser the burthen of a very distinct proof as to the necessity for the sale.

The Judge has found on the evidence adduced that the widow sold to pay her husband's debts, and that the defendant bought *bonâ fide*. There can be no question that the son would take his father's property burthened with his liabilities; and if these were cleared off by the sale of that property, or part of it, it cannot be said that such alienation was to the minor's disadvantage, or that it was one which a guardian would not have been justified in making.

But even if there were a question as to the propriety of the guardian's conduct, the mere fact of her having been able to make some more advantageous arrangement for the estate of the minor would not nullify a sale to *bonâ-fide* purchasers for value. The well-known case of Hunooman Pershad Pandey has laid it down that such a purchaser would be protected, if he had exercised due care and had made such enquiry as was open to him, and had believed in the existence of a reasonably credited necessity. The ruling has been followed by this Court in the case of a guardian. (*Vide* Radha Kishore Mookerjee *versus* Mirtunjoy Gao. 7 Weekly Reporter 23.)

And as the Judge has found as facts that there were debts due by the special appellant's father, and that the widow sold the property in order to pay off those debts, it would seem that there was such an apparent necessity as would justify the purchase. It is nowhere shown that there were any other means of paying off incumbrances, or that the widow had any income of her own sufficient for the purpose.

We think that there is no ground of special appeal in this case, and that the application should be rejected with costs.

The 3rd June 1868.

Present :

The Hon'ble G. Loch and F. A. Glover, *Judges.*

Onus probandi—Possessory suit—Mokurruree lease.

Case No. 120 of 1867.

Special Appeal from a decision passed by the Judicial Commissioner of Chota Nagpore, dated the 15th June 1867, reversing a decision passed by the Assistant Commissioner of that District, dated the 14th July 1866.

Rughoonath Dobey (Plaintiff), *Appellant,*

versus

Puresh Ram Mahata (Defendant), *Respondent.*

Baboos Mohendro Lall Shome and *Kedarnath Chatterjee* for Appellant.

Baboo Mohinee Mohun Roy for Respondent.

In a suit to recover possession of land under a mokurruree lease granted to plaintiff by the zemindar (defendant, who admitted its validity) from the other defendant who had been in possession 20 years, and who also claimed a mokurruree interest—HELD that the *onus* lay with the substantive defendant to show that his lease was mokurruree.

Glover, J.—THIS was a suit to recover possession of certain lands alleged to have been granted to the plaintiff under a mokurruree lease by the zemindar defendant, but of which plaintiff had not been allowed to take possession by the other defendant, who likewise claimed a mokurruree interest.

The zemindar defendant admitted the plaintiff's right, and alleged that the mokurruree lease set up by the other defendant was false, he never having had anything beyond a terminable lease, at the expiry of which the land had been given to the plaintiff.

The substantive defendant pleaded a mokurruree lease from the year 1235 B. S.

The Court of first instance held the mokurruree pottah of the defendant to be spurious, and consequently gave plaintiff a decree; but the Judicial Commissioner considered that, as the defendant had admittedly been in possession of the land for the last 20 years, the *onus* of proving that he held on a terminable lease only was on the plaintiff, and, as he was unable to discharge it, the Judi-

cial Commissioner refused to disturb the defendant's possession.

This decision appears to us clearly wrong. The special appellant holds a mokurruree lease from the zemindar. The defendant claims to hold a similar lease. He admits the zemindar's general rights, but puts forward the special plea that those rights were barred by the grant to him of a mokurruree lease long prior to that set up by the plaintiff. Under these circumstances, the *onus* of proof was not upon the plaintiff to show that the defendant's lease was temporary, but upon the defendant to show that it was mokurruree ; and a bare possession for 20 years or more would not shift the burthen, or give the defendant a mokurruree title against his landlord, without clear proof of his right to hold at fixed rates. This is not a suit under Act X. of 1859, where a plea of holding at one and the same rate, since the settlement might be supported by the presumption arising from 20 years' continuous payment at that rate, but one in which the tenant fixes the date of his lease in a certain year.

The Judicial Commissioner observes that the defendant's possession for 20 years has been proved by the plaintiff's own witnesses, but we remark that these witnesses speak of this possession as being that of an ijaradar or farmer only, so that their evidence in no way benefits the defendant's case.

The case must go back, in order that the Judicial Commissioner may find whether or not the defendant holds his land on a valid mokurruree title from the zemindar. If he does not, the plaintiff, who is admitted by the zemindar to hold in that manner, will be entitled to take possession of the land. Costs will follow the result.

The 3rd June 1868.

Present :

The Hon'ble H. V. Bayley and W. Markby, *Judges.*

Contribution—Mode of enforcing the obligation—Limitation—Keeping alive a separate decree.

Case No. 470 of 1867.

Miscellaneous Appeal from an order passed by the Judge of Rajshahye, dated the 7th June 1867, affirming an order passed by the Principal Sudder Ameen of that District, dated the 12th January 1867.

Khema Debia and others (Decree-holders), *Appellants,*

versus

Kumola Kant Bukshee and others (Judgment-debtors), *Respondents.*

Baboo Issur Chunder Chuckerbutty for Appellants.

No one for Respondents.

Where one person jointly interested with others in land is compelled to pay Government revenue in excess of his proper share, each co-sharer is bound to refund so much as he ought himself to have paid; and this objection is to be enforced by a suit against all the co-sharers in which the amount of their several liabilities is to be declared by the Court.

HELD that, where a decree is not a joint one against all the defendants, but a separate one as against each batch of defendants, the proceedings against one batch have no effect towards keeping alive the separate decrees against other batches.

Markby, J.—THE appellants in this case are seeking to execute a decree, dated 21st March 1863, which declares that certain of the defendants in the suit, being six in number, should pay to the plaintiff Rupees 749-0-9 ; that certain others of the defendants, being five in number, should pay to the plaintiff Rupees 91-8-2 ; that certain others of the defendants, being three in number, should pay to the plaintiff Rupees 60-8-6 ; and that the remainder of the defendants, being seven in number, should pay the sum of Rupees 280-0-9 ; in all, Rupees 1,181-5-0, which, with costs in proportion, the defendants were to pay *according to their respective shares.*

The suit was brought by one of several persons jointly interested in land against his co-sharers, the ground of his action being that he had been compelled to pay the whole Government revenue due in respect of the land, and he now sought to recover from his co-sharers that which he had paid in excess of his own proper share. The result of the suit was that he got a decree in his favor in the form stated above.

The obligation of the co-sharers in some way or other to satisfy this demand is well known, though there has been occasionally some difficulty and some misunderstanding as to the exact nature of the obligation, the mode in which it arises, and the mode in which it is to be enforced.

The mode in which the obligation arises is no longer of any importance as soon as it is ascertained what the obligation is, and the mode in which it is to be enforced ; and

both the points have, we consider, been finally settled by the practice and decisions of this Court in the following manner:—

1. That each co-sharer is bound to refund to the one who has paid the whole revenue, so much as he ought himself to have paid.

2. That this obligation is to be enforced by a suit against all the co-sharers in which the amount of their several liabilities is to be declared by the Court.

It can perhaps hardly yet be said to be fully ascertained how the rights of the parties are to be adjusted, if one of the co-sharers should be unable to fulfil his obligation, but no such question arises in the case before us. The above two propositions were recognized in the Full Bench decision reported in the VII. Weekly Reporter, page 377.

Now, turning to the case before us, we find that, in the year 1863, the plaintiff attached the property of one of the six defendants who were ordered to pay Rupees 280-0-9. On the 27th November, the defendant whose property had been attached deposited in Court the sum of Rupees 368-0-2, being the above amount together with the share of costs of this set of defendants and interest; and upon his doing this, the execution-case was struck off the file, by which we understand it to be meant that the attachment was taken off and the execution-proceedings entirely put an end to. From that time no further proceedings were taken by the plaintiff until the 21st November 1866, when he made an application for the purpose of taking out execution against that batch of defendants who were ordered to pay Rupees 749-0-9. It was thereupon objected that execution of the decree was barred under Section 20 of Act XIV. of 1859. The plaintiff in answer relied on the proceedings taken against the former batch of defendants, the last step in which was taken on the 27th November 1866. The Principal Sudder Ameen, however, to whom the application was made, gave his opinion in a very clear judgment that the decree was not a joint one against all the defendants, but a separate one against each batch, and that the proceedings against one batch had no effect whatever towards keeping alive the separate decrees against other batches; and he held the execution to be barred by limitation under the provision referred to. Upon appeal the Judge of Rajshahye confirmed this decision.

It now comes before us as a Miscellaneous Appeal, and we also think the Principal Sudder Ameen was right.

It appears to us that the language of the decree is clear. It directs each batch of defendants to pay a certain sum of money, and there is not a single word in the decree which would lead us to suppose that it was the intention of the Court which passed the decree to impose a joint-liability upon all the defendants for the whole amount.

It is said that the decree must be considered as creating a joint liability, because the plaintiff has a right to hold all the defendants jointly liable for the amount which he has paid in excess of his share; but as appears from what has been already stated, this argument is directly opposed to the established law and practice of this country. In such a suit as this, though all the sharers must be sued together, yet it is the business of the Court by its decree to apportion the liability amongst the shareholders according to their respective shares, and not to give a joint decree against all. This was done as far as it was necessary to do so in the present case.

We have been much pressed with a case decided by L. S. Jackson and Hobhouse, JJ. reported in VIII. Weekly Reporter 81. There is, no doubt, great similarity between that case and the present, and had we differed from those two Judges on any principles of law, we might have thought it right to send the case before a Full Bench. But we do not consider that, upon any principles of law involved in this case, there is any difference of opinion whatever. The Judges in that case thought that the decree before them was joint and several, and considered that the joint-liability of all the defendants was kept alive by proceedings against any single one. We do not question this, but, in our opinion, the decree before us is *not a joint decree* as against all the defendants. It, in fact, comprises four decrees against four separate batches of defendants, and though, as between defendants comprised in the same batch, there is a joint-liability for the amount which that batch has to pay, yet, as between the members of different batches, there is no common liability. Consequently, we consider that the proceedings in execution against one batch of defendants would not have any effect in keeping the rights of the decree-holder alive as against defendants who belonged to other

batches, and no proceedings having been taken within 3 years to execute the decree against the batch of defendants to which the respondents belong, the rights of the decree-holder under this decree is, as against these defendants, barred by limitation.

The appeal is dismissed with costs.

The 4th June 1868.

Present:

The Hon'ble L. S. Jackson and Dwarkanath Mitter, *Judges.*

Compensation to putneedar for use of land—Zemindar's claim.

Case No. 2927 of 1867.

Special Appeal from a decision passed by the Judge of Beerbhoom, dated the 5th August 1867, affirming a decision passed by the Moonsiff of that District, dated the 16th January 1867.

The Maharajah of Burdwan (Plaintiff), *Appellant.*

versus

Wooma Soonduree Dossee (Defendant), *Respondent.*

Baboos Juggadanund Mookerjee and *Chunder Madhub Ghose* for Appellant.

Baboo Ashootosh Chatterjee for Respondent.

A zemindar who receives his rents in full is not entitled to participate in compensation received by his putneedar for loss suffered by the latter in consequence of works being erected on land included in the putnee.

Jackson, J.—It is clear that the Maharajah (plaintiff) is not entitled to participate in the compensation received by the defendant in this case. This was not a case for lands taken by the Railway Company through the instrumentality of Government, whereby the land was taken away altogether from the putneedar and from the superior landlord, and the assets of his zemindary reduced in consequence; but the land was taken by the Railway Company from the putneedar, and the putneedar received from the Railway Company a compensation for the loss suffered by her in consequence of the erection of the Company's works thereupon. That was a matter between the putneedar and the Company, with which the zemindar who receives his rents in full has no concern. To say that the land has suffered some injury, of which the possible consequence might be that at a sale of the putnee a difficulty may arise as to finding a purchaser at an adequate price, is a circumstance involving a contingency too remote to be taken into consideration at present.

The special appeal is dismissed with costs.

The 4th June 1868.

Present:

The Hon'ble F. B. Kemp and E. Jackson, *Judges.*

Mahomedan law—Marriage in guardian's absence.

Case No. 2865 of 1867.

Special Appeal from a decision passed by the Principal Sudder Ameen of Mymensingh, dated the 6th August 1867, reversing a decision passed by the Moonsiff of that District, dated the 2nd February 1866.

Kaloo Shaikh (one of the Defendants), *Appellant,*

versus

Gureeboollah Shaikh (Plaintiff), *Respondent.*

Baboo Debendro Narain Bose for Appellant.

No one for Respondent.

A marriage contracted by the mother and grandmother of a Mahomedan minor was held to be lawful where a nearer guardian was precluded by absence from acting.

Kemp, J.—This was a suit for the dissolution of a marriage as contracted without the consent of the legal guardian of the lady who is a minor.

The plaintiff is the brother of the lady's grandfather, and he is now in jail under conviction for murder.

The first Court dismissed the suit. In appeal, the Principal Sudder Ameen, Moulvee Museeotoollah, has decreed the suit. The Principal Sudder Ameen held that

d

it was provided by the Mahomedan law that, if a minor be married by such a guardian as a mother in the presence of a nearer guardian, such marriage would not be valid, unless it receive the sanction of the nearer guardian.

The effect of the Principal Sudder Ameen's decree is that the plaintiff is at liberty to contract a marriage for the lady with somebody else.

The nearest guardian, now living, of the minor is undoubtedly the plaintiff, but he has never taken any interest in the minor, and has hitherto deserted her. Moreover, he is in jail, and it is not probable that he will ever come out of jail. The plaintiff being precluded by his absence from acting, the marriage contracted by the mother and grandmother of the minor is lawful. (See page 49, Baillie's Mahomedan Law.)

The present marriage is not represented to be an unsuitable one, and we see no good reason for declaring it to be anything but a valid marriage.

We reverse the decision of the Principal Sudder Ameen, and restore that of the first Court.

The 4th June 1868.

Present :

The Hon'ble F. B. Kemp and E. Jackson, *Judges.*

Intervention—Section 77, Act X., 1859.

Case No. 2859 of 1867 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of Hooghly, dated the 13th August 1867, affirming a decision passed by the Deputy Collector of Serampore, dated the 31st May 1867.

Rajkristo Bhuttacharjee (Plaintiff), *Appellant,*

versus

Nobeen Chung (Defendant) and another (Objector), *Respondents.*

Baboo Mohendro Lall Shome for Appellant.

No one for Respondents.

The intervention contemplated by Section 77, Act X. of 1859, is not that of a party claiming to be the tenant, but that of a party who claims the right to receive the rent.

Kemp, J.—THIS was a suit for rent for a sum below 100 rupees. The defendant was duly served, and did not appear. The plaintiff proved his claim, and obtained an *ex-parte* decree.

A third party (special respondent) intervened, stating that he was the ryot of the plaintiff, and not the party sued as defendant. The Deputy Collector, in the first instance, refused to admit the intervenor under Section 77; but, under directions of the Collector on appeal, he admitted the intervenor, and gave the plaintiff a decree against the intervenor.

On appeal by plaintiff, the Judge held that no appeal would lie to his Court, as no question of right had been determined.

Plaintiff appeals. We think that the proceedings of the Collector in this case were illegal, and that the decision of the Deputy Collector decreeing the plaintiff's claim against the original defendant was a proper decree.

The intervenor could not, under Section 77, Act X., intervene on the ground that he was the tenant, and not the party sued. Under Section 77, the only intervention that is contemplated is that of a party who claims the right to receive the rent of the land or tenure. The case of a party who avers that he is the party who ought to pay rent to the plaintiff, and not the party who has been sued, does not fall within the purview of the Section. The intervenor is not prejudiced by the *ex-parte* decree obtained by the plaintiff against the original defendant.

The decisions of the Judge and Collector are reversed, and the original decision of the Deputy Collector decreeing the case *ex-parte* is restored with costs.

The 4th June 1868.

Present:

The Hon'ble J. B. Phear and C. Hobhouse, *Judges.*

Shareholder's title to property settled with Government—Shareholder's right of possession.

Case No. 2504 of 1867.

Special Appeal from a decision passed by the Principal Sudder Ameen of Sarun, dated the 16th May 1867, reversing a decision passed by the Moonsiff of that District, dated the 23rd March 1866.

Bunwaree Singh (Defendant), *Appellant,*

versus

Ramanoogra Singh and others (Plaintiffs), *Respondents.*

Baboo Doorga Doss Dutt for Appellant.

Mr. R. T. Allan and *Baboo Unnoda Pershad Banerjee* for Respondents.

In a case in which, after resumption of certain land, one of the shareholders (*B*) alone appeared at the time of settlement, and engaged with Government as on behalf of himself and the co-sharers who were mentioned in the roobokaree of settlement, it was held that the title of any other shareholder to the property as against *B*, under this settlement, accrued from the date on which *B* took the settlement; but the right of such other shareholder to possession and enjoyment only commenced when he came in and asked to have the benefit of *B's* bargain.

Phear, J.—In pronouncing judgment in this case, the Principal Sudder Ameen said that, "when the perpetual settlement was "made, one of several shareholders, namely, "Bunwaree Lall, alone appeared and en-"gaged with Government. Such engage-"ment, of course, must be considered as for "all shareholders who have heritable right; "even the Collector in his bundobustee "roobokaree described and debited the "rights and interests on the shares of the "said co-parceners in pursuance of Regu-"lation VII. of 1862." We understand that to mean, shortly, that the Lower Appellate Court found as a fact on the evidence that, at the time of the settlement in 1858, the defendant Bunwaree Lall took the settlement as on behalf of himself and the co-shareholders who were mentioned in the roobokaree of settlement; and this finding certainly may be supported by the evidence on the record.

Now, the grounds of special appeal are three, and none of them impeach the correctness, either in law or fact, of this finding. We must, therefore, take it to represent the foundation upon which the rights of the plaintiff in this suit rest. With this view, turning to the grounds of special appeal, we find that the first is: "The "Principal Sudder Ameen was wrong in "ruling that the suit was not barred." But we think that this objection cannot be maintained. It seems to us that, if the defendant Bunwaree did take the settlement in 1858, in the way in which the Principal Sudder Ameen finds that he did, the plaintiff's right to the property as against the defendant under the settlement accrued from that date; and as the suit was brought in 1866, only 8 years afterwards, we think that the suit is not barred.

The second ground of special appeal is, that "the plaintiff cannot now claim a share "of the property which, by the act of "resumption, ceased to be family-property, "when, after repeated calls of Government, "he did not think it worth while to take "settlement, waived his right to it, and "acquiesced in the adverse possession of "the defendant." This objection is at once disposed of by the finding of the Principal Sudder Ameen, as we have said that we understand it, because the conclusion of fact that he arrives at is, that the defendant took a settlement in the year 1858 for the benefit of the plaintiff and the other shareholders. Consequently, the conduct of the plaintiff—before, and up to, and at that time—is entirely immaterial, and can have no effect upon his rights as resting upon the foundation of this settlement.

The third objection is, that, "when the "defendant himself took settlement, paid "the rent himself, and is in possession with "the honest belief of the validity of his "own right, he cannot at all be made liable "for wassilat—at least not for 8 years." This objection is in substance a good one.

A claim for wassilat is always of the nature of a claim for damages; and in order to entitle a claimant to wassilat, he must make out that he has been deprived by the wrongful act of the defendant of the natural profits and enjoyment of the property, which he would have had if it had not been for that conduct of the defendant; and that, consequently, he is entitled to be reimbursed the loss which the defendant's conduct has caused him. It seems to me that, on the finding of the Lower Appellate Court, as well as that of the first Court, and, indeed, we may add, we believe by the admission of the Advocate of the respondent himself, that there is no ground in this case for saying that, up to the time of the commencement of this suit, the defendant has by any overt act kept the plaintiff out of the enjoyment and fruition of the property which he now seeks to obtain. Indeed, we do not think that the plaintiff's title to the property under the settlement effected by the defendant gave him a right to possession *immediately* on the settlement. It seems to us that the plaintiff's right to possession and enjoyment only commenced when he came in and asked to have the benefit of the defendant's bargain.

We therefore think that the Principal Sudder Ameen had no ground in law upon which he could award wassilat, and in that respect it seems to us that his judgment ought to be modified. The decree of the Lower Appellate Court is, therefore, confirmed, except in so far as it directs payment of wassilat; and in that respect it is reversed. Each party will pay his own costs in this appeal.

The 5th June 1868

Present:

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble G. Loch and L. S. Jackson, *Judges*.

Limitation—Cause of action—Talookdar who is also purchaser—Merger.

Case No. 18 of 1867.

Appeal under Section XV. of the Letters Patent of 28th December 1865, against the judgment of the Hon'ble H. V. Bayley and the Hon'ble J. B. Phear, two of the Judges of the Court, dated the 9th September 1867, in Special Appeal No. 544 of 1867, from a decree of the Zillah Court of Nuddea, dated the 11th December 1866, the said Judges having been equally divided in opinion.

Womesh Chunder Goopto (Plaintiff), *Appellant*,

versus

Raj Narain Roy (Defendant), *Respondent*.

Baboo Anund Chunder Ghosal for Appellant.

Baboo Sreenath Doss for Respondent.

A let an under-tenure to *B*, which under-tenure was sold for arrears of rent under Section 105, Act X. of 1859, and bought in by *A*. On proceeding to take possession, *A* found that *C* had trespassed upon the under-tenure during *B's* tenure, and had held possession for more than 12 years. *A* sued to recover possession of the under-tenure, and it was held by the senior Judge of the Division Bench (*Bayley, J.*) that *A's* cause of action was the act of dispossession by *C*, and the suit was barred, more than 12 years having elapsed, and that *A's* right to sue was not affected by the fact that *B's* tenure was still running. The junior Judge (*Phear, J.*) held that the suit was not barred, that the cause of action to *A* accrued when he obtained back the property at the auction-sale, and that during the period of encroachment the cause of action did not arise to *B*, and pass from *B* to *A* during the time the putnee lasted, the putnee entirely disappearing in the superior title of zemindar-vendee.

HELD by the Appellate Court, in confirmance of the view of *Phear, J.*, that the cause of action to *A*, who was a purchaser of an estate free from incumbrances against *C*, who was a trespasser and had encroached on *B*, the defaulter, must be taken to accrue at the same time as his, *A's* right to turn out under-tenants of the defaulter, *viz.*, from the time of the purchase of the tenure of the defaulter; and the fact that *A* was both talookdar and purchaser did not prevent him from exercising the same rights as any other purchaser would be entitled to do.

Quære.—Whether the doctrine of merger applies to lands in the Mofussil in this country.

The following are the judgments of the Division Bench:—

Phear, J.—THE suit is brought to recover possession of a small piece of ground. It seems that the plaintiff had granted a putnee of certain land, including the land in suit, to one Damoodur Chunder Roy, and ultimately this putnee was sold by auction for arrears

of rent, when it was bought in by the plaintiff himself. This occurred on the 6th Srabun 1269. On proceeding to take *khas* possession of the lands of the putnee, the plaintiff discovered that the plot of the land now sued for had been encroached upon and appropriated by the defendant, the owner of a neighbouring talook, during Damoodur Chunder's enjoyment of the putnee, and the plaintiff accordingly brings this suit to recover his lost property.

It is admitted that the defendants have been in wrongful possession of the land for more than 12 years before the institution of this suit. On this arises the question whether the plaintiff's suit is barred by lapse of time or not—in other words, when did plaintiff's cause of action arise? The Lower Appellate Court has found that the plaintiff's cause of action first accrued when he obtained back his property by purchase at the auction-sale, because he could not have known earlier that the dispossession had taken place. Manifestly the reason given for this decision is erroneous, inasmuch as the accruing of the cause of action could in no way depend upon, whether the plaintiff was aware of its existence or not. I am, however, inclined to think that the decision itself is right. It seems to me that, during the pendency of the putnee, the plaintiff was not entitled to the possession of the land. Subject to the putnee even as against a trespasser, he was only entitled to such rents, profits, and privileges as were reserved to him by the pottah and the reversion of the property contingent on the event of the putnee in any way coming to end. If this view be correct, the occurrence of the encroachment did not give him any right to sue to recover possession, although it might have afforded him good cause to sue for vindication of his reversionary and other rights; and as long as the putnee continued in being, his position relative to the wrong-doer did not alter. Consequently, the cause of action upon which the plaintiff now sues did not accrue *to himself* during the time that the putnee lasted. Then, did it during that period accrue to the putneedar, and from him pass to the plaintiff by the auction-sale? I think there is no doubt upon the facts that the right to sue to eject the trespasser did accrue to the putneedar, when the encroachment was first made; and if the present plaintiff now sues only by reason of claiming through the putneedar, and on the foundation of his rights, then the present cause of action must date back to the time when it accrued to the putneedar, and the suit is clearly barred by the Limitation Act.

But passing by the question, whether under the rent-law the purchaser, at a sale of a tenure for arrears of rent, takes with it such rights of action in regard to it, and no more, as the defaulting tenant possessed at the time of sale, I think that, in this particular case, on the completion of the auction-sale, the putnee entirely disappeared by merger in the superior title of the zemindar-vendee. The zemindar could not pay rent to himself, and there was nothing in the facts to keep the tenure alive for the benefit of any one else. On the putnee thus ceasing to exist, the plaintiff became entitled, not as claiming through the putneedar, but by virtue of his original rights as zemindar, to the possession of the lands in their entirety which had been originally granted in putnee. In this state of things, the withholding possession from him, which is attributed to the defendants, constitutes a new cause of action, and is not simply a continuance of that which had before accrued to some other person. The defendant's trespass is a violation of the plaintiff's right of possession, which he is entitled to maintain by action quite independently of the fact that the trespass in question is also only a persistence in that which was before a violation of the putneedar's right of possession. The violation of right in the two instances is not one and the same thing, because the two rights of possession are themselves distinct. The zemindar does not acquire his right of possession from the putneedar, but he does so as a consequence of the putneedar's tenure and rights all falling to the ground. I assume that, during the existence of the putnee, until the sale for arrears of rent, the plaintiff was not in any way ousted of his zemindar's rights, for had the putneedar disclaimed, or paid his rent to another person, inasmuch as, in either of these events, the zemindar would have acquired immediate right of possession, his right of action against the trespasser would have accrued at the same time, and the period of limitation would have commenced to run accordingly.

On the whole, therefore, I think that the decision of the Lower Appellate Court is right, and that the appeal ought to be dismissed with costs.

Bayley, J.—I much regret that I cannot concur in this judgment, and differ from my learned brother Phear with much diffidence. But in this case, I think, the zemindar,

though purchaser of the putnee, is barred, because the cause of action is, in my view, the act of dispossession which admittedly took place 12 years before suit. I pass over one plea addressed to us, *viz.*, that the cause of action is the date of the knowledge by the zemindar (*after* his purchase of the putnee) of the adverse possession of a third party. I do so, as we are agreed that such knowledge does not create the cause of action. The question we have to decide is, whether the other plea taken by the zemindar, *viz.*, that as *purchaser* he has a right to have the putnee in the state it was when originally created, and that no cause of action arises to him till the date of his purchase, is correct or not. He is, it is true, the purchaser; but it is also true that he remains, notwithstanding, just as much the zemindar as ever. It is not seriously contended before us that, if he were the zemindar *only*, and not the zemindar and purchaser combined, he would not be barred. Now, the adverse possession by the third party is of the lands the proprietary right of which, during the whole period of adverse possession, remained with the same zemindar. The intermediate putnee-right to collect the rents and take the profits would not in any way affect the zemindar's *proprietary* right. On that right being interfered with by a third party having adversely held possession of the lands of the zemindar *proprietor*, the cause of action arose, *i. e.*, whenever the adverse possession commenced.

It is said that the zemindar could not sue while the putneedar had the putnee. But I think this is not so. The zemindar could, in my view, have always sued, whether there was a putnee or not, for a declaration of his proprietary rights against the third party in adverse possession. His doing so would not affect the putneedar's lease, and then the zemindar might, indeed, if he got a decree, make over the land to the putneedar's possession. As the zemindar did not do what, in my opinion, the law allowed him to do, and what the act of dispossession by a third party called upon the zemindar as *proprietor* to do, limitation must, I hold, bar the suit. I would, therefore, decree this appeal.

The judgments on the present appeal were delivered as follows :—

Peacock, C. J.—THIS suit was brought by the plaintiff to recover possession of a piece of ground which was originally included in an under-tenure granted by plaintiff. The tenure is called in the judgments a putnee-tenure, but in strictness it was not a putnee-tenure, the talook of the plaintiff not being an estate in respect of which he paid revenue to Government. The under-tenure was put up to sale in execution of a decree of the Revenue Court for an arrear of rent due in respect of it, and the plaintiff himself purchased the under-tenure at that sale. Upon seeking to recover a portion of the land which is the subject of this suit from the defendant, the latter set up an adverse possession for upwards of 12 years, and contended that the plaintiff was barred by limitation.

This plea cannot be supported if the plaintiff's right of action accrued when he purchased the under-tenure, and the defendant cannot avail himself of limitation unless the period during which the defendant occupied adversely to the under-tenant can be taken into consideration.

The Moonsiff held that limitation was not a bar, and the Judge upheld his decision, saying that it was unnecessary to consider whether the under-tenure was sold free from incumbrances or not, inasmuch as, when the plaintiff purchased the tenure, it merged in his larger interest.

Upon appeal to this Court, Mr. Justice Bayley, who was the senior Judge, held that the suit was barred by limitation; the other Judge, Mr. Justice Phear, considered that the decision of the Lower Courts was correct, and that the plaintiff was not barred. His opinion was also founded upon the doctrine of merger, and he did not enter into the question whether the under-tenure was sold free from incumbrances.

My own impression is that the doctrine of merger does not apply to lands in the Mofussil in this country. If it applies, the under-tenure would have merged even if the plaintiff had purchased from the original holder of it; so it would have merged if the plaintiff had purchased subject to incumbrances created by the under-tenant; but it is clear that, in either of the cases above supposed, the purchase would not have freed the under-tenure from all incumbrances created by the under-tenant. If the under-tenure had been clearly bought subject to incumbrances created out of it, it does not appear to me to be at all clear that the plaintiff would have had any remedy to recover the rents due under any tenure created out of

such under-tenure. If the under-tenure itself were merged in the original tenure out of which it was created, the consequence would be that the plaintiff would be bound by a tenure created out of the under-tenure without having any remedy to recover the rent under such tenure. I believe it is the practice in this country for zemindars to purchase and keep on foot putnee-talooks without the necessity of adopting the practice, which is followed in England, of purchasing such talooks in the name of a trustee to prevent the merger of them. If the doctrine of merger applies, a zemindar could not purchase and hold a putnee-tenure in *khas* possession.

The Judge, in support of his view, cited a case which was decided by the late Sudder Court in 1856. I do not find that case reported, and I understand that there are rulings to the contrary. If it were necessary to determine the question upon the point of merger, it would, I think, be well to refer the case to a Full Bench to determine the question. It appears to me, however, that, without reference to the doctrine of merger, the plaintiff is not barred by limitation.

It is said that the sale took place under Section 105 of Act X. of 1859, which enacts that, if a decree be for an arrear of rent due in respect of an under-tenure, which, by the title-deeds or the custom of the country, is transferable by sale, the judgment-creditor may make application for the sale of the tenure, and the tenure may thereupon be brought to sale according to the rules for the sale of under-tenures for the recovery of arrears of rent due in respect thereof contained in any law for the time being in force.

It is said that Section 15 of Regulation VII. of 1799, having been repealed by Act X. of 1859, was not in force at the time when the sale of the under-tenure took place in this case, and that there is, therefore, no law under the provisions of which the sale was free from incumbrances.

In the Full Bench case, which has been referred to from VII. Weekly Reporter, page 260, it was held that a sale for arrears of rent under Section 105 of Act X. of 1859 is not free from incumbrances created by the defaulter before the sale, unless the right of selling or bringing to sale the tenure for an arrear of rent has been specially reserved by stipulation in the engagement interchanged on the creation of the tenure.

In this case, there was a stipulation in the grant of the under-tenure, that, if the tenant should not pay the rent reserved voluntarily, the grantor might realize the same by putting in force the provisions of Act VIII. of 1859. That was a stipulation which brings this case within the exception mentioned in the Full Bench case to which I have adverted.

It has been pointed out that Section 15 of Regulation VII. of 1799, upon which the Court relied in the Full Bench case, has been repealed by Act X. of 1859, and therefore I will consider the case without adverting to the Full Bench case, in order that we may see how it stands.

Regulation VIII. of 1819 applies to putnee-talooks, and not to under-tenures, such as that which is the subject of the decision in this action, but I think the fair and reasonable interpretation of the stipulation that the grantor might realize his rent by putting in force the provisions of Regulation VIII. of 1819 is, that the grantor should be at liberty to exercise, for the enforcement of the payment of rent under the under-tenure, the same provisions as, by Regulation VIII. of 1819, are applicable to putnee-tenures, and that the stipulation in substance amounted to an agreement that the grantor should be at liberty to sell the under-tenure free from all incumbrances.

Now, it has been held by the late Sudder Court in the decisions for 1850, page 849, that the purchaser of a tenure sold free from incumbrances is not barred by limitation from turning out a trespasser, although he may have had adverse possession for more than 12 years before the sale of the tenure; and it appears to me to be only reasonable and just that the cause of action to a purchaser of an estate free from incumbrances against a person who has trespassed on the defaulter should be deemed to have accrued at the same time as his right to turn out an under-tenant of the defaulter, *viz*, from the time of the purchase of the tenure of the defaulter.

It is contended that, as the defendant was a mere trespasser, he was not bound, as grantees of the defaulter would have been, by the stipulation that the grantor might sell free from incumbrances. But suppose the stipulation had been that the grantor should be at liberty to re-enter and avoid the under-tenure altogether, I apprehend that a trespasser upon the defaulter would be so far bound by that agreement that the grantor

upon avoiding the lease would acquire a right of action to turn out the trespasser.

If, during the existence of the under-tenure, the under-tenant allowed the trespasser to encroach upon the lands included in the under-tenure, and to hold adversely for upwards of 12 years during the existence of the under-tenure, the grantor of the under-tenure, upon default of the payment of rent, would be at liberty, under Section 112 of Act X. of 1859, to distrain the crops growing upon the land which had been encroached upon, notwithstanding the trespasser might have held adverse possession for more than 12 years as against the defaulter. That is merely upon the ground that the land held by the trespasser, notwithstanding the encroachment and the Statute of Limitation, still remains part of the under-tenure.

Section 11 of Regulation VIII. of 1819 says that no transfer by sale, gift, or otherwise shall be permitted to bar the indefeasible right of the zemindar to hold a tenure of his creation answerable in the state in which he created it for the rent, which is, in fact, his reserved property in the tenure.

When a putnee is sold by a zemindar under Regulation VIII. of 1819 for arrears of rent, it is sold in the state in which it was created, and the purchaser is entitled to have it in the state in which it was created, notwithstanding any under-tenure which may have been created by the defaulter, and notwithstanding any encroachments by trespassers upon the holders of such under-tenures. He has a right to turn out under-tenants, and he is entitled to turn out persons who have encroached upon the defaulter.

If the defendant in this case had encroached upon the defaulter only a year before the sale, the purchaser would have had a right to turn him out. That is not disputed; but it is said that the purchaser cannot turn out the trespasser now, because he is barred by limitation; or, in other words, because he did not bring his action within 12 years from the time at which his cause of action accrued.

It appears to me that the cause of action of a purchaser of a tenure sold free from incumbrances under a sale for arrears of rent due in respect of it accrues when he purchases it, and not before.

If the grantor is entitled to make the under-tenure answerable for arrears of rent in the state in which he created it, and to sell it for that purpose free from incumbrances, the purchaser's right to have it in the state in which it was created accrues when he purchases it.

Mr. Justice Bayley thinks that the plaintiff's cause of action accrued when the trespass was committed upon his tenant, and he says that he might have sued, notwithstanding the tenure, to have it declared that the land upon which the trespass had been committed was part of the estate included in the tenure.

Assuming that he could have brought such an action, it would have been merely for a declaration of right, and not for relief—a very different cause of action from that which he has instituted to recover possession. The difficulties and dangers of zemindars would be great if they were bound to sue for declarations of right whenever they should discover any person other than the tenant in possession of any part of the land included in a putnee-tenure. They would have no means of knowing, and no means, that I am aware of, of compelling either the tenant or the trespasser to inform them whether the person in occupation was there with the consent of the holder of the tenure or an under-tenure derived from him, or merely as a trespasser. To hold that a grantor is bound to sue immediately a trespass is committed upon his tenant, and that he will be bound by limitation if he does not sue within 12 years from the time that the trespass was first committed, would open such a door to fraud and collusion between tenants and trespassers that the zemindar or land-owner, when he seeks to enforce the payment of his rent, would often find trespassers, whom, in consequence of limitation, he could not get rid of, in possession of the greater portion of the tenure, and who, as soon as he should have defeated the land-owner by the plea of limitation, would probably share the spoil with the defaulting tenant. Instead of granting under-tenures, tenants would allow their friends and relations to trespass upon their tenures, and thus protect them by limitation in the event of default in payment of their rent. But even if the grantor could, during the existence of the under-tenure, have maintained such an action against a trespasser upon his under-tenant, it is clear that a purchaser of the under-tenure could not do so before the sale; and if not, how could the grantor of an under-tenure sell the under-tenure in the state in which he created it, if the purchaser is to be barred by

limitation against persons who have encroached upon the under-tenant?

In this case, the purchaser and the talookdar is one and the same person; but as in his capacity of talookdar he appears to me to have no greater right by the doctrine of merger than any other purchaser would have had, he is not precluded by the merger of purchaser and talookdar in the same person from exercising the same rights as any other purchaser would be entitled to do. I am of opinion that his cause of action in this case as purchaser accrued when his purchase was made, and not at the time when, as talookdar, his cause of action arose to sue for a declaration of right to prevent a confusion of boundaries upon the termination of the tenure.

If the doctrine of merger did apply, the plaintiff is clearly not barred by limitation. If it did not apply, it is equally clear that he is not barred. Though Mr. Justice Phear determined this case upon the ground of merger, I entirely agree with the following remarks which were made by him, merely substituting the word "under-tenure" for "putnee" used by him, as the under-tenure was not, in reality, a putnee. He says: "I "am, however, inclined to think that the "decision itself is right. It seems to me "that, during the pendency of the under-"tenure, the plaintiff was not entitled to the "possession of the land, subject to the "under-tenure even as against a trespasser; "he was only entitled to such rents, profits, "and privileges, as were reserved to him by "the pottah and the reversion of the proper-"ty contingent on the event of the under-"tenure in any way coming to end. If this "view be correct, the occurrence of the "encroachment did not give him any right "to sue to recover possession;* * * and "as long as the under-tenure continued in "being, his possession relative to the wrong-"doer did not alter. Consequently, the "cause of action upon which the plaintiff "now sues did not accrue *to himself* during "the time that the under-tenure lasted"

For these reasons, it appears to me that the judgment of the Division Bench, pronounced in accordance with the views of Mr. Justice Bayley, as Senior Judge, ought to be reversed with costs, and the judgment of the Zillah Judge affirmed with the costs of this appeal.

Loch, J.—I have nothing to add to the remarks which have fallen from the Chief Justice, and I concur in the judgment delivered by him.

Jackson, J.—I am also of the same opinion as the Chief Justice.

It is perhaps scarcely necessary, after the very full judgment which he has just delivered, and which appears to exhaust the entire case, that I should add anything to what he has said, but as the conclusions at which I have arrived on one or two points, although identical with what the Chief Justice has stated, have been arrived at on somewhat different grounds, I think it right, as well as respectful to the learned Judge whose judgment we are overruling, that I should shortly state my views on these points.

I most fully concur in all that has fallen from the Chief Justice in respect of the doctrine of merger. I am not aware of any solid foundation for the opinion that that doctrine is any part of our Mofussil law. It is necessary, therefore, to consider this case upon points other than the applicability of that doctrine, upon which both the Zillah Judge and Mr. Justice Phear have mainly rested their judgment.

It seems to me quite clear that plaintiff's right to succeed in this suit must depend entirely upon the power of the land-owner to sell the under-tenure which he had created free from all incumbrances which had arisen since its creation. I observe that the special appeal in this case raised no objection to the sale under which the tenure passed, and under which all those incumbrances are assumed to have been extinguished. I am not prepared to say that, if this question had been raised, the case would have been entirely free from difficulty to my mind; for since the repeal by Act X. of 1859 of the first 20 Sections of Regulation VII. of 1799, it is not perfectly clear under what provisions of the general law sales are made of under-tenures. But no question of this sort having, as I have stated, been raised in special appeal, I think we are entitled to assume that a valid sale took place, and was made by the proper authority.

I see, moreover, that in the contract between the landlord and lessee provision was made for such sale, and the consequent falling in of all incumbrances which the lessee might have created. The condition in the contract provided that, in the event of the lessee failing to make the payments voluntarily, the provisions of Regulation VIII. of 1819 should be put in force.

I observe that plaintiff, in commencing his suit, described himself as "the zemindar," and it seems quite possible that, in drawing up the lease and the kubooleut between him and the lessee, he may have been looked upon as zemindar, and thus the express provisions of Section 8 and the following Sections of Regulation VIII. of 1819 may have been looked upon as applicable to the case.

Assuming, then, that the sale was duly held, and seeing that the contract provided for the sale free from all incumbrances, it seems clear that the purchaser under such sale was entitled to proceed immediately on his purchase to get rid of the defendant, whom he found in the character of a trespasser upon his land; and it seems difficult to understand how the Law of Limitation could apply. I do not quite understand how Mr. Justice Bayley would apply that law. He does not agree with Mr. Justice Phear as to the applicability of the doctrine of merger. To me it seems clear that plaintiff brought his suit, not as land-owner, but as purchaser of the under-tenure; and if he sued as purchaser, is he to be told that he is barred because the zemindar might have brought a declaratory suit years before? He cannot, as purchaser, be barred by reason of the failure of the zemindar to bring a suit of that description.

But was the zemindar bound to bring such a suit? I most fully concur in all that has fallen from the Chief Justice on that point. Assuming that the zemindar might have brought such a suit, it would be one of a most dangerous character, and zemindars bringing such suits would be under the perpetual risk of having to pay the defendant's costs, if it were found that the defendant occupied the land, not as a trespasser, but with the consent of the tenant.

But I may add a further consideration on this subject. If the zemindar were to let lands to a putneedar, the putneedar to a dur-putneedar, and the dur-putneedar to a se-putneedar, and a trespasser encroached on the lands when in the occupation of the se-putneedar; are the putneedar, dur-putneedar, and se-putneedar all bound to bring a declaratory suit, or which of them is bound to bring such suit? It appears to me altogether unreasonable to expect land-owners, when they have let lands to responsible tenants, to be perpetually on their guard as to the encroachments of trespassers; or, when leases have fallen in on account of the default of lessees, to tell a purchaser in a suit brought by him against the trespasser that he is barred by limitation, if the trespasser had held adverse possession for more than 12 years against the defaulter.

I have thought it right to state these considerations which have independently occurred to me; but with the very trivial exception as to the doubt in my mind with regard to the sale, I desire to say that I concur in the decision of the Chief Justice; and for the reasons which he has given, as well as for those which I have stated, I think that the judgment of the Division Bench should be set aside with costs.

The 5th June 1868.

Present:

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble Dwarkanath Mitter, *Judge*.

Attachment by landlord of growing crops—Appeal—Section 16, Act VI. (B. C.), 1862—Sections 86 and 246, Act VIII., 1859.

Case No. 3245 of 1867 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of Beerbhoom, dated the 7th August 1867, reversing a decision passed by the Deputy Collector of that District, dated the 30th January 1867.

Kartick Chunder Mookerjee (Defendant), *Appellant*,

versus

Mookta Ram Sircar (Plaintiff), *Respondent*.

Baboos Oopender Chunder Bose and *Bhowanee Churn Dutt* for Appellant.

No one for Respondent.

In a suit by a landlord against his ryot for rent, in which he attached certain growing crops under Section 16, Act VI. (B.C.) of 1862 (the attachment being before judgment, and therefore according to Section 86, Act

VIII., 1859), the claim of an intervenor ought to be investigated in the same manner as a claim to property attached in execution of a decree.

The course to be adopted in such a case is that pointed out in Section 246, Act VIII., 1859, and an order passed under that Section is not open to appeal, though the party against whom it is made is at liberty to bring a suit to establish his right.

Peacock, C. J.—THE suit was brought by a landlord against his ryot for rent, and in that rent-suit he attached certain growing crops, under Section 16 of Act VI. of 1862 of the Bengal Council. By that Section, Sections 81 to 90, both inclusive, of Act VIII. of 1859 were extended to all suits under Act X. of 1859. The attachment was an attachment before judgment, and therefore, according to Section 86 of Act VIII. of 1859, which is one of the extended Sections, the claim of the intervenor, the present appellant, to the crops ought to have been investigated in the same manner as a claim to property attached in execution of a decree.

The course to be adopted in such a case is pointed out in Section 246 of Act VIII. of 1859, and although that Section is not by express words extended to suits brought under Act X. of 1859, it is virtually extended to such suits, because it is incorporated with Section 86, which is one of the extended Sections. It is unnecessary to refer to the course pointed out by Section 246. It is sufficient to state that it is expressly declared that an order passed under that Section shall not be subject to appeal, but that the party against whom the order is made is at liberty to bring a suit to establish his right. The order of the Deputy Collector that the claimant's crops were to be released was, therefore, not appealable to the Judge, whereas the Judge has reversed the whole of the judgment, including that order.

Neither the ryot nor the plaintiff has appealed, nor has the plaintiff appeared in answer to this appeal. It is unnecessary, therefore, for us to interfere with the order of the Judge so far as it relates to the suit for rent between the plaintiff and the ryot, which will not affect the claimant or any lands belonging to him. All that we have to do is to reverse the Judge's decision so far as it relates to the order of the Deputy Collector with reference to the crops which had been attached. We, therefore, reverse the decree of the Judge to that extent, with the costs of this appeal and the claimant's costs in the Judge's Court. The effect of this order is that the order of the Deputy Collector releasing the crops is to stand as if the Judge had not interfered with it; but having reversed the order of the Judge to the extent above pointed out, we must order that the claimant is to be restored to all that he has lost by reason of that part of the order of the Judge which we have reversed. If the crops still remain under attachment, they will be restored to the claimant. If they have been made available in execution of the plaintiff's decree, he must refund to the claimant the value thereof, to be assessed, if necessary, by the Deputy Collector in executing this order of restitution.

The 5th June 1868.

Present:

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble Dwarkanath Mitter, *Judge*.

Estoppel—Section 2, Act VIII., 1859—Limitation—Suit to contest a revenue-award—Suit for confirmation of title—Clause 6, Section 1, Act XIV., 1859.

Case No. 40 of 1868.

Special Appeal from a decision passed by the Principal Sudder Ameen of Dacca, dated the 13th September 1867, affirming a decision passed by the Moonsiff of that District, dated the 28th June 1866.

Mohima Chunder Chuckerbutty (Plaintiff), *Appellant*,

versus

Raj Coomar Chuckerbutty (Defendant), *Respondent*.

Baboo Rajendurnath Bose for Appellant.

Baboos Chunder Madhub Ghose and *Kishen Dyal Roy* for Respondent.

A suit to have a declaration of right, and to set aside a thakbust proceeding in respect to certain lands, is not estopped by Section 2, Act VIII., 1859, by reason of a decision in a previous suit for the value of fruit growing on that land in which the question of title to the land came collaterally in issue.

A suit by a plaintiff in possession to contest a thakbust award and map made under Regulations VII. of 1822 and IX. of 1825 is barred, unless brought within

three years, whether plaintiff is legally bound by it or not.

A person who remains in possession for upwards of three years after a revenue-award is not barred by Clause 6, Section 1, Act XIV., 1859, from maintaining a suit to confirm his title.

Peacock, C. J.—The plaintiff sues four defendants with reference to five plots of land, and his prayer is to set aside a summary thakbust award, to have a thakbust map which was amended in pursuance of that award rectified, and to confirm his right to the five plots of land, and also to confirm his possession thereof. It appears that in November 1858 a thakbust map was made, in which the land was demarcated as being in the possession of the present plaintiff. One of the present defendants made a claim that the plots, or one of them, had been unjustly demarcated with the present plaintiff's estate, whereas it belonged to a joint mehal of the plaintiff and defendant. It is not clear, nor is it very material, according to the view which the Court takes, whether the claim extended to the whole of the plots, or only to one of them.

In the revenue proceedings, it was determined by two decisions founded upon the defendant's answer, the report of the peshkar, and upon the evidence of witnesses, that the lands had been improperly demarcated, and that the thak map should be rectified, and it was rectified by demarcating the lands to the plaintiff and the defendant jointly The decisions in the Revenue Courts were—one on the 17th, and the other on the 18th November 1858. This suit was commenced on the 11th of December 1865; and it is contended that the plaintiff is barred by the 6th Clause of Section 1 of Act XIV. of 1859.

Between the date of the thakbust award and the commencement of the suit, the defendant brought a suit in the Moonsiff's Court against the plaintiff to recover the value of certain mangoes which grew on two of the plots, and in that suit the question arose whether those plots belonged to the plaintiff alone, or to the plaintiff and defendants jointly. On the 12th of December 1864, that suit was decided in favor of the defendants, upon the ground that the plots belonged to the plaintiff and defendant jointly. It is contended that, in consequence of that decision, the plaintiff is barred from suing in this action in respect of those two plots by virtue of Section 2 of Act VIII. of 1859.

Both the Lower Courts have held that the plaintiff is so barred. We think that the decision in that respect is erroneous.

Section 2 enacts that "the Civil Courts "shall not take cognizance of any suit "brought on a cause of action which shall "have been heard and determined by a "Court of competent jurisdiction in a "former suit between the same parties, or "between parties under whom they claim."

It is clear that the cause of action to recover damages for the mangoes, and a suit brought to have a declaration of right and to set aside a thakbust proceeding, are not the same; and the plaintiff is not barred by that Section Nor is he stopped by the decision in the suit relating to the mangoes upon a point which came collaterally in issue.

It is contended that in that suit the plaintiff paid the stamp-duty upon a valuation not merely of the mangoes, which he sought to recover, but of the lands which he did not seek to recover. But the fact of the plaintiff's having paid a higher stamp-duty in that suit than he was by law bound to pay, cannot affect the rights of the parties in the present suit. Two cases upon the subject of estoppel by decisions upon matters coming collaterally in issue are reported in VII. Weekly Reporter, page 338, and in VIII. Weekly Reporter, page 175.

With regard to the three years' limitation, plaintiff contends that he is not barred by Clause 6, Section 1 of the Limitation Act, by reason of his not having brought this suit within three years from the date of the award in the thakbust proceedings. He says that, although his name is used in those proceedings, he was no party to them; in fact, that he was never summoned, and that he never even heard of the awards until they were used as evidence against him in the suit relating to the mangoes, and no evidence was given in the present case to show that he was summoned by the Collector in the revenue-proceedings. If the plaintiff had been out of possession, and was suing to recover possession, it would have been necessary to determine whether he was bound by the thakbust awards without some evidence to show that he was a party to the proceedings, beyond the mere fact of his name appearing in them. But the plaintiff is not entitled to ask to have the thakbust-maps rectified in a suit commenced more than three years after the date of the award, whether he is legally bound by the award

or not. If the award was a nullity, and the map was rectified by virtue of that award, plaintiff cannot ask us to rectify an award, which he says was a nullity. The award was *de facto* made under Regulation VII. of 1822 and Regulation IX. of 1825; and a suit to contest an award or a map made under it is barred unless brought within 3 years. The award and the map do not determine the title of the parties, nor are they evidence of title. Even if they would have authorized the revenue-authorities to put the defendant into possession, they have not been executed if the plaintiff's contention is right that he is in possession, and has been in possession, ever since those awards were made. There is no necessity, therefore, for the plaintiff's having the awards rectified.

Then, is the plaintiff barred as to his claim for confirmation of right and for confirmation of possession? Clause 6, Section 1, says that a suit to recover any property comprised in such award must be brought within the period of three years from the date of the award; but a suit by a person in possession to have his title confirmed is not a suit to recover property. The defendant has denied the plaintiff's possession, and without determining the question of possession, or the question of right, both the Lower Courts have held that the plaintiff is barred by limitation, because his suit was not brought within three years from the dates of the awards. We think that a person who remains in possession for three years and upwards after the making of a revenue-award is not barred by Clause 6 from maintaining a suit to confirm his title. Such an award could not, by virtue of Section 22 of the Act, be executed by turning him out of possession.

We think that the decision of the Lower Appellate Court must be reversed, and that the case must be remanded to that Court to try whether the plaintiff was, at the time of the commencement of his suit, in the sole possession of the plots in question. If he find that issue in favor of the plaintiff, then he will have to determine whether the plaintiff is entitled to a declaration for confirmation of his possession, and that he has the right to the property as well as the possession. The plaintiff's suit for confirmation is based upon his allegation of possession, and in this suit he would not be entitled to a declaration of right or of confirmation of possession, if his allegation of possession is unfounded. We should not declare the right of a man out of possession, if the right claimed was a right which entitled him to possession. In such a case we should leave him to sue for his possession, and in that suit his right might be determined. We say when the right claimed would entitle him to possession that we may not be misunderstood as referring to suits brought for declarations of right by persons entitled in reversion.

If the Principal Sudder Ameen should find that the plaintiff was not in possession at the time he commenced this suit, it will be unnecessary for him to enter into the question of title.

The costs of this appeal will abide the ultimate decision of the case.

The 5th June 1868.

Present:

The Hon'ble H. V. Bayley and W. Markby, *Judges.*

Secondary evidence—Conditional decree.

Case No. 2433 of 1867.

Special Appeal from a decision passed by the Principal Sudder Ameen of Gya, dated the 1st July 1867, affirming a decision passed by the Sudder Ameen of that District, dated the 29th December 1866.

Syud Lotfoollah (Defendant), *Appell*

versus

Mussamut Nuseebun (Plain

Messrs. R. E. Twidale a
for Appellan

Baboo Kishen Succa M
Respondent

Where a Court is satisfied that a
and has been lost or destroyed
secondary evidence of the conten
oral; and it is not necessary that
in to give oral testimony shoul
nesses.

A decree awarding immediate mesne-profits at the rate admitted by defendants, and larger mesne-profits contingently on a higher rate being proved at the time of execution, is altogether irregular.

Markby, J.—THIS was a suit for the recovery of possession of a small share of Mouzah Mahevya Bodwa, Pergunnah Manara, by cancelment of an alleged *bhurnanamah* or deed of usufructuary mortgage, dated the 1st Assin 1255 F., and by setting aside certain proceedings in the Revenue Courts.

The former title of the plaintiff was admitted, but the defendant relied on the deed of usufructuary mortgage above stated, which he declared the plaintiff to have executed in favor of his maternal grandmother, Mussamut Hosseinee.

The defendant did not produce the mortgage deed, being, as he said, unable to do so, because it was burnt during the mutiny. He, however, asserted that his grandmother and himself had been successively in possession of the property now in dispute, and that the *bhurnanamah* was mentioned in papers attested by the Courts of Justice, and that the plaintiff's suit was barred by limitation.

Both the Lower Courts have found, in favor of the plaintiff, that the deed of mortgage has not been proved. We regret that we are unable to understand the judgment of either Court. The Sudder Ameen gives very slight reasons for holding the mortgage deed not to be proved, and takes no notice of the defendant's allegation of possession, which is a most important one in this case. He intimates an opinion that if the mortgage ever existed, it had probably been paid off, but eventually comes to the conclusion that it is a pure invention on the part of the defendant. He nevertheless orders it to be cancelled.

The Principal Sudder Ameen, if we understand him rightly, comes to the conclusion that there was a *bhurnanamah* or mortgage deed once in existence, and that it was burnt, and therefore (he says) the terms of it cannot be ascertained, and the defendant's plea of *bhurna* is inadmissible. It appears, however, that the defendant had tendered witnesses to show what the contents of the deed were; but the Principal Sudder Ameen, commenting on this evidence, says that "it is not sufficient, "inasmuch as when the *bhurnanamah* or "deed of usufructuary mortgage is not "filed, then it cannot appear that these witnesses had subscribed their names to the "said deed or not;" the obvious consequence of such reasoning being that no one could ever prove the contents of a document which had been lost or destroyed.

The case must be remanded to re-try the questions: *first*, whether a deed of usufructuary mortgage was executed by the plaintiff; and, *secondly*, if so, whether, under the terms of it, the defendant is entitled to retain possession? If the Principal Sudder Ameen is satisfied that such a deed was executed, and has been lost or destroyed, then he will receive secondary evidence of its contents, either documentary or oral. It is not necessary that the witnesses called for this latter purpose should be attesting witnesses; if they have seen and know the contents of the deed, it will be sufficient, provided the Principal Sudder Ameen gives credit to them, and is satisfied of the due execution. Of course, such evidence must be very carefully tested; and a point of the greatest importance which the Principal Sudder Ameen, as well as the Sudder Ameen, appears to have overlooked, is, whether the defendant and his predecessors have been for a long time in possession of the land. If they have, then the Principal Sudder Ameen will consider whether this can be accounted for in any other way than supposing that some document of the kind set up by the defendant was executed by the plaintiff. It is not necessary that the witnesses should be able to state the exact contents of the deed. It will be sufficient if they can state generally the nature of the transaction.

We also wish to point out that the decree, as it stands, is improperly drawn up. It seems that the defendant stated the mesne-profits of the land to be Rupees 21; the plaintiff, however, stated that they were more, but was not ready with any proof on the point, whereupon the Sudder Ameen said that there must be an enquiry in the Mofussil. We should have thought an adjournment of the case for the plaintiff to get evidence, with which he ought to have been prepared at the trial, was hardly proper under the circumstances, but having made the adjournment it was altogether wrong to draw up a decree which directs that "if the plaintiff "at the time of execution of decree will "prove the greater quantity of the mesne-"profits by good and strong evidence, then "he will obtain the same. At present the "mesne-profit will be awarded according "to the rate admitted by the defendant."

Such a decree is altogether irregular, and the quantity of mesne-profits ought to have been finally determined before drawing up the decree or else entirely omitted.

The case is remanded, accordingly, for re-trial with reference to the above remarks.

The 5th June 1868.

Present:

The Hon'ble H. V. Bayley and W. Markby, *Judges.*

Reviews—Delay in applying—Section 377, Act VIII., 1859.

Case No. 2463 of 1867.

Special Appeal from a decision passed by the Principal Sudder Ameen of Tipperah, dated the 26th June 1867, reversing a decision passed by the Moonsiff of that District, dated the 27th May 1865.

Pran Kishen Bhuttacharjee (Plaintiff), *Appellant,*

versus

Bukshee Cazee (Defendant), *Respondent.*

Baboo Mohinee Mohun Burdhun for Appellant.

Baboo Nubo Kishen Mookerjee for Respondent.

Where the only cause for admitting a review after the 90 days prescribed by Section 377, Act VIII., 1859, was that the High Court had construed the law differently from the way in which it had been laid down in the decision admitted to review—HELD that the cause alleged was no excuse for the delay.

Markby, J.—IT is quite clear to us that the Principal Sudder Ameen was wrong in admitting this review after the 90 days had expired since the original case was decided. By Section 377 the application for a review is to be made within 90 days, unless the party preferring the same can show just and reasonable cause, to the satisfaction of the Court, for not having preferred such application within the limited period.

The only cause shown in this case was that, prior to the review having been admitted, this Court in another case had laid down the law in a different manner from that in which the Principal Sudder Ameen had laid it down in the decision admitted to review.

But, as said by the Chief Justice in the Full Bench case reported in the 9th Weekly Reporter at page 185, "the new construction of the law might be a ground for review but it was no excuse for not having applied before."

The vakeel for the respondent had suggested that in the cases that were not appealed, the parties abstained from appealing in order to see the result of the case which had been sent up to this Court. This in some cases may be a very prudent course to take, but it can in no way alter the application of the law requiring certain steps in the proceedings to be taken within a prescribed time. If parties wish to take this course, they must secure themselves beforehand by an arrangement which will prevent the delay from barring their further proceedings in the suits they are desirous to prosecute. If all the parties concur, there will be no difficulty in making such an arrangement.

The appeal in this case will be decreed with costs, and the effect of that will be that the order of the Principal Sudder Ameen, dated 14th December 1865, affirming the original decree, will be restored.

The 5th June 1868.

Present:

The Hon'ble F. B. Kemp and E. Jackson, *Judges.*

Farmers—Ejectment—Section 23, Act X., 1859.

Case No. 2831 of 1867 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of Rungpore, dated the 25th July 1867, reversing a decision passed by the Deputy Collector of that District, dated the 22nd August 1866.

Kalee Chunder Sandyal and others (Defendants), *Appellants,*

versus

Bhoobunessuree Dabee (Plaintiff), *Respondent.*

Baboos Gopal Lall Mitter and *Annund Chunder Ghosal* for Appellants.

Baboos Sreenath Doss and *Onookool Chunder Mookerjee* for Respondent.

Where a farmer is admitted to have no permanent interest in the land, he cannot be said to have a transferable interest if the contract between the zemindar and himself is silent on the point; and, under Section 23, Act X., 1859, such farmers cannot be ejected otherwise than in execution of a decree or order under the provisions of that Act.

Jackson, J.—We are of opinion that the Judge is right in the view which he has taken of the law in this case. He quotes the precedent in Solano's case, but there is a later ruling of a Full Bench of this Court to the same effect at page 186 of the Weekly Reporter, Volume VII. This case applies to the ejectment of ryots, and lays down the effect of the provisions of Section 22 Act X. of 1859. But exactly the same provisions are laid down for farmers who do not hold any permnanet and transferable interest in the land by Section 23 of the Act. The Section rules that no such farmer shall be ejected otherwise than in execution of a decree or order under the provisions of this Act. It is said in the first place that the farmer in this case, though it must be admitted he has no permanent interest in the land, still has a transferable interest in it. The contract is silent on this point, and therefore no sale by the plaintiff would be binding on the defendant (the zemindar). No purchase of the plaintiff's farm could force the defendant to recognize him as the farmer, and to register his name as the farmer in plaintiff's place. The plaintiff, therefore, holds no transferable right in the land. The plaintiff, therefore, is such a farmer as is contemplated by Section 23, Act X. of 1859, and the provisions of that Section apply to him. It follows that the plaintiff cannot be ejected *proprio motu* by the zemindar, but the zemindar must take the proper legal steps to enforce the law against him. As he did not do so in this instance, the Judge was right to restore the plaintiff to possession.

Appeal dismissed with costs.

The 6th June 1868.

Present :

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Bond—Money decree—Mortgage.

Case No. 2884 of 1867.

Special Appeal from a decision passed by the Principal Sudder Ameen of Tirhoot, dated the 9th September 1867, reversing a decision passed by the Sudder Ameen of Mozuffurpore, dated the 24th January 1867.

Achumbit Thakoor and others (Defendants), *Appellants,*

versus

Choonee Lall Chowdhry (Plaintiff), *Respondent.*

Baboo Debendro Narain Bose for Appellants.

Mr. R. E. Twidale for Respondent.

Where money is lent on a bond under which property is hypothecated to the obligee, and the latter obtains a money decree against the obligor, not making the property liable for the claim, he is not entitled, except by regular suit against the party in possession, to follow the property, if it has meantime been mortgaged and sold in execution of a decree obtained by the mortgagee.

Kemp, J.—The plaintiff (special respondent) lent money to the judgment-debtor on a bond in September 1849. On the 20th March 1852, the plaintiff obtained a simple money decree against his judgment-debtor.

In no sense can such a claim be, in our opinion, a claim to real property, but comes under Section 6, Act XI. of 1865; and thus by Section 27, Act XXIII. of 1861, no special appeal will lie.

In this view we dismiss the special appeal with costs.

The 9th June 1868.

Present:

The Hon'ble L. S. Jackson and F. A. Glover, *Judges.*

Limitation—Alienations by Hindoo widow—Suit by reversioner.

Cases Nos. 287 and 288 of 1867.

Regular Appeals from a decision passed by the Principal Sudder Ameen of Patna, dated the 20th August 1867.

Rash Beharee Lall and another (Defendants), *Appellants,*

versus

Burmessur Nauth (Plaintiff), *Respondent.*

Baboo Unnoda Pershad Banerjee for Appellants.

Mr. C. Gregory and *Baboo Onookool Chunder Mookerjee* for Respondent.

A reversioner suing to set aside certain deeds executed more than 12 years before, alienating property which a Hindoo widow had been declared entitled to retain for her lifetime, was held to be barred by limitation, and to have no right to sue for recovery of possession and declaration of right before the death of the widow.

Jackson, J.—THIS case is the third of a series of suits which have been brought to impeach certain acts of alienation in dealing with the estates of Roy Luchmee Narain and Roy Koonj Beharee Lall.

The earlier cases came before this Court on appeal in 1865 and 1867, and the facts are to be found fully set forth in a judgment of this Court reported at page 72, IV. Weekly Reporter.

The plaintiff now before us as respondent is Roy Burmessur Nauth, son of Bisessur Nauth, who was the nephew of Luchmee Narain and Koonj Beharee Lall, deceased. He sues for the recovery of possession, and a declaration of right to the extent of one-fourth of each of the estates. He has had a decree in the Court of the Principal Sudder Ameen in respect of both estates.

The defendant appeals. But the contention before us is only in respect of that portion of the estate which belonged to Koonj Beharee. The point raised before us, and upon which the appellant must, in our opinion, be successful, is that the suit, as a suit to invalidate and set aside certain documents referred to which were executed more than 12 years before the institution of the suit, is barred by limitation, and must therefore fail.

We think that on the authority of the decision in the case of Pran Putty Kooer, (II. Weekly Reporter, page 273.) and which has been followed in other cases, the contention must prevail. The widow of Koonj Beharee is still living, and has been declared entitled to retain the estate for her lifetime. The plaintiff, consequently, even if he were the next reversioner—which it seems he is not—could not now sue for possession of the estate. It is true that on the death of the widow, the reversioner will be entitled to sue for, and will recover possession, provided that the deeds which are now impleaded, are proved to be invalid; but that will not entitle the present plaintiff to maintain this suit before her death. Therefore, so far as the estate of Koonj Beharee is concerned, the decision of the Principal Sudder Ameen is reversed, with costs in proportion to the extent to which his decision is affected; the respondent will be entitled to his costs on the remaining value.

As regards the separate appeal by Ruttun Dye (No. 288), the same observations apply. The suit was barred by limitation; she was brought into Court as a defendant, and was entitled to have her costs instead of being directed to bear her own costs. Her appeal is, therefore, decreed to the extent of the costs which she was ordered to bear. She not being interested in raising the other ques-

tions which arise in the case, is not entitled to carry on her appeal beyond the question of costs, to which extent it is decreed.

We pass no order in respect of the respondent's costs in this appeal.

The 9th June 1868.

Present:

The Hon'ble F. P. Kemp and E. Jackson, *Judges.*

Sale for arrears of Income Tax—Act XXXII. of 1860—Act XI. of 1859.

Case No. 2918 of 1867.

Special Appeal from a decision passed by the Principal Sudder Ameen of Tirhoot, dated the 12th August 1867, modifying a decision passed by the Sudder Ameen of that District, dated the 25th September 1866.

Sheo Pershad Singh (Plaintiff), *Appellant,*

versus

Muthoora Pershad and others (Defendants), *Respondents.*

Mr. R. E. Twidale and *Baboo Chunder Madhub Ghose* for Appellant.

Messrs. R. T. Allan and *J. S. Rochfort* and *Baboo Onookool Chunder Mookerjee* for Respondents.

A sale of land for arrears of Income Tax under Act XXXII. of 1860 does not render a mokurruree title to the land void with reference to Act XI. of 1859, which has no relation whatever to such a sale.

Jackson, J.—THIS is a suit to obtain possession of certain lands under a mokurruree title, the defendant having purchased the lands at a sale for arrears of Income Tax, and, as the plaintiff states, dispossessed him.

The Principal Sudder Ameen in deciding on this question has ruled that such a sale renders the mokurruree title void, and refers to Act XI. of 1859 in support of this view. But Act XI. of 1859 has no relation whatever to a sale under Act XXXII. of 1860. The Principal Sudder Ameen must decide the case according to the provisions of the law under which the sale was made, *viz.*, Act XXXII. of 1860; and it may be that for this purpose, questions of fact will have to be tried, especially the question when the attachment of the property took place. The Principal Sudder Ameen makes no allusion to these questions in his present judgment.

The case is remanded to the first Court to fix the issues, and, after hearing such evidence as is necessary, to decide the case. The orders passed are reversed. The appellant will pay the costs of the Government who have been unnecessarily made a party to the appeal.

The 9th June 1868.

Present:

The Hon'ble L. S. Jackson and F. A. Glover, *Judges.*

Contribution—Limitation—Liability of mortgagee assigning his mortgage.

Case No. 353 of 1867.

Regular Appeal from a decision passed by the Principal Sudder Ameen of Patna, dated the 14th September 1867.

Musst. Jumeelun and others (Defendants), *Appellants,*

versus

Wullee Ahmed and others (Plaintiffs), *Respondents.*

Mr. R. E. Twidale for Appellants.

Mr. C. Gregory for Respondents.

A having taken by assignment from *J* a mortgage of certain property deceased, and the mortgagor having obtained a decree for possession and surplus proceeds, executed it against some of *A's* heirs, who sued to obtain contribution from the other heirs.

HELD that six years is the limitation for such suits, and the cause of action arose from the sale of the property in execution.

HELD that it was not wrong for the Lower Court to decree a liability in lump against *N*, one of the heirs of *A*, although *N* had various representatives.

HELD that although *J* was a defendant in the suit by the mortgagor, he was not liable, as he had no interest in the property, and had received none of its profits.

Jackson, J.—THIS is a suit for contribution. The plaintiff and defendants severally are all descendants of one Amjud Ali. This Amjud Ali took, as long ago as the year 1192 Fuslee, by assignment from one Gungee Lall, a mortgage of landed property. The mortgagors long afterwards sued to recover possession of the mortgaged estate with surplus proceeds, and they recovered a decree on the 4th of August 1835 for such surplus proceeds against the heirs of Amjud Ali as well as against the heirs of Gungee Lall, the original mortgagee.

This decree was executed, and various amounts were realized under it from the present plaintiff, Wullee Ahmed, and from his brothers and sister, who on their part have joined in a separate suit against the defendants; and the object of this and the other separate suit is to obtain contribution from the other heirs of Amjud Ali. The Principal Sudder Ameen has given the plaintiff a decree against the descendants, some of whom have appealed.

Four objections have been taken to the decision of the Court below. The first is that the suit is barred by limitation.

But we are of opinion that limitation does not apply. Six years is the period allowed for suits of this description. The plaintiff's cause of action arose from the sale of the property in execution of decree on the 4th of December 1860; and the present suit having been instituted within six years from that date, the plaintiff is in time.

The next point is, that the suit is not properly constituted as brought against the other co-sharers of Amjud, inasmuch as Bishwanauth Singh, the representative of Gungee Lall, having been a party to the suit by the mortgagors, and judgment having been given against him, his heirs should also have been sued for contribution.

We observe that although Bishwanauth was a defendant, and judgment was for some reason or other given against him, he was not really liable, inasmuch as the mortgaged property had many years previously passed from his hands, and in fact inasmuch as he had clearly no interest in the mortgaged property and had received none of the profits.

The third question raised is that amon the defendants were various representative of one Nujjoo, who was the daughter of Am jud Ali; and the Principal Sudder Amee has erroneously decreed a liability in lum of Rupees 1,763, whereas that liability ougi to have been apportioned amongst the seve al descendants of Nujjoo.

We think that under the circumstances the case, the Principal Sudder Ameen w not wrong in declaring in one sum the amou which the branch of Amjud Ali's family de cended from Nujjoo was liable to pay. W are informed that she had four sons, and th the heirs of those sons are parties on the r cord. If that is so, their liability being equa it is easy for them to ascertain the amou which each has to pay.

The last ground is, that the plaintiff ha made a claim in respect of his right, titl and interest in a certain Mouzah. Khar bozoorg, which was sold in execution, an that plaintiff was not really the owner of third share of this mouzah, but that one-thir belonged to his father, and the claim should be reduced to his interest as one of several co-sharers inheriting from the father. But this property was sold as belonging in equal shares to the plaintiff and two other shareholders. *Primâ facie*, therefore, the plaintiff is the owner of a third of this property, and there is nothing to show that he was not owner of a third share.

For all these reasons, therefore, this appeal must be dismissed with costs.

The 9th June 1868.

Present:

The Hon'ble H. V. Bayley and A. G. Macpherson, *Judges.*

Error of valuation—Will.

Case No. 2502 of 1867.

Special Appeal from a decision passed by the Judge of Rajshahye, dated the 6th August 1867, affirming a decision passed by the Principal Sudder Ameen of that District, dated the 21st January 1867.

Kisto Churn Mojoomdar and others (Defendants), *Appellants,*

versus

Dwarkanath Biswas (Plaintiff), *Respondent.*

h

Baboos *Mohinee Mohun Roy* and *Debendro Narain Bose* for Appellants.

Baboos *Chunder Madhub Ghose* and *Nuleet Chunder Sein* for Respondent.

An error of valuation, which does not affect the jurisdiction of the Courts in which a suit is tried, and does not lead to a defect in the decision on the merits, is not sufficient ground for interference in special appeal.

When a document propounded as a will is proved to have been executed and registered by the alleged testator, it is still essential to enquire into the circumstances connected with its execution and registration, when the will is inofficious, and there are other suspicious matters connected with it.

Macpherson, J.—As regards the objection taken to the valuation of this suit, we are of opinion that as it has not been shown that the jurisdiction of the Courts has been affected by the manner in which the suit has been valued, the error (if any) has not produced a defect in the decision of the case on the merits, and we therefore shall not, on this ground, interfere with the decree of the Lower Court.

The most material ground of special appeal is that the Lower Appellate Court committed an error in law in the manner in which it has dealt with the case. The objection taken substantially is this, that whereas the issue is whether the document pleaded as the will of Gooroo Doss deceased, is really his will, the Judge has rested satisfied with merely finding that the document pleaded was as a matter of fact executed by Gooroo Doss and registered by him. It is objected that the Judge has not gone sufficiently fully into the case, and has not considered the peculiar circumstances and position of the parties, nor decided whether the will was executed deliberately and with full testamentary intention on the part of Gooroo Doss.

It is found by the Lower Appellate Court that Gooroo Doss was in weak health all his life; that he lived with the respondent Dwarkanath who was his guardian, and to whom, in certain respects, he was under obligations; and that Gooroo Doss, shortly after he came of age, executed the document now put forward as his will, whereby he left his entire property to Dwarkanath, notwithstanding that the female appellant is Gooroo Doss's own sister and survived him.

Primâ facie the will, leaving the whole of the property away from his own sister, is an inofficious will. Bearing that in mind, and the position in which Dwarkanath stood to Gooroo Doss, there is no doubt that the clearest evidence is requisite in order to support this will. Now, the evidence is meagre and insufficient, and the *onus* has not been duly laid upon the plaintiff.

There is no evidence that any instructions were ever given by Gooroo Doss for the preparation of a will; and it is proved that Dwarkanath himself got the will prepared, he having first produced a rough draft of a will which purported to give 6 annas to Gooroo Doss's sister, and having subsequently produced the rough draft of the will now propounded. Dwarkanath was not examined as a witness, and the Court has no means of knowing whether any thing passed on the subject between him and Gooroo Doss before the drawing up of the instrument which was eventually executed, or of knowing how the different drafts produced by Dwarkanath came to be made.

Both the Lower Courts find as a fact that Gooroo Doss did execute the will and register it. But the Court of first instance was dissatisfied with the circumstances under which the will was executed, and, being of opinion that it was not proved that the will was ever read over to Gooroo Doss before he signed it, held that it was not proved that Gooroo Doss knew what the nature of the document was, and that the will propounded was not a *bond-fide* document, and was not the will of Gooroo Doss.

On appeal, the Judge held that when the document was proved to have been executed and registered, it was beyond the province of the Court to assume that the testator was cheated in the act; and, further, that if the testator had been decoyed into signing a document of which he did not know the contents, it ought to have been proved what the nature of the document was which he had signed. The Judge also declared that if there was any thing so violently irregular in the will as to suggest fraud, that circumstance would justify the Court in enforcing a rigid explanation of all that was suspicious, but that in the present instance there was nothing suggestive of fraud. The Judge on the whole considered the will to be valid.

It appears to me that the Judge was wrong in thus treating the case. It was *not* beyond the province of the Court to enquire into the circumstances connected with the execution and registration of this document. There are on the face of the case for the plaintiff some most suspicious circumstances. And the Judge, without enquiring fully into them, did not put himself in such a position as made it possible for him to decide whether

the document propounded was really the will (within the legal meaning of the term) of Gooroo Doss. There is no doubt that the position of Dwarkanath with relation to Gooroo Doss was one likely to give him very great influence over him; and considering that Gooroo Doss had always been in bad health, and had lived with and under the care of Dwarkanath, that Dwarkanath is the person materially benefited by the will; that the will was prepared under his instructions; and that the execution of it was conducted by him, it was essential that the Court should have satisfied itself upon the evidence that the will did really represent the last wishes of Gooroo Doss, and that it was executed by him with full understanding of its real effect, and with due deliberation, and not through any undue influence exercised upon him by Dwarkanath.

The absence of any evidence of instructions for the preparation of a will having ever been given by Gooroo Doss is in itself most remarkable; and when we find (as it appears the Principal Sudder Ameen found) from some of the witnesses, who are considered the most important witnesses in support of the will, that the document was not read over to Gooroo Doss before he signed it; when it is, to say the lest of it, doubtful upon the evidence whether it was fully explained to him—it was absolutely essential that the Court should very carefully enquire into the whole matter before declaring the will to be valid. The Judge entirely lost sight of some of the most important questions in the case; for it was not enough that he should be satisfied as to the proof of the mere execution and registration by Gooroo Doss when of full age and labouring under no mental incapacity. As it is, the appeal was incompletely tried by the Judge, and the case must, therefore, be remanded for re-trial.

An objection was taken by Mr. Paul as to the finding of the Judge upon the issue as to the age of the testator. The objection is that the Judge wrongly relied on a copy of a copy of a certain *wuseeutnamah* as being evidence of Gooroo Doss's age. The Judge is clearly wrong in saying that this copy is an "estoppel." It is no evidence at all as against the sister of Gooroo Doss, although I do not think the Court would have been wrong in admitting it as evidence (not conclusive) against Kristo Churn.

The Court will again try the issue as to the age of Gooroo Doss, and, in disposing of the whole case, will lay upon Dwarkanath the *onus* of proving that, notwithstanding the very peculiar circumstances of the case, the document propounded is really the will of Gooroo Doss, executed by him with full knowledge of its contents, and with due deliberation, and not under any undue influence exercised over him by Dwarkanath, or any one on his behalf. The mere execution and registration of the instrument are not of themselves sufficient proof of this. Probably the best course the Judge can adopt will be to summon Dwarkanath, and interrogate him narrowly as to the circumstances under which he caused the will to be prepared: but the Judge must use his own discretion as to taking further evidence.

The Judge will take up this case at once out of its turn, and will dispose of it with the least possible delay.

It is not to be supposed from the remarks I have made that I entertain, or mean to express the opinion, that the will propounded is not the will of Gooroo Doss. I entertain no such opinion, and it may well be that it, in truth, is a perfectly good will. All I say is that the case has not been sufficiently enquired into, or rightly tried by the Lower Appellate Court; and that therefore it is necessary that it should be now remanded in order that it may be properly tried.

The costs of this appeal will follow the result of the re-hearing.

Bayley, J.—I am of the same opinion, and think the Judge, although he sets forth certain findings of facts, has not come to these findings on legal evidence and on a statement of legal reasons.

I concur in the specific reasons given by Mr. Justice Macpherson on the arguments adduced by Mr. Paul for remanding the case for re-trial.

The 10th June 1867.

Present:

The Hon'ble F. B. Kemp and E. Jackson, *Judges.*

Amendment of plaint—Section 77, Act VIII., 1859—Re-married widow's rights in her deceased husband's estate—Sections 2 and 5 Act XV. of 1856.

Case No. 2704 of 1867.

Special Appeal from a decision passed by the Officiating Deputy Commissioner of Nowgong, dated the 6th August 1867, affirming a decision passed by the Sudder Moonsiff of that District, dated the 20th December 1866.

Okhorah Soot (Defendant), *Appellant*,

versus

Bheden Barianee and others (Plaintiffs), *Respondents*.

Baboos Khettur Mohun Mookerjee and *Shushee Bhoosun Bose* for Appellant.

Baboo Chunder Madhub Ghose for Respondents.

The son of a Hindoo widow having died after her re-marriage, she sued as guardian of her daughter by her first husband, claiming the estate of her son, and then applied to be made a co-plaintiff in her own right.

HELD that the Lower Court was not wrong in arraying the plaintiff amongst the parties to the suit under Section 77, Act VIII., 1859, and that such amendment did not alter the character of the suit or affect the merits of the case.

HELD (by Kemp, J., dismissing the appeal under Section 15 of the Letters Patent) that as plaintiff at the time of her re-marriage had no rights or interests in the estate of her deceased husband or his son, none ceased and determined upon the re-marriage; and after her son died, the estate which he inherited from his father devolved on her, and under Section 5, Act XV. of 1856, she did not forfeit her right thereto.

HELD (by E. Jackson, J.) that under Section 2, Act XV., 1856, all right which the widow had in her deceased husband's property by inheritance to him and to his lineal successors ceased by reason of her re-marriage, as if she had then died, and thereupon the next heir inherited; and that Section 5 referred more especially to the new husband's property, including property left otherwise than to her late husband and his lineal descendants.

Kemp, J.—THE defendant is the special appellant.

It is stated in the plaint that one Peokam died, leaving a widow, the plaintiff, a son Burut Ram, and a daughter Dhuna Mala, him surviving. The defendant is the step-brother of Peokam.

The plaintiff re-married, and she now sues in right of inheritance, claiming the estate of her son Burut Ram, which became vested in him on the death of his father Peokam.

The Lower Courts have given the plaintiff a decree.

In special appeal it is contended—

1st.—That the Court of first instance was wrong in allowing such an amendment of the plaint as changed the very nature of the suit.

2nd.—That the Lower Courts have erred in declaring that the plaintiff is entitled to succeed to the estate of her son Burut Ram, inasmuch as under the provisions of Section 2, Act XV. of 1856, all her rights and interests in that estate ceased and determined upon her re-marriage.

I am of opinion that the Lower Courts were not wrong in arraying the plaintiff amongst the parties to the suit under Section 77, Act VIII. of 1859. The plaintiff first sued as guardian of her daughter, a minor; but finding that she had a personal right in the estate claimed, and that she was likely to be affected by the result of the suit, she applied to be made a co-plaintiff, and her application was complied with. The character of the suit was not changed, and as the objection is at the best a technical one, and the order admitting her to be made a party to the suit does not affect the merits of the case or the jurisdiction of the Court, I would reject it under the provisions of Section 350, Act VIII. of 1859.

On the *second* point, which is a novel one, I am of opinion that the decision of the Court below is right.

At the time of the re-marriage of the plaintiff, her son Burut Ram was alive, and the estate of the former husband of the plaintiff was vested in the said Burut Ram. Section 2, Act XV. of 1856 runs thus: "All rights and interests which any widow "may have in her deceased husband's property by way of maintenance, or by inheritance to her husband, or to his lineal "successors, or by virtue of any will or "testamentary disposition conferring upon "her, without any express permission to "re-marry, only a limited interest in such "property, with no power of alienating the "same, shall, upon her re-marriage, cease "and determine as if she had then died, and "the next heirs of her deceased husband, "or other persons entitled to the property "on her death, shall thereupon succeed "to the same."

At the time of her re-marriage, no rights and interests, either in the estate of her deceased husband, or in the estate of his lineal successor, the son, had become vested in the plaintiff. Therefore, no estate in which she had any rights and interests ceased and determined upon her re-marriage. After the re-marriage the son died, and the estate which he inherited from his father devolved on the plaintiff, and under Section 5 of the same Act, *viz.*, XV. of 1856, she does not, by reason of her re-marriage, forfeit her right thereto.

I would dismiss this special appeal with costs and interest. Under Section 15 of the Letters Patent, dated 28th December 1865, the appeal will be dismissed with costs and interest.

Jackson, J.—I agree with Mr Justice Kemp on the first point argued.

I would not now reverse the decision of the Lower Court on the ground of the amendment allowed in the plaint. Whether that was strictly legal or not, it is not a point affecting the merits of the case.

But I differ from my learned colleague in the interpretation which he puts upon Act XV. of 1856, and more especially upon Section 2 of that Act. I do so with some hesitation, as the words of the Section are somewhat ambiguous—"All rights and interests, "which any widow may have in her deceas-"ed husband's property by inheritance to "her husband or to his lineal successors, "shall, upon her remarriage, cease and de-"termine as if she had then died, and the "next heirs of her deceased husband, or "other persons entitled to the property on "her death, shall succeed to the same."

The plaintiff in this case is a widow and has re-married. At the date of her re-marriage her deceased husband's property had been inherited by his son. The son has since died, and the plaintiff now claims to succeed to her son's estate. The right which she now claims is a right in her deceased husband's property by inheritance to his lineal successors. But it is said that the widow had no such right at the time of her re-marriage, and such right did not, therefore, cease and determine; that the law in fact alludes only to such property as the widow had inherited before her re-marriage. I think that the words of the Act bear an extended signification, and that "upon her re-marriage" should not be read as at the date of such re-marriage, but with reference to such re-marriage. All right which the widow has in her deceased husband's property by inheritance to him and to his lineal successors ceases by reason of her re-marriage, and in consequence of her re-marriage, as if she had died; and thereupon, that is, when her right has ceased, the next heir shall inherit. The policy of the law appears to me to be one which is generally acknowledged in all society, and which is perhaps more especially required to be put in force in Hindoo society, *viz.*, that the widow by re-marriage shall not take her late husband's property away from his family and into the hands of her new husband. Take the case of a joint Hindoo family of six brothers, one of them dies leaving a minor son and a widow. The minor son takes his father's property. His mother re-marries; and if the minor son dies before attaining majority, he cannot make a will, and the result will be, if she can inherit the property, that the widow being re-married, takes a share with the joint brothers of her first husband's property, and is entitled to a share in the family house, and every thing that the family possesses; and to enjoy this, she will have a right to bring her new husband into the family.

The policy of the law seems to me to be to prevent any further interference by the widow after her re-marriage in her deceased husband's property, or, as stated in the abstract of this Section given at the head of that law, that the rights of the widow in her deceased husband's property are to cease on her re-marriage. Upon her re-marriage, she is to be dead to all rights of inheritance to her deceased husband's property—not only dead at that moment to such rights as she has inherited, but dead then and for the future to all such rights. Section 3 of the Act supports this view. The family of her deceased husband can by petition to the Court deprive the widow of even the guardianship of her children on her re-marriage. Section 5 of the Act seems to me to refer more especially to her new husband's property. It would include also all property left by will, or as heir to any one except her late husband and his lineal successors, but the widow cannot under the Hindoo Law inherit from any one except the husband or his lineal successors.

I would reverse the Judge's decision and dismiss the plaintiff's suit with all costs.

The 10th June 1868.

Present:

The Hon'ble J. B. Phear and C. Hobhouse, *Judges.*

Registration—Act XVI., 1864.

Case No. 2734 of 1867.

Special Appeal from a decision passed by the Principal Sudder Ameen of Backergunge, dated the 13th August 1867, reversing a decision passed by the Sudder Moonsiff of that District, dated the 24th August 1866.

Gobind Chunder Roy (Plaintiff), *Appellant.*

versus

Poorno Chunder Sein and others (Defendants), *Respondents.*

Baboos Kalee Mohun Doss and *Shushee Bhoosun Bose* for Appellant.

Baboo Bama Churn Banerjee for Respondents.

A Civil Court was held to have done right in giving priority to a lease registered under Act XVI., 1864, as against an unregistered conveyance of an earlier date.

Phear, J.—It appears that one Poorno Chunder, on the 4th Pous 1272, conveyed his share of the property in question in this suit to the plaintiff, and on the 17th Aghran of the same year Poorno Chunder created a sub-tenure in favor of the defendant. The plaintiff brings this suit against the defendant Poorno Chunder, and also against Poorno Chunder's grantee, for confirmation of his, the plaintiff's possession and declaration of his right to this property as against both the defendants, and also seeks to have Poorno Chunder's lease to the second defendant set aside. The Lower Appellate Court has found in effect that both the conveyance to the plaintiff by Poorno Chunder and the lease to the second defendant by Poorno Chunder are authentic deeds, but that as the second of these, namely, the lease, was registered under the Registration Act of 1864, while the conveyance to the plaintiff was not registered, the Court considered itself bound under Section 68 of the Registration Act to give priority to the lease as against the conveyance. It therefore refused to set aside the lease, and consequently dismissed the plaintiff's claim.

We think that the Lower Appellate Court was quite right. On this state of facts the plaintiff clearly failed to establish the absolute right of ownership which he claimed against both defendants, and he was, therefore, not entitled to have the declaration of right which he sought. We dismiss the special appeal with costs.

We may add that as in this case it is not really put forward by the plaintiff that the registration of the lease was effected with a view to defraud him, the decision of a Division Bench of this Court reported in the 7th Weekly Reporter, page 119, Civil Rulings, entirely supports the view which we have just expressed.

The 10th June 1868.

Present :

The Hon'ble F. B. Kemp and E. Jackson, *Judges.*

Evidence.

Case No. 2930 of 1867.

Special Appeal from a decision passed by the Principal Sudder Ameen of Tirhoot, dated the 10th August 1867, affirming a decision passed by the Moonsiff of that District, dated the 29th May 1866.

Rughoonath Pershad (one of the Defendants), *Appellant,*

versus

Huree Mohunt (Plaintiff), *Respondent.*

Baboo Kedarnath Chatterjee for Appellant.

Baboo Chunder Madhub Ghose for Respondent.

A Lower Appellate Court was held not to be wrong in reading as evidence in the suit, evidence in another suit which had been read in the first Court, unless it was objected to.

Jackson, J.—We think no sufficient ground is shown for interference in the decision of the Lower Appellate Court. It is said that it has proceeded on the depositions of witnesses taken in another suit, and that the first Court acted in the same illegal manner. It does not appear, however, that when the special appellant made his appeal to the Principal Sudder Ameen, he objected to the admission of this evidence by the first Court as being without his consent. If he did not then make this objection, we may fairly presume that the evidence was admitted with his consent; and we cannot say that the Lower Appellate Court was wrong in reading as evidence in the suit evidence which had been read in the first Court unless it was objected to.

Then it is said that the Lower Appellate Court does not allude to one or two of special appellant's documents, but it is not shown to us that these are material documents which would have affected the decision on the merits.

Appeal dismissed with costs.

e

The 10th June 1868.

Present:

The Hon'ble J. B. Phear and C. Hobhouse, *Judges.*

Jurisdiction—Determination of question of title—Claim to eject—Clause 5, Section 23 and Section 153, Act X., 1859.

Cases Nos. 2588 to 2594 of 1867 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of the 24-Pergunnahs, dated the 1st August 1867, reversing the decisions of the Deputy Collector of Diamond Harbour, dated respectively the 2nd and 4th February 1867.

Shoudaminee Dossee (Plaintiff), *Appellant,*

versus

Ram Chand Baido and others (Defendants), and others (Intervenors), *Respondents.*

Baboos Onookool Chunder Mookerjee, Khetturnath Bose, and *Anund Chunder Ghossal* for Appellant.

Mr. R. T. Allan and *Baboos Unnoda Pershad Banerjee* and *Bhowanee Churn Dutt* for Respondents.

In a suit for arrears of rent, in which an intervenor opposed plaintiff's claim, and the Deputy Collector collaterally and incidentally to guiding his mind to a conclusion on the issue which arises under Section 77, Act X., 1859, thinks proper to enquire into and state his opinion as on matters of title between the plaintiff and the intervenor, he cannot be said, in the sense of Section 153 *to determine* a question of title between the parties by his judgment.

In a suit for arrears of rent, where a claim to eject the defendant under the powers provided by Clause 5, Section 23 is inserted in the plaint, but is not made the subject of an issue, or adjudicated upon, the insertion of such claim does not shift the jurisdiction of the Court of appeal.

Phear, J.—The advocates for the different parties in special appeals Nos. 2588 to 2594, both numbers inclusive, admit that all these cases will be governed by one and the same judgment of this Bench. The decision of the first Court in reference to them is, among our papers, attached to No. 2591, and it commences in these words: "The "plaintiff in this case sues for arrears of "rent. The defendant admits tenancy, but "pleads that he has paid his rents to the in-"tervenor, who has come into the possession "of the tenure by purchase. The inter-"venor opposes the claim of the plaintiff on "the ground, that he is in the receipt and "enjoyment of the rent from the defendant. "The points at issue are, *first*, has the inter-"venor been in receipt of the rent as required "by the Act; and, *secondly*, is the defend-"ant's rent in arrears? The intervenor "comes in under Section 77 of the Act. "He cannot show that he has actually and "in good faith received and enjoyed the "rent before and up to the time of the in-"stitution of the suit." The Deputy Collector goes on to discuss the evidence produced before him in the case, and shows that the conclusion to which the last words quoted by us indicate that he had come, is supported by that evidence. And eventually he gives the plaintiff a decree as against the intervenor. The intervenor preferred an appeal to the Judge, and the Judge reversed the decision of the Court below as between the plaintiff and intervenor. Against the decision of the Judge the plaintiff now appeals to this Court specially.

It seems to us that the Lower Appellate Court had no jurisdiction in this case to entertain the appeal of the intervenor, and that, consequently, we have now no jurisdiction to entertain these appeals from the decision of the Judge. From so much as we have quoted of the judgment of the Deputy Collector, it is clear that he has in his mind the real question that he was called upon to try between the plaintiff and the intervenor under the terms of Section 77, Act X. of 1859, and he expressed his determination of that question strictly in the words of the Section itself. It is true that in guiding himself to a conclusion upon the question, he did take into consideration matters of title which were put forward by the intervenor. He thought that, as a matter of fact, a small portion of the rent had been actually received by the intervenor, just immediately preceding the institution of the suit; but from the conclusions which he drew from the evidence with regard to the nature of the title put forward by the intervenor as the ground upon which he had obtained these arrears of rent from the

ryot defendant, he arrived at the conviction that the receipt of rent actually proved was not a *bona-fide* receipt of rent within the meaning of the provisions of Section 77, Act X. of 1859; and, having arrived at that conviction purely as a matter of fact, he decided the issue of fact which arises by reason of the terms of Section 77 between the plaintiff and the intervenor, against the intervenor.

It is said by the special respondent now that the circumstance of the Deputy Collector having gone into the matter of the intervenor's title at all, shows that the case falls within the exception of the latter portion of Section 153. Now, Section 153 says: "In suits under Clauses 2, 4, and 7 of "Section 23, and under Section 24 of this "Act, tried and decided by a Collector, if "the amount sued for, or the value of the "property claimed, does not exceed 100 "rupees, the judgment of the Collector shall "be final, and not open to revision or appeal "except as hereinafter provided, unless in "any such suit a question of right to en-"hance or otherwise vary the rent of a ryot "or tenant, or any question relating to a "title to land, or to some interest in land "as between parties having conflicting "claims thereto, *has been determined by the* "*judgment*, in which case the judgment "shall be open to appeal in the manner "provided in Sections 160 and 161 of this "Act." And then Section 160 says: "In all "suits other than those in which, when "tried and decided by a Collector, the judg-"ment of the Collector is declared to be "final, or when tried and decided by a "Deputy Collector, an appeal is allowed to "the Collector, an appeal from the judgment "of the Collector or Deputy Collector shall "lie to the Zillah Judge, unless the amount "or value in dispute exceed 5,000 rupees, in "which case the appeal shall lie to the Sud-"der Court."

Now, in this case, the amount of the arrears of rent is admittedly less than 100 rupees, and consequently, unless the suit be one which falls within the exception in the latter part of Section 153, and so is provided for by Section 160, there is no appeal from the judgment of the Deputy Collector to the Judge. Thus, it seems that unless a question relating to title to land has in this case been determined by the judgment of the Deputy Collector, the appeal from his judgment did not lie to the Judge, and, consequently, the Judge had no jurisdiction to entertain and decide it. We have, therefore, to say whether a question of title to land has been determined between the plaintiff and the intervenor by the judgment of the Deputy Collector in this case, bearing in mind the form which that judgment, as we have already described it, substantially assumed.

We have been referred to various decisions more or less remote from this point. One, the earliest of them, was decided by the Full Bench and is reported in Volume III., Weekly Reporter, Act X. Rulings, page 21, and in that case the Court said: "We think that "under Section 77 the only matter enquired "into is the fact of the actual receipt and "enjoyment of rent before and up to the "time of the commencement of the suit; "that this fact is totally unconnected with "the legal title to, or any interest in the "land, or with the right to receive the "rent, which is by the proviso of the "Section reserved for enquiry in the Civil "Court; and that, consequently, no appeal "lies to the Judge under Sections 153 and "190 of Act X. of 1859."

This decision seems to be a complete authority for saying that where the Deputy Collector confines himself, as between the plaintiff and the intervenor, to deciding the simple question of the receipt of rent and its *bona fides*, there can never be an appeal to the Judge. No doubt, it is possible that the Deputy Collector may, in some cases, not very clearly distinguish between the issue which arises on the intervenor's claim between the intervenor and the plaintiff, and the issues which arise in the suit between the plaintiff and the original defendant; and it may be that in consequence of some confusion on this point, the Deputy Collector may make his decision between the plaintiff and the intervenor depend upon a matter of title, instead of upon the simple question of fact, which is prescribed by Section 77 as the sole matter in issue between the plaintiff and the person who is allowed to intervene. If the Deputy Collector does so, it may be that his judgment determines a question of title within the meaning of the latter part of Section 153, Act X. of 1859, and so shifts the Court of appeal from the Collector to the Judge. I do not myself desire to express a judicial opinion upon this point now. I have before—namely in the case reported in Volume VIII., Weekly Reporter, page 393—thrown out what was at that time the inclination of

my mind with regard to it, and I am willing to go so far as to say, even now, that I have not since seen any reason to change my view. However, the decision which was come to by the Division Bench in that case in no way touches the present matter. The Court was not then called upon to decide whether the Judge had jurisdiction or not to entertain the appeal from the Collector, because that point had been already determined in that particular case by a Bench of co-ordinate authority.

We do not think it is necessary for us now to enter into and discuss all the other cases which have been quoted before us to-day. The case reported in Volume IV., Weekly Reporter, page 40, Act X. Rulings, is clearly not applicable, because the Bench there said: "We cannot gather from the judgment of "the Deputy Collector that he has (either "rightly or wrongly) determined any ques-"tion of right to enhance or otherwise vary "the rent of a ryot or tenant, or any ques-"tion relative to a title to land or to some "interest in land as between parties having "conflicting claims thereto." But the remarks which were thrown out in the sentence which followed the one we have just quoted, afford us some guide as to whether the consideration which the Deputy Collector gave in the present instance to the matters of title put forward by the intervenor ought to be considered to amount to an enquiry into, or determination of, a question of title. The words to which we allude are these: "He may have misapprehended the value "and character of the documentary evidence "before him, but the Act does not include "such a circumstance among the contingen-"cies on the happening of which the Col-"lector's decision would cease to be final and "become open to revision." That would seem to justify our saying here that the particular view taken by the Deputy Collector of the title put forward by the intervenor, and made use of by him as a guide to his decision on the *bona fides* of the receipt of rent, is not one of the contingencies upon which the Act intended that the Collector's decision should cease to be final. The judgment delivered by the Chief Justice, upon which much stress has been laid by the respondent in this case, and which is reported in Volume VII., Weekly Reporter, Civil Rulings, page 25, affects a decision between the plaintiff and the original ryot, defendant. It has no concern with any question which did or might arise between the plaintiff and the intervenor, and the Chief Justice himself makes the remark that Section 77 does not apply to the case. All the remaining cases which were pressed upon our attention are included in, or cited by, the judgment reported in Volume VI., Weekly Reporter, page 1; Act X. Rulings, and there the Court, upon a review of them, says that it considers all these cases to form a class in which the Deputy Collector did not confine his enquiries to the mere fact of the receipt and enjoyment of rent, but entered upon a consideration of, and *decided various questions* of, title.

Now, we have already intimated that the words of the Deputy Collector's judgment lead us to think that he directed his attention exclusively to the simple question of fact which rightly and properly fell to be decided by him as between the plaintiff and the intervenor under Section 77, Act X. of 1859, and that he did not travel beyond the issue so raised; and although he in some sense enquired into the matters of title tendered to his notice by the intervenor, he did not decide any question of title between the plaintiff and the intervenor. The words of Section 153 which are relied upon are, when looked into, really very stringent. They do not appear to us, giving them their widest extension, to apply to cases other than those in which the Collector has made the determination of the suit depend *immediately* upon the determination of a question of title. They are these: "Unless any question re-"lating to the title to land has been *deter-*"*mined* by the judgment." The Legislature, when using these words, must have contemplated the case where the judgment has determined or affected to determine as between the parties, a question relating to a title to land, and not merely where the Deputy Collector has, collaterally and incidentally to guiding his mind to a conclusion on the issue which arose under Section 77, thought proper to enquire into and state his opinion as on matters of title between the plaintiff and the intervenor. It seems to us that when he does that, and that only, he cannot be said, in the proper sense of the words of Section 153, to *determine* a question of title between the parties by his judgment.

Turning with this view to the case which is before us, it is clear to us that the only question which the Deputy Collector proposed to himself to determine, and which he did judicially determine, between the plaintiff and the intervenor, was the simple question of fact whether or not the intervenor had actually and in good faith received the rent of the land before and up to the time of the

institution of the suit: and we, therefore, think that the case does not fall within the latter words of Section 153.

But the respondent further argues that this suit is not merely a suit to recover arrears of rent under Clause 4, Section 23, Act X. of 1859, but it is also a suit to eject the ryot-defendant for non-payment of arrears under Clause 5 of that Act, and that a suit to eject a ryot under Clause 5, Section 23, does not fall within the provisions of Section 153. No doubt, this contention is just as to suits brought under Clause 5, Section 23. It has been more than once held by this Court that, when a claim which does not fall within the claims mentioned in Section 153 is joined with a claim which does fall within Section 153, in that case, the jurisdiction of appeal is not affected by the provisions of Section 153. However, upon looking at the pleadings in this case, the course which the case has taken, the evidence which has been adduced, and the issues raised, the conclusion that we arrive at is that, although the claim to eject the defendant under the powers provided by Clause 5, Section 23, has been inserted in the plaint, still that claim has never been really matter of contest between the parties. It was never made the subject of an issue in the trial of the cause. There was no contention on the plaintiff's part during the progress of the suit that that was a substantial object which he desired to gain. The Deputy Collector, in stating what the suit between the parties was, after having heard both sides and considered all the evidence with very great discrimination, speaks of the suit solely as a suit for arrears of rent. There is no adjudication with regard to the claim to eject, and the decree given by the Deputy Collector is a decree for arrears of rent only. In view of all these facts, we cannot avoid the conclusion that the suit was substantially, to all intents and purposes, a suit for arrears of rent only, and we do not think that the Legislature intended that the mere insertion in the plaint of a nominal claim for ejectment, which was never meant to be pressed, which certainly never was mentioned in the Court of first instance, and with regard to which no attempt whatever was made to obtain an adjudication, that the insertion of such a claim in the plaint should have the effect of shifting the jurisdiction of the Court of appeal.

We have no case quoted to us which could give us any guidance upon the point. We think that we must be governed by a consideration of the conduct of the parties in the Court of first instance, and the words of the judgment of the Deputy Collector himself in arriving at a conclusion as to the real character of the suit. Upon the whole, we have no doubt that we ought to hold that this suit is in the position of a suit brought simply to recover arrears of rent within Clause 4, Section 23, Act X. of 1859, and it is obvious that the amount sought to be recovered is less than 100 rupees. We have already explained at some length the reasons which make us come to the conclusion that the Deputy Collector did not determine a question of title between the plaintiff and the intervenor within the meaning of Section 153, Act X. of 1859. It follows, therefore, that the Judge had no jurisdiction to entertain the appeal, and we, consequently, can have no jurisdiction either, except for the purpose of determining the jurisdiction. We must, therefore, reject the appeal. However, in order to do justice between the parties, we think it is necessary for us to exercise that power which is reposed in us by Section 15 of the Letters Patent, dated 28th December 1865, and to direct that the judgment of the Lower Appellate Court be quashed. Each party will pay his own costs.

This decision applies to all the appeals above mentioned; therefore all will be dismissed on the same terms. The effect will be that in each of the cases the decision of the Deputy Collector will remain undisturbed.

The 10th June 1868.

Present:

The Hon'ble L. S. Jackson and F. A. Glover, *Judges.*

Limitation — Enhancement of rent — Section 32, Act X., 1859.

Case No. 2996 of 1867 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of Dacca, dated the 19th August 1867, affirming a decision passed by the Deputy Collector of the District, dated the 27th March 1867.

Huree-Kishore Ghose (Defendant), *Appellant,*

versus

Koomodinee Kant Banerjee (Plaintiff), *Respondent.*

Baboo Greeja Sunkur Mojoomdar for Appellant.

Baboo Romesh Chunder Mitter for Respondent.

Where a ryot's suit contesting a notice of enhancement was dismissed, and the dismissal confirmed in special appeal in the month of May, the landlord's suit, brought in December of the same year, for rent at an enhanced rate according to notice, was held to be barred by Section 32, Act X., 1859.

Jackson, J.—THIS was a case in which the landlord served notice of enhancement in Chyet 1269. The ryot immediately afterwards sued to contest that notice. The suit proceeded chiefly upon a claim to exemption from enhancement set up by the ryot, on the ground that he had paid rent at a uniform rate for a series of years.

The suit of the ryot was dismissed, and the case came finally before the High Court in special appeal, and that Court, in affirming such dismissal, observed that the ryot would not be debarred in any future suit which might be brought by the landlord, from showing that he is not in possession of a larger quantity of land than that for which he has been paying rent.

This decision was passed in May 1866, and in December of the same year, the landlord brought a suit for rent at an enhanced rate according to notice. The defendant-ryot in his written statement objected that the suit was barred by the rule of limitation contained in Section 32, Act X. of 1859. This was decreed against him, or it may be that the plea was passed over by the Court.

The ryot appealed to the Zillah Judge, and the point, though not taken in his written grounds of appeal, was raised for him by his vakeel at the hearing.

The Zillah Judge appears to have been under the impression that it was not competent to him to entertain the objection, because it had not been entered in the memorandum of appeal; nevertheless the Judge proceeded to give his opinion on the matter, and he also has decided against the ryot.

The defendant now comes before us on special appeal, and the question of limitation is raised for the third time.

It appears to us quite clear that the landlord *is* barred, and that his case does come within the provision contained in the latter portion of the Section above referred to.

Baboo Romesh Chunder Mitter occupied he Court some time in endeavouring to show that the enhancement has been confirmed by a competent Court. This argument is quite untenable, for the enhancement has not been confirmed. Not only did the judgment in the former suit go no further than disallow the claim to be exempted from enhancement on the ground of fixity of payment, but it expressly reserved for future decision the plea of the ryot that he was not holding lands in excess of those for which he was paying rent.

Under these circumstances, it is quite idle to say that the enhancement has been confirmed. This suit, therefore, comes under the last part of Section 32, and limitation being relied on by the defendant throughout, he must get the benefit of that plea.

The decision of the Lower Appellate Court is reversed, and the plaintiff's suit is dismissed with all costs.

The 10th June 1868.

Present:

The Hon'ble J. B. Phear and C. Hobhouse, *Judges.*

Res-adjudicata — Review — New trial.

Case No. 2732 of 1867.

Special Appeal from a decision passed by the 2nd Principal Sudder Ameen of the 24-Pergunnahs, dated the 27th June 1867, reversing a decision passed by the Sudder Ameen of that District, dated the 14th October 1864.

Luleet Mohun Roy Chowdhry and others (Defendants), *Appellants,*

versus

Sowtra Bebee (Plaintiff), *Respondent.*

Baboo Hem Chunder Banerjee for Appellants.

Baboos Chunder Madhub Ghose and *Sreenath Banerjee* for Respondent.

When once a Civil Court has passed a final decision between the parties, it loses jurisdiction over the suit except for the purposes of executing the decree; and it cannot hold a new trial of the same, unless, for some reason within the Procedure Act, the first trial appears to have been unfair between the parties.

Phear, J.—IT is not necessary that we should go into the matter of the special appellant's objection, but we think it right to say that, if, as appears to have been the case, there was no new matter brought before the Principal Sudder Ameen at the hearing of the review, which the petitioner in review could not, with reasonable diligence, have obtained, brought forward, or urged at the time of the

original hearing, or some other like cause affecting the administration of substantial justice between the parties, the review ought not to have been entertained, even had the application for review been preferred within the limited time of 90 days. When once a Civil Court has passed a final decision between the parties, it loses jurisdiction over the suit, except for the purposes of executing the decree; and it cannot hold a new trial of the same unless, for some reason within the Procedure Act, the first trial appears to have been unfair between the parties. We reverse the decree of the Principal Sudder Ameen made on review, and confirm the decree which he made on the original hearing on appeal on the 20th of April 1864. The special appellant must have his costs in this Court, and also his costs in the Lower Court on review.

The 10th June 1868.

Present:

The Hon'ble J. B. Phear and C. Hobhouse, *Judges.*

Deputy Collector's Court—Court of justice—Section 237, Act VIII., 1859.

Lowazima Appeal from an order passed by the Judge of Burdwan, dated the 8th June 1868.

Messrs. John Cowie and J. W. Mirfield, Trustees of the Land Mortgage Bank of India, Limited, *Appellants,*

versus

Mr. Barbara Owen John Elias, *Respondent.*

Baboo Ashootosh Dhur for Appellants.

No one for Respondent.

The Court of a Deputy Collector is a Court of justice within the meaning of Section 237, Act VIII. of 1859.

Phear, J.—No sufficient ground has been shown to us for interfering with the Judge's order. The Judge states that the Deputy Collector has already determined the question of priority of claim to the surplus moneys in his Court against the present petitioner, and we are of opinion that the Court of the Deputy Collector is a Court of justice within the meaning of Section 237 of Act VIII. of 1859. This being so, the right to the moneys in question has been finally decided against the present petitioner, and the Judge was right in withdrawing his order of attachment, dated 4th June.

We reject this petition.

The 10th June 1868.

Present:

The Hon'ble L. S. Jackson and F. A. Glover *Judges.*

Local investigation—Examination of witnesses by Civil Ameen—Section 73, Act X. of 1859, and Section 180, Code of Civil Procedure.

Case No. 2976 of 1867 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of Beerbhoom, dated the 28th August 1867, reversing a decision passed by the Deputy Collector of that District, dated the 29th May 1867.

Gour Chunder Roy (Plaintiff), *Appellant,*

versus

Rash Beharee Dutt (Defendant), *Respondent.*

Baboo Ashootosh Chatterjee for Appellant.

Baboo Umbica Churn Banerjee for Respondent.

Section 180, Code of Civil Procedure, as applied to cases under Act X. by Section 73 of the latter law, allows the widest discretion to Courts of first instance with regard to making local investigations; and a Deputy Collector was held to have done what the law allowed him, in deputing a Civil Ameen to examine witnesses in a suit for enhancement of rent.

Jackson, J.—THE decision of the Lower Appellate Court in this case is erroneous, but the plaintiff's suit must fail upon a ground quite distinct from that assigned by the Judge, or indeed raised by the special respondent.

If the case had been that of an ordinary suit for enhancement, we should have felt bound to remand the case to the Lower Appellate Court, because the evidence, which was, we think, quite regularly produced in the Collector's Court, and which, if believed, was quite sufficient to support a decree for enhancement, has been set aside by the Judge on grounds wholly untenable.

The plaintiff sought to enhance on the ground that the defendant held lands of the description specified at rates lower than those paid by ryots of a similar description for similar lands in the neighbourhood.

In order to inquire what was the description of the land, and what the rates were which were paid in the neighbourhood by ryots of a similar description for similar lands, the Deputy Collector deputed an Ameen to make a local enquiry. The Ameen held an investigation, took the evidence, and made a report of his proceedings. That report and that evidence have been summarily rejected by the Judge, who says

that to depute an Ameen in such cases is not warranted by law. He observes, "to "depute an Ameen to examine witnesses re- "lative to enhancement sought under Clause "1 of Section 17 is to adopt a course of pro- "cedure not authorized by law; when facts "can be elicited by evidence, that evidence "should be heard by the Court itself, and "not by an Ameen."

And the Judge, referring to this alleged irregularity on the part of the Deputy Collector, has called upon him, through the Collector of the District, to account for his conduct. Now, it is quite clear that Section 180 of the Code of Civil Procedure (which is extended to cases under Act X. by Section 73 of that Act) allows the widest discretion to Courts of first instance with regard to making local investigations in suits on judicial proceedings.

We think that, in many suits of this description, local enquiry is a very convenient mode of ascertaining the truth of the case. Whether it is so or not, the Court has full discretion in the matter, and it was not proper for the Lower Appellate Court to censure the Deputy Collector for doing that which the law allows him to do, and to call upon him for an explanation of his conduct.

It is contended for the respondent that the Judge has found as to the matter of rates, and that this Court could not interfere in special appeal with such finding. But considering that the Judge has set aside the Ameen's report, and declares that the evidence is not sufficient for the reasons given, we should have felt it our duty to remand the case for a fresh finding upon that report and upon that evidence, giving our reasons for disturbing the Judge's judgment.

But the truth is, that we must dispose of the case on other grounds.

The plaintiff, instead of proceeding in the regular way by notice in a suit to enhance, has thought proper to sue for a kubooleut at an enhanced rate; and by a recent ruling of a Full Bench of this Court, it has been laid down that, when a plaintiff brings a suit of this description, unless he can succeed in showing that he is entitled to the specific rent mentioned in the kubooleut, his suit must fail.

For this reason, the present suit ought to have been dismissed in the Court below, and for the same reason the special appeal is now dismissed with costs.

The 11th June 1868.

Present:

The Hon'ble L. S. Jackson and Dwarkanath Mitter, *Judges.*

Minor's right of action—Section 11, Act XIV., 1859.

Case No. 2294 of 1867.

Special Appeal from a decision passed by the Judicial Commissioner of Chota Nagpore, dated the 14th June 1867, affirming a decision passed by the Deputy Commissioner of that District, dated the 7th December 1866.

Sree Pershad (Plaintiff), *Appellant,*

versus

Rajgooroo Treeumbuknath Deo and others (Defendants), *Respondents.*

Baboo Poorno Chunder Shome for Appellant.

Baboo Romesh Chunder Mitter for Respondents.

By Section 11, Act XIV., 1859, a person who is under legal disability when his right of action accrues has not a shorter period allowed him for suing than other parties; but has in addition three years from date of attaining majority.

Jackson, J.—In this case there is manifestly an oversight on the part of the Lower Appellate Court, which has held the plaintiff to be barred by limitation in consequence of his having failed to bring his suit within three years of the date on which he attained his majority. The suit was one to obtain possession of half the village of Duttoah, and was, therefore, one for immoveable property. The period of limitation for such suits is 12 years.

Section 11 of Act XIV. of 1859 says: "If, at the time when the right to bring an "action first accrues, the person to whom "the right accrues is under a legal disabili- "ty, the action may be brought by such "person or his representative within the "same time after the disability shall have "ceased as would otherwise have been "allowed from the time when the cause of "action accrued, unless such time shall ex- "ceed the period of three years, in which "case the suit shall be commenced within "three years from the time when the dis- "ability ceased."

It is, therefore, clear that a person who was under legal disability when his right accrued has not a shorter period allowed him for suing than other parties. On the other hand, he has, in addition, three years from date of attaining majority. This suit was commenced

within the twelve years, and is, therefore, clearly within the time prescribed by the Law of Limitation. The decisions of the Lower Appellate Court and of the Court of first instance are set aside, and the case remanded for trial. The costs of these proceedings are to be costs in the cause.

The 11th June 1868.

Present:

The Hon'ble F. B. Kemp and E. Jackson, *Judges.*

Contributors to a loan—Shares in amount recovered.

Case No. 2980 of 1867.

Special Appeal from a decision passed by the Judge of Mymensingh, dated the 22nd August 1867, affirming a decision passed by the Principal Sudder Ameen of that District, dated the 22nd October 1866.

Radha Churn Dey and others (Plaintiffs), *Appellants,*

versus

Muddun Mohun Paul (Defendant), *Respondent.*

Baboos Rash Beharee Ghose and *Umbica Churn Banerjee* for Appellants.

Baboos Mohinee Mohun Roy and *Kishen Dyal Roy* for Respondent.

If *A* and *B* contribute in shares to lend money to *C* in *B*'s name, and *B* recovers some of it, *A* is entitled to a share of what is recovered, whether *C* knows he had joined in the transaction or not; and *B*, in suing, must be held to be suing for all the lenders, and what he realizes belongs to both.

Jackson, J.—We think that the Judge has decided on an erroneous line of argument.

The plaintiff alleged that his father had joined the defendant's father in giving a loan to certain third parties some thirty years ago; that the bond was drawn out in defendant's name only; and that the defendant has latterly realized a portion of this loan by suit and execution of decree in the Civil Court, but will not give the plaintiff any share of the money he has realized. Plaintiff, therefore, sues to obtain a share in proportion to the amount his father lent.

The first Court disbelieved the joint-character of the transaction, and held the suit barred by limitation. The Judge, on appeal, rejected the plea of limitation, but dismissed the suit, because it was not shown that defendant brought his suit as agent for plaintiff, or that the borrower knew that the plaintiff lent a share of the money.

We think these facts are immaterial. If plaintiff and defendant contributed in shares to lend a third person money in defendant's name, and defendant has recovered some of it, plaintiff is entitled to a share of it, whether the third party knew he had joined in the transaction or not, and the defendant, in suing, must, under such circumstances, be held to be suing for all the lenders, and what he realizes will belong to both.

The Judge's decision is reversed. The case is remanded in order that a clear decision may be recorded on the evidence, whether the plaintiff's allegation of the joint-loan is true and correct, and what amount he is entitled to recover. Plaintiff must prove, not only the fact of the original loan, but also what he had received and what remains due to him, and whether, looking to all such facts, he is entitled to a share of what has been recovered.

The 11th June 1868.

Present:

The Hon'ble H. V. Bayley and A. G. Macpherson, *Judges.*

Multifariousness—Legitimacy under Mahomedan law.

Case No. 262 of 1867.

Regular Appeal from a decision passed by the Principal Sudder Ameen of Gya, dated the 10th June 1867.

Nujmooddeen Ahmed (one of the Defendants), *Appellant,*

versus

Beebee Zuhoorun and others (Plaintiffs), and others (Defendants), *Respondents.*

The Advocate-General and *Messrs. G.* and *C. Gregory* for Appellant.

Messrs. A. T. T. Peterson, R. T. Allan, and *R. E. Twidale* for Respondents.

In a case in which several causes of action had been joined together, which should not have been included in one plaint, the High Court in appeal declined to dismiss the suit on that account as it had been fully tried below, and there would be no object now in dismissing it.

According to Mahomedan law, the acknowledgment of the father renders the son a legitimate son and heir, whether the mother was or was not lawfully married to the father.

Macpherson, J.—THIS is a suit brought by the plaintiffs Zohrun and Begum, two of the widows of the late Syud Koorshed Ali. There is a third plaintiff, Zuhoorun, who is alleged to have a share in whatever the other plaintiffs may be found to be entitled to.

The object of the suit is three-fold—

1st.—To have it declared that the defendant, Nujmooddeen Ahmed, is not a son of Koorshed Ali, and that the plaintiffs, Zohrun and Begum, together with the defendant Tyebun, who is another widow, and the defendant Usmut, who is a sister of Koorshed Ali, are his only heiresses and representatives, and as such entitled to take his whole estate;

2nd.—To have it declared that a certain mokurruree lease, a ticca lease, and certain properties standing in the name of the defendant Nujmooddeen, belonged, *not* to Nujmooddeen alone, but to the estate of Koorshed Ali; and

3rd.—To have it declared that the plaintiff Zohrun is entitled to a dowry of 40,000 rupees and one goldmohur, and the plaintiff Begum to a dowry of 14,000 rupees and one goldmohur, payable to them out of Koorshed Ali's estate—as *moowujjul* or deferred dowry.

The general case for the defendant Nujmooddeen is, that he is the only son and principal heir of Koorshed Ali; that the mokurruree lease in question was granted to him, Nujmooddeen, for his own use and benefit by Koorshed Ali; that the ticca lease and other properties referred to in the plaint were acquired by Nujmooddeen with his own funds, and never belonged to Koorshed Ali; that the statements as to dower contained in the plaint are untrue, the dower of Zohrun and Begum having been only 500 *dirhems* each; and that this dower, such as it was, was relinquished by them to Koorshed Ali before he died.

The defendants Tyebun and Usmut substantially admit and support the plaintiffs' case.

The Lower Court has given a decree in favor of the plaintiffs, finding against the defendant Nujmooddeen on all contested points, save as to the ticca lease and certain property which is found to have been acquired by Nujmooddeen with his own funds.

When the appeal came on for hearing, the first objection taken by the Advocate-General, who appeared for the appellant, Nujmooddeen, was that the suit is multifarious, and should, therefore, be dismissed. While of opinion that the several causes of action which have been joined together in this suit should not have been all included in one plaint, we declined to dismiss the suit on that account, the case having, in fact, been fully tried below upon all the questions in issue between the parties, and there being, therefore, no object now to be gained by dismissing the suit, and making them go through the whole case again in a different form. But we directed that the appeal upon each separate cause of action should be argued separately, that is to say, that we should hear Counsel first upon the issue as to whether Nujmooddeen is or is not, according to Mahomedan law, the only son and heir of Koorshed Ali; then upon the issue as to the right to the mokurruree lease and to the ticca lease and other property standing in the name of Nujmooddeen; and finally upon the issue as to the dower of Rupees 40,000 claimed by the plaintiff Zohrun, and the dower of Rupees 14,000 clamed by Begum.

The appeal having been argued in the manner indicated, we shall dispose of each issue separately.

It appears to us that the appellant Nujmooddeen has proved that he is the only son and an heir, according to Mahomedan law, of Koorshed Ali. The evidence shows that Nujmooddeen is the son of Koorshed Ali by Shurf, a dancing girl of loose character; that Koorshed Ali, subsequently to the birth of Nujmooddeen, constantly visited and sometimes lived with Shurf, although he never lived regularly with her as a man usually lives with a woman who is his wife, and never called her or represented her to be his wife; that after Nujmooddeen's birth, Shurf continued to be a dancing girl, but lived in a house built for her by Koorshed Ali; that Nujmooddeen was, from a very early age (four or five years of age), taken up entirely by Koorshed Ali, with whom he from that time always lived, and who educated him and called him his son, and always treated him as his son, and gave him in marriage as such; and that Koorshed Ali frequently, both verbally and in writing, acknowledged Nujmooddeen to be his son, and, in fact, believed and died in the belief that he was his son.

Under such circumstances, Nujmooddeen was, according to Mahomedan law, the legitimate son of Koorshed Ali : for (as was decided in the case of Oomda Beebee *versus* Jonab Ali, 3 Weekly Reporter, page 132) the acknowledgment of the father renders the son a legitimate child and heir, unless it is impossible for the son (by acknowledgment) to have been really the son.

That Nujmooddeen was acknowledged by Koorshed Ali to be his son, and treated invariably as such, is, we think, proved by the witnesses called by the plaintiffs themselves, independently of all the evidence to the same effect given on behalf of the defendant. The Lower Court seems to have taken substantially the same view of the facts as we take. But the Principal Sudder Ameen was wrong in the issue he fixed, and in the view he took of the point of Mahomedan law involved.

The issue fixed by him was whether Nujmooddeen was a son born of the loins of Koorshed Ali by a woman *lawfull ymarried to him;* and throughout his judgment it is evident that the Principal Sudder Ameen considered that Nujmooddeen could not be a legitimate son and heir of Koorshed Ali, *unless his mother had been lawfully married* to Koorshed Ali. It is for that reason only that he considered that, although Nujmooddeen had been brought up and acknowledged as his son by Koorshed Ali, he could not, by Mahomedan law, be looked upon as a legitimate son. There is no doubt the Principal Sudder Ameen is quite wrong in this, and that, as it is quite possible, not to say most probable, that Koorshed Ali was in fact. Nujmooddeen's father, his acknowledging him to be his son, as he did, makes him his legitimate son, and an heir, whether the mother was or was not lawfully married to Koorshed Ali—(see Baillie's Mahomedan Law, pp. 404, 405, and 411 ; Oomda Beebee's case, 3 Weekly Reporter 132 ; and the case of Ashruffoodowlah in the Privy Council, 7 Weekly Reporter, Privy Council, 1).

The 11th June 1868.

Present:

The Hon'ble F. B. Kemp and E. Jackson, *Judges.*

Suit for declaratory decree—Section 15, Act VIII., 1859.

Case No. 3022 of 1867.

Special Appeal from a decision passed by the Judge of Rungpore, dated the 12th August 1867, affirming a decision passed by the Principal Sudder Ameen of that District, dated the 15th April 1867.

Oomur Sulima Bibee and another (two of the Defendants), *Appellants,*

versus

Luckhee Prea Dabee (Plaintiff), *Respondent.*

Mr. C. Gregory and *Baboo Kishen Succa Mookerjee* for Appellants.

Baboos Sreenath Dass and *Ashootosh Chatterjee* for Respondent.

Suits by the guardian of a minor having a farming lease which had nine years to run, to obtain a declaratory decree that certain pottahs put forth by defendants to protect themselves from enhancement of rent were spurious and calculated to injure the future interests of the minor, were held to be premature, and could not lie under Section 15, Act VIII., 1859.

Kemp, J.—THESE are three special appeals, and it is admitted that one decision governs the three appeals.

The suits were to obtain a declaratory decree that certain pottahs put forth by the defendants were forged and calculated to injure the future interests of the minor whom the plaintiff, as guardian, represents in these suits.

It is admitted that the plaintiff's estate is a farming lease, and that the term of that lease has yet nine years to run. In the suits which the plaintiff's lessor brought to enhance the rent of the defendants' tenure, the defendants pleaded an istumraree mokurruree holding, and filed their pottahs to support their claim to protection from enhancement. It is said that the plaintiff's lessor, in collusion with the defendants, admitted the pottahs, and allowed his suits for enhancement to be compromised.

Both the Lower Courts have pronounced the pottahs to be spurious.

In special appeal it is contended that the plaintiff's suit is premature, and that it will not lie under the provisions of Section 15, Act VIII., 1859.

We think this contention is good. The plaintiff is not injured in her rights, nor is

the minor injured by these pottahs being put forward by the defendants. The plaintiff, as guardian of the minor, or the minor, if he is of age when the lease terminates, will be at liberty to sue the defendants for enhancement, and in a suit of that description the whole question, *viz.*, the right to enhance and the *bona fides* of the pottahs can be tried.

We reverse the decision of the Lower Appellate Court, and decree this appeal with costs and interest.

The 11th June 1868.

Present:

The Hon'ble J. B. Phear and C. Hobhouse, *Judges.*

Land taken for public purposes—Party in possession—Onus probandi.

Case No. 2852 of 1867.

Special Appeal from a decision passed by the Judge of the 24 Pergunnahs, dated the 17th August 1867, affirming a decision passed by the Principal Sudder Ameen of that District, dated the 23rd February 1867.

Chundee Churn Chatterjee (one of the Defendants), *Appellant,*

versus

Bidoo Budden Banerjee (Plaintiff), *Respondent.*

Baboo Debendro Narain Bose for Appellant.

Baboos Unnoda Pershad Banerjee and *Kalee Prosunno Dutt* for Respondent.

When the Railway Company takes land for public purposes, the party in possession at the time is *primâ facie* entitled to the money paid for it until some one else establishes a prior claim.

Phear, J.—We see no objection in law to the judgment of the Lower Appellate Court. That Court found upon the evidence before it that the plaintiff was in possession of the land at the time that the Railway Company took it for public purposes, and also negatived the allegation of the appealing defendant that he was in possession at that time. If the plaintiff was in possession of the land at the time it was taken, he was *primâ facie* entitled to the money which was paid for it by the Railway Company, until some one else showed that he had a prior claim. In the present suit, the contest is between the plaintiff and the defendant upon this point, and the *onus* lay upon the defendant to show that he was entitled to the money paid for the land in preference to the person, namely the plaintiff, whom the Court found to be in the possession and enjoyment of it. The Lower Appellate Court has distinctly found also on the evidence before it that the defendant has not made out the title which he sets up to the property, and we think that, on those two findings of fact it remained only for the Judge to give a decree in favor of the plaintiff. This the Judge has done, and none of the written grounds of special appeal have been made out, so as to afford reason for interfering with the judgment of the Lower Appellate Court. We dismiss the appeal with costs.

The 11th June 1868.

Present:

The Hon'ble L. S. Jackson and Dwarkanath Mitter, *Judges.*

Survey-award—Limitation.

Case No. 2290 of 1867.

Special Appeal from a decision passed by the Judge of Sylhet, dated the 27th June 1867, reversing a decision passed by the Officiating Principal Sudder Ameen of that District, dated the 19th March 1867.

Toolsee Ram Doss and others (Plaintiffs), *Appellants,*

versus

Mahomed Afzul *alias* Mahomed Mirza and others (Defendants), *Respondents.*

Baboo Gopal Lall Mitter for Appellants.

Baboos Kishen Kishore Ghose and *Debendro Narain Bose* for Respondents.

Where a survey-award relates to land belonging to parties whose rights and interests are distinct and separate, and one of the parties appeals against the award, limitation runs against the other party, not from the date of such appeal, but from the date of the survey-award.

Jackson, J.—This is a suit to set aside a survey-award, and obtain a declaration of right, that is, confirmation of possession, in the land comprised in that award. It appears that the land affected by the award belonged to a variety of parties, one of whom was Kisto Chunder, another Byragee Doss, and there were other parties who were his co-parceners. Kisto Chunder, one of those who were affected, appealed against the survey-award, but Byragee Doss did not so appeal. The present suit, however, is on the part of Byragee Doss and his co-sharers. The Lower Appellate Court has held that the suit is barred, because it

was not brought within three years of the date of the final award against them. They maintain that, the suit having been brought within three years of the decision on the appeal of Kisto Chunder Doss, it is not barred by the Law of Limitation. It appears to us, however, that they are not entitled to the benefit of Kisto Chunder's appeal. His rights and those of the present plaintiff's were distinct and separate. * * *

* * * * * * *

* * * * * * *

The 11th June 1868.

Present:

The Hon'ble J. B. Phear and C. Hobhouse, *Judges.*

Jurisdiction—Suit against a zemindar and others —Plaint disclosing no cause of action.

Case No. 2854 of 1867 under Act X. of 1859.

Special Appeal from a decision passed by the Officiating Additional Judge of Nuddea, dated the 28th August 1867, affirming a decision passed by the Assistant Collector of that District, dated the 20th May 1867.

Sreekant Roy Chowdhry (Defendant), *Appellant,*

versus

Kitabooddeen Sirdar and others (Plaintiffs), *Respondents.*

Baboo Anund Chunder Ghossal for Appellant.

Baboo Motee Lall Mookerjee for Respondents.

A plaintiff claiming to be reinstated in the occupation of lands under Section 6, Act X., 1859, and desirous of joining others with the zemindar and obtain his remedy against them jointly, must bring his suit in the Civil Court.

Where a plaint discloses no cause of action so far as regards one of the plaintiffs in a case, no decree can be passed in favor of that plaintiff.

Phear, J.—It seems to us that this action has been entirely misconceived. Nominally, there are two plaintiffs, Kitabooddeen Sirdar and Chowdhry Bewa, and the suit is brought by them against the zemindar and two other defendants, claiming to be reinstated in the occupation of certain lands under the provisions of Clause 6, Section 23, Act X. of 1859. Now, Kitabooddeen Sirdar alone states the cause of action. He says that he has been the occupier of the lands, and so on. Nothing is said as to the manner in which Chowdhry Bewa is interested in the suit. Kitabooddeen Sirdar alone verifies the plaint. Chowdhry Bewa only put her name to it. Again, it is clear that, if the suit is founded upon a good cause of action under Clause 6, Section 23, it has been wrongly brought in the Court of the Collector as against all the defendants excepting the zemindar. If the plaintiffs desire to sue all the defendants together, and to obtain a remedy against them jointly, they ought to have sued in the Civil Court, and upon this point we need only refer to the cases reported in Volume III., Weekly Reporter, page 8, and Volume VI., Weekly Reporter, Act X. Rulings, page 19, for authority.

Irrespective, therefore, of the merits of the case, it seems to us clear that the Courts below have been wrong in giving a decree against all the defendants; but we think that there is a still greater infirmity in the decisions of these Courts due to a circumstance which we have already mentioned, namely, that one of the plaintiffs only has set up a cause of action, while the decree which has been given has, curiously enough, severed the plaintiffs, and been pronounced in favor of the second plaintiff *alone*, on whose part no cause of action at all was alleged. Objection on the score of misjoinder, or rather on the ground that the plaint disclosed no cause of action so far as regards the second plaintiff, was made in the Court of first instance. It was repeated in the Lower Appellate Court, and again it has been urged before us. In our opinion, it ought to be allowed to prevail. We think we should not be right in permitting a decree to be passed in favor of the second plaintiff on a plaint like this, after the defendant has done all that really lay in his power to avail himself of this substantial weakness, if we may so say, in his opponent's case, and had rightly pointed out at the earliest possible moment that she exhibited no cause of suit against him. We think that on this ground the plaintiff's suit ought to be dismissed. Therefore, the appeal should be decreed, and the decrees of both the Lower Courts reversed. The special appellant will have his costs in all the Courts.

It appears to me that this case affords an instance of great remissness on the part of the Deputy Collector. He ought not to have allowed a plaint to be filed by two joint plaintiffs, which not only did not disclose a community of interest between them in regard

to the subject of suit, but actually showed, if the statements made in it were accepted, that one of the plaintiffs had no right to sue at all. And we must add that it is matter of surprise to us that the Judge should have omitted to take notice of this very serious error.

The 11th June 1868.

Present:

The Hon'ble J. B. Phear and C. Hobhouse, *Judges.*

Documents not objected to in Lower Courts—Special appeal.

Case No. 1790 of 1867 under Act X. of 1859.

Special Appeal from a decision passed by the Officiating Additional Judge of Nuddea, dated the 7th June 1867, modifying a decision passed by the Deputy Collector of Chooadangah, dated the 26th July 1866.

Godayi Joardar (Defendant), *Appellant,*

versus

Mr. G. Mears (Plaintiff), *Respondent.*

Baboo Mohinee Mohun Roy for Appellant.

Mr. R. T. Allan and *Baboo Bhowannee Churn Dutt* for Respondent.

In a suit for enhancement of rent, where a plea advanced under Section 4, Act X., 1859, was set aside by the evidence of certain *jumma-wassil-bakee* and other papers which defendant did not object to in the Lower Courts, it was held that he could not be allowed to object to them in special appeal.

Phear, J.—THIS is a suit for arrears of rent at an enhanced rate. The Lower Appellate Court has expressed its opinion that the defendant would have been protected from enhancement upon the presumption directed to be made in certain cases according to the terms of Section 4, Act X. of 1859, had it not been for the evidence to the contrary of such presumption afforded by certain so-called *jumma-wassil-bakee* papers of 1204, and certain other partition-papers of the zemindar, dated in 1220. But on the evidence afforded by these two sets of papers, the Court has come to the conclusion that there has been a variation in the rent payable by the defendant in respect to the lands held by him, such as to deprive him of the benefit of the presumption under Section 4, and on this ground the Lower Appellate has given a decision in favor of the plaintiff.

It is now objected on special appeal that neither the papers of 1204, nor the papers of 1220, are any evidence against the defendant in this suit. Without expressing any opinion as to the value of these papers, or their admissibility as evidence had they been objected to at the proper time, we are of opinion that it is now too late for the special appellants to raise this objection. The Court of first instance took the same view of the matter of litigation as the Lower Appellate Court afterwards took, and it expressly discussed the evidence afforded by both these two sets of papers. It did more even than this, for during the pendency of the trial the Court of first instance pointed out to the defendant the difficulty which the papers of 1204 put in his way, and gave him the papers themselves to look over, asking him to give what explanation it might occur to him to give of the entries or rather the absence of entries in those papers It further afforded him a week's time for this purpose. The defendant did not then make any objection on the score that these papers were no evidence against him, but on the contrary he accepted the challenge, so to speak, and at the end of the week admitted himself unable to give the explanation required, making no sort of objection to the use of these papers against him. After this, on appeal to the Lower Appellate Court brought by himself, he again made no objection to the admissibility of either of these classes of papers as evidence against him, and in that Court, as well as in the first Court, the contest seems to have been founded mainly upon them. The judgment of the Lower Appellate Court goes in considerable detail into the contents of these papers, and it is clear that they had been matter of argument in the trial of the appeal before it. Under these circumstances, we think that whatever may be the merit, as matter of law, of the objection which is now taken by the advocate of the special appellant, we ought not now to give him the opportunity of objecting to the judgment of the Lower Appellate Court on the ground that it had taken this evidence into its consideration. For this reason, and for this reason only, we think that the special appeal must be dismissed with costs.

The 11th June 1868.

Present:

The Hon'ble L. S. Jackson and Dwarkanath Mitter, *Judges.*

Survey-award—Limitation—Clause 6, Section 1, Act XIV., 1859.

Case No. 2287 of 1867.

Special Appeal from a decision passed by the Judge of Sylhet, dated the 1st August 1867, reversing a decision passed by the Officiating Principal Sudder Ameen of that District, dated the 19th March 1867.

Kishen Chunder Dass and others (Plaintiffs), *Appellants,*

versus

Mahomed Afzul *alias* Mahomed Mirza and others Defendants, *Respondents.*

Baboos Gopal Lall Mitter and *Chunder Madhub Ghose* for Appellants.

Baboos Juggodanund Mookerjee, Sreenath Doss, and *Debendro Narain Bose* for Respondents.

Where an award by a Survey Deputy Collector, confirmed by the Superintendent of Survey, is appealed successively to the Commissioner and the Board of Revenue, both of whom decline to go into the merits of the case, a suit to contest the justice of the award and obtain a declaration of title may be brought within three years (Clause 6, Section 1, Act XIV., 1859), from the date, not of the Deputy Collector's award, but of the order of the Board of Revenue.

Jackson, J.—THE question raised before us is whether, in a case of award by a Survey Deputy Collector, and confirmed by the Superintendent of Survey, an appeal having been made successively to the Commissioner and Board of Revenue, both of whom declined to go into the merits of the case, whether under such circumstances the three years within which a suit may be brought to get rid of the award is to be calculated from the date of the survey-officer's award, or that of the final decision. The Judge has held that, because the Commissioner and the Board of Revenue had summarily thrown out the appeal, the only real award was that made by the survey-officer, and that the plaintiff was, therefore, bound to sue within three years from the date of that award.

On this point, the special respondent has not addressed any arguments to the Court, and has left the question in our hands. We think that there can be no doubt about it. This being a suit brought for the purpose of contesting the justice of an award made by the survey-authorities, and also for the purpose of obtaining a declaration of the title of the party concerned, the period of limitation is to run* for three years from date of the final award or order in the case. There can be no doubt whatever that the final order is that of the Board of Revenue. The law admits an appeal successively from the award of a survey-officer to his immediate superiors, and to the Commissioner and the Board of Revenue; and the fact that the Board summarily dismissed the appeal without entering into the merits of the case does not make it the less a final order. In our opinion, then, the suit, being brought within three years from the date of that order, was within time.

* Clause 6, Section 1, Act XIV. of 1859.

The 12th June 1868.

Present:

The Hon'ble F. B. Kemp and E. Jackson, *Judges.*

Jurisdiction — Suit by zemindar against naib or gomastah — Section 24, Act X., 1859.

Case No. 2923 of 1867.

Special Appeal from a decision passed by the Judge of Hooghly, dated the 5th August 1867, reversing a decision passed by the Sudder Ameen of that District, dated the 11th April 1867.

Kaleenath Ghossal (Plaintiff), *Appellant,*

versus

Chundee Churn Sircar and others (Defendants), *Respondents.*

Baboo Peary Mohun Mookerjee for Appellant.

Baboo Nil Madhub Sein for Respondents.

The suit of a zemindar against a naib or a gomastah for papers, accounts, and moneys collected, is not cognizable in the Civil Court, but by the Collector.

Kemp, J.—THE ground taken in this special appeal is that the Judge was wrong in holding that the suit of the plaintiff, who is the special appellant before us, is not cognizable in the Civil Court.

It appears that the plaintiff sued Chundee Churn Sircar and Mohesh Chunder Ghossal in the Civil Court for papers and accounts, as also for certain moneys alleged to have been collected, but not accounted for.

The Court of first instance laid down four issues, one in bar of the suit, *viz.*, whether it was cognizable or not by the Civil Court.

The three issues on the merits involved the question of the respective liabilities of the two defendants.

The Court of first instance held that the suit was cognizable. On the merits the Court found that the defendant Mohesh Chunder had failed to prove that the defendant Chundee Churn, in his capacity of naib of the plaintiff, and during his incumbency in such office, had received from him the papers, accounts, and money collected. The Sudder Ameen appears also to have mistrusted the genuineness of the acquittance filed by Mohesh Chunder, which he alleged he had received from Chundee Churn in his capacity of naib.

The suit was decreed against the defendant Mohesh Chunder alone. On appeal by Mohesh Chunder, the Judge observed "that previous to the institution of the "present suit, plaintiff had instituted pro-"ceedings in the Collector's Court against "the defendant Mohesh Chunder, to recover "the same papers and alleged balance, and "the defendant pleading that he had made "over the papers and balance to Chundee "Churn, and filing an acquittance to that "effect, the case was dismissed. The plaint-"iff has now come into the Civil Court to ob-"tain redress." "In my opinion," observes the Judge, "this suit is not cognizable by "the Civil Court. It is not denied that "Mohesh Chunder stood in the relationship "of gomastah to the plaintiff, and in "that capacity kept the accounts and re-"ceived the rents of the land in plaintiff's "behalf. Section 24, Act X. of 1859, ex-"pressly provides for suits of this descrip-"tion, and states that suits against agents "employed by zemindars in the manage-"ment of land on collections of rent, &c., "shall be cognizable by the Collector, and "not by any other Court, except in the way "of appeal."

The Judge for the above reasons held that as against the defendant Mohesh Chunder, the only course open to plaintiff, with respect to the allegations in the plaint, was to institute proceedings under Section 24, Act X. of 1859; he did this and failed, and he cannot now come to the Civil Court for redress upon similar grounds. The suit of the plaintiff was dismissed.

We are of opinion that the decision of the Judge is correct. The plaintiff sued the special respondent Mohesh Chunder in the Collector's Court, on the allegation that he was the naib of the plaintiff's estate. The Collector found that Mohesh Chunder "had "done no act which would place him in the "position of naib." The Collector further found "that the acquittance which the "defendant Mohesh Chunder filed in his "capacity of gomastah had been duly verified "by witnesses, and that it was clear from the "terms of this acquittance that Mohesh "Chunder, was a gomastah and not a naib." The liability of Mohesh Chunder as naib not being established, he was absolved from plaintiff's claim.

The plaintiff now sues the same defendant, Mohesh Chunder, in the Civil Court, joining Chundee Churn as co-defendant. Such a suit is not cognizable by the Civil Court; for whether Mohesh Chunder be a naib or a gomastah (as it has been decided by the Collector that he served in the latter capacity), he must be held to be an "agent" employed by the plaintiff in the collection of rents, and, as such, he has discharged himself of all liability by producing the acquittance of his superior, the naib Chundee Churn, which the Collector has substantially found to be proved. The suit of the plaintiff as against Mohesh Chunder, an agent, has been properly dismissed as not cognizable by the Civil Court, but by the Collector, who has already tried and dismissed it. The plaintiff may or may not have his remedy against Chundee Churn under Section 24, Act X. of 1859, although he did not make him a party to the first suit brought by him in the collectorate.

We dismiss this special appeal with costs and interest.

The 12th June 1868.

Present:

The Hon'ble H. V. Bayley and A. G. Macpherson, *Judges.*

Ejectment — Intervenor — Onus probandi.

Case No. 2526 of 1867.

Special Appeal from a decision passed by the Principal Sudder Ameen of Gya, dated the 22nd June 1867, affirming a decision passed by the Sudder Moonsiff of that District, dated the 8th December 1866.

Juggodanund Misser (Plaintiff), *Appellant,*

versus

Hamid Russool and others (Defendants), *Respondents.*

d

Baboo Nil Madhub Sein for Appellant.

Baboo Romesh Chunder Mitter for Respondents.

In a suit to recover possession of certain property from plaintiff's vendor (who did not substantially resist the claim), a third party, who came in and claimed the property, was made a defendant. It was held that the *onus* of proof as against the plaintiff lay entirely on the intervenor.

Macpherson, J.—THE plaintiff in this case sues to recover possession of certain property from Hamid Russool, from whom he alleges that he purchased it.

Hamid Russool appeared in the Court of first instance, but has not substantially resisted the plaintiff's claim. But Banee Khanum, his mother, has come forward, and claimed the property as her own, contending that Hamid Russool has no interest in it, and therefore could not pass any title in it.

We think it much to be regretted that Banee Khanum was made a defendant in this way. The plaintiff sought no relief as against Banee Khanum, and could not have obtained any decree which would have been binding upon her. Coming in as she does, her presence greatly complicates the case, and very unnecessarily. Having been admitted as a defendant, she must remain there. But the fact of her having caused herself to be introduced as a defendant must not change the *onus* of proof so far as she is concerned, and, in our opinion, the *onus*, as against the plaintiff, is entirely on her, and not on the plaintiff, since the latter has proved his purchase from Hamid Russool.

In special appeal, it is contended that the Lower Court has wrongly received a certain decree of February 26th, 1863 (which was subsequent to the plaintiff's purchase from Hamid Russool), as evidence against the plaintiff.

We think this objection good, for, as the plaintiff was no party to the suit, the decree was no evidence against him.

Then it is contended that the Lower Court is wrong in the construction it puts on the terms of the kobalahs, under which Banee Khanum purchased. In them, she is described as "mother of the minor" Hamid Russool. We altogether differ from the Principal Sudder Ameen in thinking that this does not show that she was purchasing, not on her own behalf, but on behalf merely of her minor son Hamid Russool. We think that the use of this designation is the strongest possible evidence that the purchases were made by her in her capacity of mother and guardian.

We think there has been a substantial error in law in the trial of this case by the Lower Appellate Court, and we remand it for re-trial with reference to the above remarks. In trying it, the Principal Sudder Ameen will bear in mind that the whole *onus* is on the intervenor Banee Khanum, who must prove distinctly that she purchased for herself, and not in her capacity of mother and guardian of Hamid Russool.

The 12th June 1868.

Present:

The Hon'ble G. Loch and F. A. Glover, *Judges.*

Pre-emption—Conditional decree.

Case No. 150 of 1868.

Miscellaneous Appeal from an order passed by the Judge of Sylhet, dated the 31st December 1867, affirming an order passed by the Moonsiff of that District, dated the 11th November 1867.

Syud Ahsan Ali (Judgment-debtor), *Appellant,*

versus

Sabokee Beebee (Decree-holder), *Respondent.*

Baboos Gopal Lall Mitter and *Greesh Chunder Ghose* for Appellant.

Moulvie Syud Murhamut Hossein for Respondent.

In decreeing a right of pre-emption, a Civil Court has no power to make the decree-holder's right to depend on payment of the purchase-money within a specified time.

Glover, J.—IN this case, one Sabokee Beebee obtained a decree affirming her right of pre-emption to certain lands in possession of the defendant.

The words of the decree were that the decree-holder should be entitled to take possession of the lands on paying Rupees 200, either within two months of the date of the decree, or within one month after the judgment on appeal, should the case be appealed.

The case *was* appealed, and again decided in her favor; and one month and eight days after that decision, she tendered the 200 rupees, and took out execution of her decree.

She was opposed by the judgment-debtor, on the ground that she had not tendered the purchase-money within the time specified in the decree.

Both Lower Courts decided in favor of the decree-holder, and the judgment-debtor now appeals specially on the same ground as that taken below.

We think that the Judge was right. A right of pre-emption once established and decreed cannot be annulled by non-payment of the purchase-money within a time specified by the Court making the decree. That Court had no jurisdiction to make such an order, or to annul the rule of Mahomedan law, by adding to it a proviso, which might have been incapable of execution.

It is not incumbent on a pre-emptor to produce the price at the time of making his claim; and "even after the decree has been pronounced, if he should delay to deliver the price after he has been directed to deliver it, his right is not cancelled, and this, without any difference of opinion." (*Vide* Baillie's Mahomedan Law, Chapter IV., page 489.)

It appears to us, therefore, that the decree-holder was able to enforce her claim at any time within the period allowed by law for the execution of decrees.

The special appeal is dismissed with costs.

The 12th June 1868.

Present:

The Hon'ble J. B. Phear and C. Hobhouse, *Judges.*

Third parties in rent-suits—Section 77, Act X., 1859.

Case No. 184 of 1867 under Act X. of 1859.

Regular Appeal from a decision passed by the Deputy Collector of Backergunge, dated the 22nd April 1867.

Doorga Narain Roy Chowdhry (Plaintiff), *Appellant,*

versus

Kishen Mohun Doss and others (Defendants), *Respondents.*

Baboo Onookool Chunder Mookerjee for Appellant.

Baboos Sreenath Doss and *Kalee Mohun Doss* for Respondents.

The procedure of the Revenue Courts does not admit of third parties being introduced into the record, excepting under the circumstances prescribed by Section 77, Act X., 1859.

Phear, J.—We think that there has been a mis-trial of this case in the Court below, and that it must go back to be re-tried. In the first place, the two intervening defendants never ought to have been placed upon the record, because they did not come into Court making any claim under Section 77, Act X. of 1859, and the procedure of the Revenue Courts does not admit of third parties being introduced into the record, excepting under circumstances prescribed by that Section. These defendants must, therefore, be expunged from the record. This having been done, the case must be re-tried.

* * * * * *

The 13th June 1868.

Present:

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice,* and the Hon'ble C. Hobhouse, *Judge.*

Review—Pleaders—High Court.

Case No. 9 of 1868.

Application for review of judgment passed by the Hon'ble Sir Barnes Peacock, Kt., Chief Justice, and the Hon'ble C. Hobhouse, Judge, on the 18th of February 1868, in Miscellaneous Appeal No. 848 of 1866.

Messrs. Rousseau and another, Decree-holders (Appellants). *Petitioners,*

versus

Mr. Pinto, Judgment-debtor (Respondent), *Opposite Party.*

Mr. W. A. Montriou and *Baboo Chundernath Bose* for Petitioners.

Mr. G. C. Paul for Opposite Party.

Junior pleaders of the High Court should be cautious how they certify for a review, when they find that the case has been in the hands of members of the Bar and pleaders more experienced than they, who, they ought to consider, have declined to certify to the review.

Peacock, C.J.—I never heard an application for a review in which there were less grounds for granting it than the present. The Court has now been occupied nearly four hours upon an application to review a judgment based upon certificate, not of either of the learned Counsel who argued the case originally, but upon the certificate

of a very young gentleman who has certified to the Court that in his judgment there are good grounds for reviewing the judgment. * * * * * *

This case has been before the Court on several former occasions. It has been argued by able Counsel. The Court has bestowed much time in considering it, and has expressed its reasons fully on two occasions why it considered that the plaintiff was not entitled to possession.

If either of the learned Counsel who argued this case had really believed that the Court had formed an erroneous opinon, and that there were grounds for asking the Court to review its judgment, knowing what I do of both those learned Counsel, I am quite sure that they would not have shrunk from their duty in refusing to certify that there were good grounds for review. One of those learned Counsel has left the country, but the judgment was given in his presence, and there was ample time for him to certify before he left, if he had believed that there were good grounds for review. But even if the plaintiff had not made up his mind to apply for a review before that learned gentleman left the country, there was the vakeel, learned, able, and independent, who now sits beside the learned Counsel who has argued this case, and who would doubtless have certified if he had believed that the case was a proper one for a review.

Here, the learned Counsel, Mr. Montriou, stated that Baboo Juggodanund Mookerjee, the vakeel, had advised that there was a good ground for review. Baboo Juggodanund explained that he had told the plaintiff that there were no grounds.

The Chief Justice continued, I thought that I was right in what I was saying, and I was about to add that I had no doubt that the vakeel on the left of the learned Counsel, Baboo Juggodanund Mookerjee, had refused to certify, and therefore that the case had been carried to the young gentleman on the right who knew nothing about it, in order that he might give the necessary certificate. This is not the first occasion on which I have seen a similar course adopted. It frequently happens that when the Counsel who has argued the case refused to certify, the case is carried to a young and inexperienced vakeel, in order that, by his certificate, he may give the case a *locus standi* in the Court for a review. This young gentleman, no doubt, is inexperienced, but that would rather be a reason why he should not be allowed to practise than that he should give a certificate for a review, and cause the public time of the Court to be wasted when there was no foundation for it.

But the vakeel has not been satisfied with certifying that there were grounds of review by reason of the error of the Court; he has also certified to a ground which casts a very serious imputation on the Judicial Commissioner who tried this case. He says: "Your "Lordships have adverted to the neglect of "your petitioners to test the accuracy of "Captain Sherer's conclusions" (Captain Sherer was the Deputy Commissioner) "by "examination before the Judicial Commis-"sioner, but your petitioners are in a con-"dition to prove that they were checked and "restrained in their attempt to cross-examine "the Deputy Commissioner in a most un-"fair and irregular manner, and to which "restraint alone it is owing that they did "not efficiently avail themselves of their "lawful opportunity to cross-examine; and "your petitioner asserts that the Deputy "Commissioner has been perfectly misled; "he acted according to his belief but errone-"ously."

Not one title of evidence, either by affidavit or otherwise, has been laid before this Court in support of that ground for review, and how a vakeel could have been induced to certify to that effect without any evidence or affidavit I am at a loss to understand.

Having fully detailed the reasons of the Court in the judgment which is sought to be reviewed, I will not be a party to wasting the public time by reiterating the reasons upon which the judgment was based, but I will merely add that in the plaintiff's own plaint which was handed up to me to-day, he described the Choonsali Hills as being the eastern boundary of his grant. * *

* * * * * * *

* * * * * * *

I am always most anxious, when I commit a mistake, to be set right; and if I believed that in the present case I had fallen into an error, I should not have been ashamed to admit it, but I should have agreed entirely with Lord Hardwicke, who stated that "he "always considered it to be a greater reproach "to a Judge to continue in error than to re-"tract it." The argument which I have heard to-day has failed to convince me that I came to an erroneous conclusion on the first occasion. I know that I gave the case

all the care and all the attention which were in my power, and in delivering judgment I explained my reasons as clearly as I could in order that the plaintiff might be induced to refrain from further litigation.

This application for a review is refused with costs, and I trust that the young pleaders of this Court will for the future be cautious how they certify for a review when they find that the case has been in the hands of members of the bar and pleaders more experienced than they. When they find that the pleaders who have been engaged in the case have not certified, their suspicions at least should be aroused that the case is brought to them not on account of their greater or more extensive learning and experience, but because abler and more experienced persons who know that there are no grounds have refused to certify.

The 13th June 1868.

Present:

The Hon'ble H. V. Bayley and A. G. Macpherson, *Judges.*

Criminal verdict—Evidence in Civil case.

Case No. 2562 of 1867.

Special Appeal from a decision passed by the Principal Sudder Ameen of East Burdwan, dated the 25th June 1867, reversing a decision passed by the Sudder Ameen of that District, dated the 23rd July 1866.

Shumboo Chunder Chowdhry (Plaintiff), *Appellant,*

versus

Modhoo Kyburt and others (Defendants), *Respondents.*

Baboo Umbica Churn Banerjee for Appellant.

Baboo Ashootosh Dhur for Respondents.

A plea of guilty in the Criminal Court may, but a verdict of conviction cannot, be considered in evidence in a Civil case.

Bayley, J.—In this case, the ground of special appeal is that the decision of the Lower Appellate Court is wrong in not allowing the proceeding of a Criminal Court, recording the conviction of certain parties of assault to be evidence in a Civil case for damages. We are shown no authority to support this plea.

A plea of guilty in the Criminal Court might be considered in evidence, but not a verdict of conviction in the Criminal Court.

We accordingly dismiss this special appeal with costs.

The 13th June 1868.

Present:

The Hon'ble J. B. Phear and Dwarkanath Mitter, *Judges.*

Limitation—Merchant or Trader—Section 8, Act XIV., 1859—Action for debt on deposit of title-deeds.

Case No. 2934 of 1867.

Special Appeal from a decision passed by the Principal Sudder Ameen of the 24-Pergunnahs, dated the 30th July 1867, affirming a decision passed by the Sudder Ameen of that District, dated the 3rd October 1866.

Pearee Mohun Bose (Defendant), *Appellant.*

versus

Gobind Chunder Addy (Plaintiff). *Respondent.*

Baboos Umbica Churn Banerjee, Khetter Mohun Gangooly, Obhoy Churn Bose, and *Debendur Chunder Ghose* for Appellant.

Baboos Romesh Chunder Mitter and *Kalee Mohun Doss* for Respondent.

Re-paying a debt which one has contracted does not constitute a trafficking or dealing in the capacity of "merchant or trader" in the sense intended by Section 8, Act XIV., 1859.

Where a creditor sues to recover money advanced by him on the deposit of title-deeds of property, his claim is governed by the limitation applying to debts; but where he seeks to have his lien realized, it is a claim to realize an interest in land to which the limitation of 12 years applies.

Phear, J.—This is a suit brought to recover money which the plaintiff says he has lent to the defendant, and the evidence of the lending is the *hath-chitta* book, in which the several entries are made, and in which also appear entries of re-payment by the defendant. It was objected by the defendant that a portion at any rate of the plaintiff's claim was barred by the Act of Limitation, but both the Lower Courts overruled this plea, and gave a decision in favor of the plaintiff.

The defendant now appeals specially to this Court in reference to two of the items of the sum which is sought to be recovered.

and which the Lower Court has decreed that he must pay.

The first is an item of 500 rupees advanced to him by the plaintiff on the 4th of Cheyt 1268, accompanied by a deposit of the title-deeds of certain property; and the second is an item of 50 rupees advanced to him on the 29th of Bysack 1269. If the claim of the plaintiff to recover these two sums falls within the operation of Clause 9, Section 1 of the Limitation Act, then it is obvious that it is barred by the lapse of time. The plaintiff, however, urges that his claim does not come within the scope of that Section, but falls within Section 8, which says: "In suits "for balances of accounts current between "merchants and traders who have had "mutual dealings, the cause of action shall "be deemed to have arisen at, and the "period of limitation shall be computed from, "the close of the year in the accounts of "which there is the last item admitted or "proved, indicating the continuance of "mutual dealings, such year to be reckoned "as the same is reckoned in the accounts." And the Lower Appellate Court has adopted this view, and consequently held that the plaintiff's claim is saved.

We think, however, that this Section does not apply to the case. It cannot strictly be said that there were *mutual* dealings between the parties to this suit as merchants and traders. The plaintiff may have been acting as a trader or as a merchant in advancing the money, but all that was done by the defendant in the matter was to repay the debt which he had contracted, and it seems to us that this alone does not constitute on his part a trafficking or dealing in the capacity of merchant or trader. And in this view we think that we are entirely supported by the case which is reported in Volume 7, Weekly Reporter, 70, where the judgment was given at some length by the present Chief Justice.

It follows that, as regards the second of the two items, namely, the one for 50 rupees, the plaintiff's claim, as made in the plaint, is barred, because he sues to recover it simply as a debt on the contract itself. But as we understand the plaint, the case is somewhat different with regard to the other item. The plaintiff not only seeks to recover it as a debt due to him, but he also asks the Court to realize for him the lien upon the property which was created by the deposit of the title-deeds. As far as the plaintiff claims to recover this item of 500 rupees merely as a debt, it is in the same condition as the other item of 50 rupees, and the claim is barred; but, so far as he seeks to have his lien realized, we think that the claim is of a different nature. It is a claim to realize an interest in land, and for this a longer period, namely, 12 years, is prescribed by the Act. The plaintiff is, therefore, clearly within time as regards this.

We, therefore, are of opinion that the appeal must be decreed so far as concerns the plaintiff's claim for the item of 50 rupees, and also so far as concerns his claim to recover 500 rupees by execution against the defendant's person and goods generally. But we think that the appeal must be dismissed as regards the alternative remedy given by the Lower Appellate Court in respect of the 500 rupees, which must be treated as a decree for realization to the extent of 500 rupees, and interest thereon, of the plaintiff's lien upon the property which was covered by the title-deeds. Each party must pay his own costs.

The 15th June 1868.

Present:

The Hon'ble H. V. Bayley and A. G. Macpherson, *Judges.*

Remand—Sale of ancestral property—Legal necessity.

Case No. 4 of 1866.

Regular Appeal from a decision passed by the Principal Sudder Ameen of Cuttack, dated the 28th April 1865.

Brojo Kishore Gugendar Mohapattur and others (Plaintiffs), *Appellants,*

versus

Huree Kishen Doss and others (Defendants), *Respondents.*

Mr. R. E. Twidale for Appellants.

Babooos Onookool Chunder Mookerjee, Unnoda Pershad Banerjee, Romesh Chunder Mitter, and *Obhoy Chunder Bose* for Respondents.

The mere fact that sales of ancestral property took place in execution of decrees against the ancestor does not of itself show that the sales were for necessary or justifiable purposes.

Macpherson, J.—WHEN this case was heard by a Division Court on the 21st September 1867 (*coram* Seton-Karr and Macpherson, JJ.), the appeal was dismissed, save as to such alienations of the ancestral estate as were made by the appellant's grandfather within 12 years prior to the institution of the suit. But the Court framed an issue which it referred back to the Lower Court for trial, as to whether those excepted alienations were made for any necessity or justifying cause which would render them valid as against the plaintiff. The Lower Court has tried the issue which was referred to it, and has returned its finding thereon, together with the evidence. Its finding is that the alienations were not made under circumstances which render them good as against the plaintiff. The defendants who are affected by this result (Sadhoo Churn Adhikaree and Jugdanund Doss) have filed a memorandum of objection to it, which has been argued before us. The whole case having been disposed of at the original hearing, save with regard to the alienations as to which the further investigation was directed, we now dispose of the questions which remain for determination, without in any way touching or re-opening any part of the case which has already been disposed of.

The first objection taken to the finding of the Lower Court is, that it has gone far beyond the order of reference of the 21st September last. While that order (it is contended) limited the enquiry to certain specified quantities of land alienated by sales of the 9th of June 1852, 16th November 1852, 6th December 1852, and 4th July 1853, respectively, the Lower Court has extended the investigation to, and expressed its opinion upon, parcels of land other than the parcels specified. It is true that the referring order does mention the quantity of land, and does specify the four sales as having occurred within the 12 years, and as being sales the validity of which was to be enquired into. But we do not think that the plaintiff ought to be tied down to the sales and quantities mentioned in the order: for the order does not state that there are no other lands of which sales were made within the twelve years. And when the Lower Court finds, as a matter of fact, that there were other parcels of land, the alienation of which is of so recent a date that the plaintiff's suit as to them is not barred according to the principle upon which our order of the 21st September is based, it appears to us that the Court was right in not excluding these other parcels from his investigation. It is not alleged that the Principal Sudder Ameen has included any lands which had not been alienated within the twelve years.

Upon the merits, we think the finding of the Lower Court is right. There is no doubt that the mere fact that the sales in question took place in execution of two decrees against the grandfather does not itself show that the sales were for necessary or justifiable purposes. The decrees were obtained on the admission of the grandfather—certainly the decree of December 4th, 1844, was passed upon his confession—and there is no reliable evidence as to the necessity for the loans which the grandfather is said to have taken. The recitals in the bond which he executed are no evidence, as against the plaintiff, of the truth of the statements made in those recitals. Nor does the Collector's receipt for a sum, almost the same in amount as that mentioned in the bond, prove that the grandfather, in fact, borrowed the money in order to pay Government revenue; or that, if he did borrow it for that purpose, there was any necessity or good reason for his doing so.

The case of Luchmeedhur Singh *v.* Ekbal Ali, VIII. Weekly Reporter, page 75, has been relied on. But in that case it was proved that there was a large sum of money due from the father, and that the ancestral property had been mortgaged to secure that debt, and that the mortgage was on the eve of being foreclosed—and the sale (which it was the object of the suit to set aside) was in consideration of the payment of a large sum of money which was applied in paying off the mortgage-debt and various other debts, as to the fact of the existence of which there was no dispute. That case is very different from the present, in which it is, in our opinion, not proved that any *bonâ-fide* debt existed, or that the purchaser in any way brings himself within the rule which protects purchasers who act with due care and *bonâ fide*.

We think the finding of the Lower Court of the 31st January is right, and that the plaintiff is entitled to a decree for the ancestral property which the Principal Sudder Ameen finds was alienated within twelve years prior to the institution of the suit. The original decree of the Principal Sudder

Ameen of the 28th April 1866 must be amended accordingly, and so much of it as dismissed the plaintiff's suit as regards these particular parcels of land, must be reversed. The plaintiff is entitled to proportionate costs both in this Court and in the Court below: but the liability of the two defendants now before us (Sadhoo Churn Adhikaree or Gossain and Jugdanund Doss) for these costs will be only in proportion to the value of the lands to which the plaintiff is declared entitled as against them respectively, and the decree must be drawn up so as to show distinctly in respect of what parcels the defendant Sadhoo Churn is liable, and in respect of what other parcels the defendant Jugdanund is liable, for they are in no way jointly liable.

The 15th June 1868.

Present:

The Hon'ble J. B. Phear and C. Hobhouse, *Judges.*

Cause of action against agent—Section 20, Act X., 1859.

Case No. 2936 of 1867 under Act X. of 1859.

Special Appeal from a decision passed by the Additional Judge of Nuddea, dated the 17th August 1867, reversing a decision passed by the Deputy Collector of that District, dated the 18th March 1867.

Mr. R. T. Hills (Plaintiff), *Appellant,*

versus

Shokhee Monee Dossee and others (Defendants), *Respondents.*

Mr. J. S. Rochfort and *Baboo Bhowanee Churn Dutt* for Appellant.

Baboo Rash Beharee Ghose for Respondents.

A cause of action accruing against an agent for money received and accounts kept, falling within the class mentioned in Section 20, Act X., 1859, survives the death of the agent.

Phear, J.—We think this appeal must be decreed. The only question before us is whether a cause of action against an agent for money received and accounts kept falling within the class mentioned in Section 20, Act X. of 1859, survives the death of the agent, it having accrued during his lifetime. We think it does so survive, and therefore that the Judge of the Lower Appellate Court was wrong in dismissing the plaintiff's suit without going into the merits. His decision must be reversed, and the case must be remanded to the Lower Appellate Court to be re-tried upon the evidence upon the record. The special appellant must have his costs of this Court.

The 15th June 1868.

Present:

The Hon'ble G. Loch and F. A. Glover, *Judges.*

Limitation—Construction of High Court's rulings—Minor's jote—Relinquishment by guardian.

Case No. 2809 of 1867.

Special Appeal from a decision passed by the Judge of Moorshedabad, dated the 2nd August 1867, affirming a decision passed by the Moonsiff of that District, dated the 22nd May 1867.

Kedarnath Mookerjee (Plaintiff), *Appellant,*

versus

Muthooranath Dutt and others (Defendants), *Respondents.*

Baboo Kishen Succa Mookerjee for Appellant.

Baboo Mohinee Mohun Roy for Respondents.

The rulings of this Court which lay down that limitation, being a question bearing on jurisdiction, can be taken up at any stage of the proceedings, whether pleaded or not, refer to cases where the defect is patent on the record, not to those in which further investigation would be required to ascertain whether there was a defect or not.

To make a guardian's relinquishment of a hereditary jote binding on the minor, it must be shown that it was made for the minor's benefit.

Glover, J.—This was a suit to recover possession of a "mouroosee" jumma, from which the plaintiff, during his minority, had been dispossessed by the defendant.

The plaintiff's statement was, that his grandmother, who was his guardian, being unable to manage the jote, had made it over temporarily to one Chunder Seekhur in trust for him, and that Chunder Seekhur was turned out by the zemindar.

The defendants alleged that the plaintiff's grandmother relinquished the jote; and that they had held it, ever since that time, under a lease from the zemindar.

The Judge held that there had been a relinquishment of the jote by the grandmother, and that that relinquishment was binding on her grandson.

Both parties appeal against this decision; the defendant under Section 348 of the Code of Civil Procedure.

His contention is that the plaintiff is barred by limitation, inasmuch as he, not being a zemindar, attained majority at the age of 15, whereas this suit was not brought till the year 1273 B. S., when the plaintiff was 21 years old.

We have no hesitation in rejecting this cross-appeal. The objection was never before taken at any stage of the proceedings, and the plaintiff has now been most unfairly taken by surprise. The rulings of this Court which lay down that limitation, being a question bearing on jurisdiction, may be taken up at any time, whether pleaded or not, refer to cases where the defect is patent on the record, and not to those which would require further investigation to ascertain whether there was a defect or not.

The plaintiff appeals on the ground that his grandmother did not relinquish the jote, and that if she had done so, her act of relinquishment cannot bind him.

And it is contended on the other side that as the plaintiff failed to prove that Chunder Seekhur had been in possession as his trustee, and had been ousted by the defendants, the case should have stopped there, and that no adjudication on the question of relinquishment by the grandmother was necessary.

This last contention is, as it appears to me, unsound. It is not denied that the land in dispute formed the plaintiff's hereditary jote, and it was, therefore, immaterial to the issue whether or not Chunder Seekhur had been put in possession by the grandmother. The plaintiff being a minor at the time, would not be affected by Chunder Seekhur's possession, and his failure to prove that his grandmother had made over the land to that individual ought not to have injured his case.

But were it otherwise, as the Judge did not decide the case solely on this failure to prove Chunder Seekhur's possession, but adjudicated also on the defendant's pleas, the plaintiff would in any case be entitled to have the Judge's decision taken as a whole and to appeal against that part of it which made the act of his grandmother binding upon him.

The Judge in coming to this finding mainly relied upon a decision of this Court of the 3rd of July 1866, Muneeroodeen *versus* Mahomed Ali, 6 Weekly Reporter, 67, in which it is laid down that, "when a cultivating ryot goes away from the land which he has occupied, and neither cultivates nor pays rent for it, he has wholly relinquished the land." And he finds that as the plaintiff would have been bound by the act of his grandmother had she formally relinquished the jote, so he is equally bound under this precedent by her informal relinquishment.

No doubt that, in the case quoted, a ryot going away would altogether relinquish his land, but here the question is not whether or not the grandmother relinquished the jote, but whether her doing so binds her grandson. And I am not disposed to admit that it did so. The plaintiff was a minor at the time, and to make the relinquishment valid, it must be shown that it was for the minor's benefit so to make it. Nothing of this kind has been shown us, nor has the plea ever been raised. *Primâ facie*, to give up an hereditary jumma would be the reverse of beneficial to a minor.

I think, therefore, that we ought to reverse the decision of the Lower Appellate Court with costs, and decree that the plaintiff recover possession of his hereditary land from the defendant.

Loch, J.—I concur in the order.

The 16th June 1868.

Present:

The Hon'ble G. Loch and F. A. Glover, *Judges.*

Execution of High Court's decree—Interest.

Case No. 139 of 1868.

Miscellaneous Appeal from an order passed by the Principal Sudder Ameen of Moorshedabad, dated the 21st January 1868.

Messrs. Jardine Skinner and Co. (Judgment-debtors), *Appellants,*

versus

Ranee Shama Soondurce Debia (Decree-holder), *Respondent.*

Messrs. R. T. Allan and *J. S. Rochford* for Appellants.

Baboos Sreenath Doss and *Ashootosh Chatterjee* for Respondent.

d

A Lower Court, in executing a decree of the High Court, has no authority to alter it; any amendment desired, *e. g.*, the grant of interest, should be obtained by application to the High Court on the part of decree-holder.

Loch, J.—We think that the rule laid down in the Full Bench judgment* must be carried out in this case, and that the decree-holder, if he wishes to have interest on the sum decreed to him, should apply to this Court to have the decree amended, for it is the decree of this Court which is sought to be executed. The Lower Courts, in executing decrees of the High Court, have no authority to alter them in any way, but should execute them as they stand. We reverse the order of the Court below with costs.

The 16th June 1868.

Present :

The Hon'ble L. S. Jackson and Dwarkanath Mitter, *Judges.*

Proceedings under Section 269, Act VIII. of 1859—Default under Section 114.

Case No. 3014 of 1867.

Special Appeal from a decision passed by the Additional Principal Sudder Ameen of Chittagong, dated the 27th August 1867, reversing a decision passed by the Moonsiff of that District, dated the 12th February 1867.

Futtah Ali (Defendant), *Appellant,*

versus

Kureem Ali and others (Plaintiffs), *Respondents.*

Baboo Nubo Kishen Mookerjee for Appellant.

Baboo Hem Chunder Banerjee for Respondents.

The abandonment of proceedings taken under Section 269, Code of Civil Procedure, does not amount to dismissal on default under Section 114, and is no bar to plaintiff's bringing a fresh suit.

Jackson, J.—The first point raised before us in this special appeal was that the suit was barred under Section 114 of the Civil Procedure Code.

The defendant, it appears, purchased at a sale in execution of decree the right, title, and interest of one Mokeem, and having so purchased, he took possession of the entire property. The plaintiffs, claiming to have been co-sharers with Mokeem, appear to have preferred an objection under Section 269 of the Code of Civil Procedure. This Section was apparently not applicable to their case; and this having been discovered, the proceedings under that Section were abandoned, and the defendant seeks to avail himself of this, as if it had been a dismissal on default by which, under Section 114, the plaintiffs would be debarred from bringing a fresh suit. But that Section refers to regular suits, and not to proceedings taken under Section 269, even if such proceedings could have properly been taken in the circumstances.

The second objection urged before us was that the Principal Sudder Ameen has improperly used as evidence the admission of some of the plaintiffs against the other plaintiffs, the effect of this evidence being to admit a larger number of co-sharers, and a proportionate reduction of Mokeem's share which the defendant had purchased. But, independently of that admission, there is evidence upon the record to show that the several plaintiffs did respectively hold the several shares of the property as admitted.

Both grounds failing, therefore, the special appeal is dismissed with costs.

The 16th June 1868.

Present :

The Hon'ble L. S. Jackson and Dwarkanath Mitter, *Judges.*

Possession—Lakheraj title.

Case No. 3141 of 1867.

Special Appeal from a decision passed by the Officiating Judge of Midnapore, dated the 3rd September 1867, affirming a decision passed by the Sudder Ameen of that District, dated the 25th January 1867.

Bissonath Komilla and others (Defendants), *Appellants,*

versus

Brojo Mohun Chuckerbutty and others (Plaintiffs), *Respondents.*

Baboo Doorga Doss Dutt for Appellants.

Baboo Anund Chunder Ghosal for Respondents.

Following a decision of the Privy Council, it was held that possession of land without payment of rent for 12 years is sufficient to establish lakheraj title.

Jackson, J.—This was a suit by an unsuccessful intervenor in a rent-suit under Section 77, Act X. of 1859. Having so failed,

* *See* 6 W. R., Miscellaneous, p. 109.

he brought his suit in the Civil Court to establish his title. The title set up was long continued possession and holding of the lands in dispute as *debutter lakheraj*.

The Judge, finding the plaintiff to have fully established his possession of the land without payment of rent for a period of 12 years, declined going into the question of the validity of the lakheraj title, and, on the ground of possession, merely affirmed the decision of the Moonsiff who had given judgment for the plaintiff.

The contention before us on special appeal is, that the Courts below were in error in coming to their decision simply on the ground of possession, inasmuch as that point had been already determined against the plaintiff in the previous suit under Act X. of 1859.

The question before the Revenue Court under Section 77 is merely as to the actual receipt and enjoyment of the rents by a third person who disputes the landlord's right to receive the same, and the Collector's Court is doubtless competent to decide that question for the purposes of the particular suit before his Court.

Section 77, however, provides "that the "decision of the Collector shall not affect the "right of either party, who may have a legal "title to the rent of such land or tenure, to establish his title by suit in the Civil Court, if instituted within one year from the date of the decision."

The plaintiff, therefore, brought this suit to establish his legal title to the land. He also asked for possession and for damages on account of some fish which had been taken out of a tank which was part of the subject of dispute.

From the course which this litigation has taken, and from the nature of the special appeal before us, it is tolerably clear that the object of the defendant, who is the zemindar, has been to place the present plaintiff in the position of being compelled to establish affirmatively, as plaintiff, his *lakheraj* title to the land which he holds: the manifest object of the defendant being to avoid the difficulty in which he himself would be placed by the Law of Limitation, and by the recent decisions of the Courts on that law; and no doubt, if it were not now the law of this country that continued possession for a period of 12 years in itself confers a title, the plaintiff might have found himself in the precise difficulty contemplated. But that this is the law of the country has been clearly laid down in the decision of the Privy Council in the case of Gunga Gobind Mundle *versus* the Collector of the 24-Pergunnahs and Prince Gholam Mahomed, reported at page 676, Sutherland's collection of Privy Council Judgments.* Their Lordships of the Judicial Committee declare in that case that "as between private owners "contesting *inter se* the title to the lands, "the law has established a limitation of 12 "years; after that time, it declares not "simply that the remedy is barred, but "that the title is extinct in favor of the "possessor."

The plaintiff in this case has proved that he has such a title as 12 years' possession confers; and this, in our opinion, is sufficient for the purposes of the present suit.

The decision, therefore, given in favor of the plaintiff appears to be right, and this special appeal must be dismissed with costs.

The 18th June 1868.

Present:

The Hon'ble J. B. Phear and C. Hobhouse, *Judges.*

Mesne-profits—Construction of Section 11, Act XXIII. of 1861—Sections 196 and 197, Act VIII., 1859.

Case No. 3043 of 1867.

Special Appeal from a decision passed by the Principal Sudder Ameen of the 24-Pergunnahs, dated the 26th August 1867, affirming a decision passed by the Sudder Ameen of that District, dated the 11th January 1867.

Huro Mohinee Chowdhrain (Defendant), *Appellant,*

versus

Dhun Monee Chowdhrain (Plaintiff), *Respondent.*

Baboos Romesh Chunder Mitter and *Hem Chunder Banerjee* for Appellant.

Baboo Anund Chunder Ghosal for Respondent.

Mesne-profits are essentially in the nature of damages which do not exist as an obligation to be discharged, but are only *payable* when due under an order of Court. Hence "mesne-profits payable at the time of execution," in the sense of Section 11, Act XXIII. of 1861, mean mesne-profits which have been at that time directed to be paid by a decree of Court, the latter portion of that Section being in direct connection with Section 197, Act VIII., 1859, as the former part is with Section 196.

---

* *See* also 7 W. R., Privy Council cases, p. 21.

Phear, J.—In the year 1269 B. S., Dhun Monee Chowdhrain sued Huro Mohinee Chowdhrain to recover certain property, with mesne-profits in respect thereof up to date of filing the suit, and in 1270 B. S. a decree was given in favor of the plaintiff, according to the terms of a solehnamah filed by the defendant. This decree, while it awarded a rough sum by way of set-off against mesne-profits up to the date of suit, as claimed by the plaintiff, was silent as to mesne-profits after that time. It seems, however, that the plaintiff, although she thus obtained a decree by consent for recovery of possession of the property in the year 1270, did not, in fact, get possession until the year 1272. She alleges that she was kept out of possession during this period by the wrongful act of the defendant in the original suit, and the suit now before us is a suit brought by her against him to obtain mesne-profits for the period during which she was so kept out of possession. In her plaint, she claimed mesne-profits for the whole time from the year 1269, when, as we have said, the original suit was instituted, to the year 1272, when she filed the present suit. Both the Lower Courts have passed a decree in her favor, but they have not given her mesne-profits for the time during which she was out of possession before 1270, that is, for the time which elapsed previously to the decree in the last suit. Both the Lower Courts have confined their decrees for mesne-profits to the interval between the date of the consent-decree in the original suit in 1270, and the date of the institution of the second suit in 1272. Against the decree of the Lower Appellate Court in this suit, the defendant now appeals to this Court upon substantially three grounds of special appeal.

The first is that the present suit "being "on account of mesne-profits said to be pay-"able in respect of the subject-matter of a "suit between the date of the institution of "the suit and execution of the decree, is, "under the provisions of Section 11, Act "XXIII. of 1861, not maintainable." In some slight degree this objection seems to be founded upon a misapprehension of the plaintiff's claim. The plaintiff did not say that mesne-profits which she claimed were "payable in respect of the subject-matter of a suit," &c. Still, no doubt, if, on the substance of the plaint and written statement taken together, it appears that the mesne-profits claimed by the plaintiff are "payable in respect of the subject-matter of "a suit between the date of the institution of "the suit and execution of the decree," the claim does fall within the words of Section 11, Act XXIII. of 1861, and the present suit would consequently be barred. We must, therefore, in deciding upon the merits of this objection, see whether the mesne-profits claimed by the plaintiff are "payable in respect of the subject-matter, &c."

Upon turning to the Section itself, we find that it runs thus: "All questions regard-"ing the amount of mesne-profits, which "in the terms of the decree may have been "reserved for adjustment in the execution "of the decree, or of any mesne-profits or in-"terest which may be payable in respect of "the subject-matter of a suit between the "date of the suit and the execution of the "decree, shall be determined by order of "the Court executing the decree, and not "by separate suit." It is clear that there is some distinction between the first part of the Clause, as we have quoted it, and the second portion which follows after the disjunctive "*or*." The first part in distinct words refers to mesne-profits which may have been reserved for adjustment in execution of the decree: the second refers to mesne-profits or interest which may be *payable* in respect of the subject-matter of a suit. Now, 'payable' can only be rightly spoken of that which is due to some one under an obligation already existing. Mesne-profits, then, which are essentially of the nature of damages, can only be *payable* when they are due under an order of Court. They do not merely in the shape of mesne-profits spring from a liability under a contract, either express or implied. They must not be confounded with rent, although they are generally measured by reference to rent. They are in themselves simply damages, which do not exist as an obligation to be discharged until they have been awarded by a Court competent to do so. Hence, as it seems to us, 'mesne-profits payable at the time of execution' must mean mesne-profits which have been at that time directed to be paid by a decree of Court; and this construction seems to us to follow naturally from the arrangement of the Section itself. As we have already said, the first part of the Section refers to mesne-profits, which, although they have been the subject of decree, have not been ascertained by the decree, but have been directed to be adjusted in execution; the second refers to mesne-profits which have been not only the subject of decree, but actually ascertained and made matter of specific order and direction.

Sections 196 and 197 of Act VIII. of 1859 give authority to the Court to reserve adjustment of mesne-profits until execution in the one case, and to order and direct mesne-profits to be paid up to the date of execution in the other case; so that the two portions of Section 11, Act XXIII. of 1861, seem really to be in direct connection with Sections 196 and 197, Act VIII. of 1859. If this construction of Section 11 is correct, then it follows that the mesne-profits payable in respect of the subject-matter of a suit, and which are forbidden to be sued for in any separate suit, are merely the mesne-profits which have been directed to be paid by the decree in the first suit; and consequently the force of Section 11, so far as it operates to deprive Civil Courts of the jurisdiction to entertain a claim for damages put forward by a plaintiff, applies solely to damages sought in the character of mesne-profits which have been already awarded by a decree of a Civil Court in a previous suit. And thus the objection which has been made by the special appellant in this case falls to the ground, for it is admitted, so far as the present special appellant is concerned, that not only were the mesne-profits, which are now the subject of consideration, never matter either of decision, or even consideration, in a former suit, but that they are sought by the plaintiff as recompense for loss resulting to her in consequence of conduct of the defendant which has been exhibited by him since the passing of the decree in the former suit.

A decision of the Madras High Court has been referred to by the special appellant for the purpose of showing that the construction which we have just put upon Section 11 is not the proper construction which that Section ought to bear, and if we take the bare words of the judgment of the Court as they are reported in page 453, Volume I., Stokes's Reports, no doubt it would appear very much as if the Madras High Court took a different view of the Section from that which we have just now expressed. But it is clear that that judgment is given with much conciseness. Probably it was delivered orally in Court without any explanation of the original facts of the case, and there is reason, we think, for inferring that, before the suit for mesne-profits had been brought, which was there disposed of, the same matter of claim for mesne-profits had been the subject of a decision of a Civil Court under one or other of the Sections 196 or 197 of Act VIII. of 1859, and in truth the High Court in its judgment says that, "inasmuch as the "amount collected as mesne-profits was improperly returned to the defendants, an "appeal was, by the express words of the "Section, open to the plaintiffs." Something, therefore, had clearly occurred in the Court below which had laid open to the plaintiffs a remedy by appeal in the original suit, and it was not necessary in any sense for the plaintiffs to seek the same remedy by means of an independent original suit. But whatever were the real facts of that case, there is, we think, so much doubt as to whether or not the decision is strictly applicable to the case which is now before us, that we do not think that we are bound, even if it be substantially an expression of opinion different from that which we now entertain, to defer to it.

On the other hand, we have before us a decision of a Full Bench of our own Court reported in Volume VI., Weekly Reporter, Misc., page 109, which was delivered by the Chief Justice. In that case the Court was called upon to say "whether, if the decree itself was silent as to interest, the Court "executing the decree has power to award interest," and in coming to a conclusion upon this matter all the Sections to which we have just now referred of Act VIII. of 1859 and Act XXIII. of 1861 underwent the consideration of the Court. The Chief Justice said in reference to Section 11, Act XXIII.: "The latter "branch of the Section clearly refers to "cases in which payment of mesne-profits "or interest is provided for in the decree "under Section 196 of Act VIII. of 1859, "the former branch to cases under Section "197:" and again he says: "It clearly "could not have been intended by words "which convey a discretion to determine all "questions regarding the amount of mesne-"profits or interest payable in respect of "the subject-matter of suit between the date "of the suit and the execution of the decree, "to authorize the Court executing the "decree to determine, it may be contrary "to the terms of the decree, or in the "absence of any decision upon the subject, "whether interest or mesne-profits were or "were not payable, at any rate for the "period between the date of the suit and "the date of the decree."

It seems to us that the words now quoted from the judgment delivered by the Chief Justice entirely authorize and support the construction which we place upon Section 11

Act XXIII. of 1861. The judgment of the Full Bench, as a judicial decision, was, no doubt, confined to answering the question relative to interest, but the whole reasoning of the Court from the beginning to the end of the judgment coupled mesne-profits with interest, and. in fact, the two, that is, mesne-profits and interest, are exactly similarly situated in the Section of the Act, and whatever construction is applicable to the one is almost of necessity applicable to the other.

We may add that, if the special appellant's contention could be upheld, this very remarkable result would follow, namely, that an unsuccessful defendant, directed by the Court to give up possession of the property held by him to the plaintiff, might with impunity withhold possession from the plaintiff, notwithstanding the decree in which possession of the property is directed to be delivered over. keeping the plaintiff out by main force under every circumstance of aggravation, without the slightest apprehension or risk of having damages assessed against him which should have any reference to his tortious conduct. The utmost that could be done in such case for the relief of the plaintiff would be this, that the plaintiff should ask the Court executing the decree to assess the amount of mesne-profits, having regard solely to the time that he was kept out of enjoyment, and to the annual proceeds of the property. The Court in execution has no means of trying any question arising out of the new cause of action, and it would be unable to do more than merely calculate the result of a question in *arithmetic*. It seems to us to be impossible to suppose that the Legislature, by the words which it has used in Section 11, Act XXIII. of 1861, intended to deprive a plaintiff, who had been successful in a suit for ejectment, of his right to bring a suit upon a subsequent trespass, and to recover substantial damages in reference thereto, merely because the trespass and the wrongful act had occurred between the passing of the original decree and the obtaining execution thereof, that interval being actually due to the tortious and wrongful act of the defendant himself. Yet this would seem to be the result, if, under such circumstances, the plaintiff is forbidden to bring a new suit for recovery of mesne-profits. It can hardly be that the Legislature meant him to split his damages, and would allow him to sue afresh for such portion of them as could be attributed solely to the tortious character of the defendant's act, while it forced him to recur to the old suit for reimbursement of the loss of profits caused by the same act.

The second of the grounds of special appeal is to the effect that the terms of the solehnamah * * * * * *
* * * * * * * *

The 18th June 1868.

Present:

The Hon'ble H. V. Bayley and A. G. Macpherson, *Judges.*

Registration—Sections 18, 50, and 100, Act XX. of 1866.

Case No. 2573 of 1867.

Special Appeal from a decision passed by the Principal Sudder Ameen of Gya, dated the 5th August 1867, reversing a decision passed by the Sudder Moonsiff of that District, dated the 12th February 1867.

Grija Singh (Plaintiff), *Appellant,*

versus

Greedharee Singh and others (Defendants), *Respondents.*

Baboo Khetturnath Bose for Appellant.

Baboo Nil Madhub Sein for Respondents.

Section 50, Act XX. of 1866, does not vitiate titles acquired prior to the passing of that Act, merely because the instruments on which they rest are not registered.

Before the new Registration Law was passed, a bill of sale was executed, full consideration was paid, and the purchaser had obtained, and remained in possession, *bonâ fide*, for eleven years.

HELD that a subsequent sale, duly registered under Act XX. of 1866 (which was in force at the time of its execution), did not prevail against, or affect, the title which the purchaser under the prior unregistered deed had acquired.

Macpherson, J.—THE plaintiff (who is the appellant before us) sued for possession of certain lands which he claimed under a kobalah, or bill of sale, dated the 29th October 1866, and duly registered in accordance with the provisions of Act XX. of 1866. The defendants plead that the land belongs to them, and that they purchased it from the person through whom the plaintiff's vendors make their title, in Bysack 1262 (that is to say in 1855), and have been in possession ever since. The defendants' kobalah is dated the 2nd Bysack 1262, but is not registered.

The Lower Appellate Court has decided in favor of the defendants, finding that the property was really sold to them as alleged; that they paid full consideration for it; and that they were at once put in possession, and have been in possession ever since.

In appeal, it is contended that the Lower Appellate Court has erred in not giving the preference to the plaintiff's kobalah, it having been duly registered, while the other is not registered at all.

Section 100 of Act XX. of 1866 enacts that every instrument of the kinds mentioned in Sections 17 and 18, which shall have been executed in any part of British India before the date on which the Act came into operation therein, shall be accepted if it be duly presented for registration within twelve months from such date. The defendants' kobalah, therefore, might have been registered under Act XX. of 1866, if it had been presented for registration within twelve months after the Act came into force in Gya. Then Section 50 of Act XX. says that every instrument of the kinds mentioned in Clauses 1, 2, and 3 of Section 18 shall, if duly registered, take effect as regards the property comprised therein against every unregistered instrument relating to the same property. It is contended that, as the defendants' kobalah is an instrument of the kind mentioned in Clauses 1 and 2 of Section 18, and as it has not been registered as it might, under Section 100, have been, the plaintiff's duly registered instrument takes effect as against it.

It appears to me that, whatever might be the position of the parties, if it were a mere question as to which deed was to be given effect to, the plaintiff is not entitled to recover in the present instance. The defendants' kobalah was duly executed, and, according to the law then in force, it was in no degree essential that it should be registered. The purchase-money was paid in full, and possession was then given, and has ever since been held under it. The transfer of the property to the defendants was complete, and nothing was wanting to perfect it according to the law then in force. When it is found, as a fact, that the *bond-fide* purchase has been followed by eleven years' possession, the position of the purchaser is far stronger than if he were seeking possession for the first time under his deed of sale; and the question is not merely one as to the effect to be given to the deed as against a deed of later date registered under Act XX. of 1866.

I do not think that Section 50 of Act XX. of 1866 is to be construed as vitiating all titles acquired prior to the passing of that Act, unless the instruments on which they rest are registered under Section 100. Had such been the intention, registration of old deeds would have been made compulsory, and it would have been declared expressly that unless registered, instruments registered under Act XX. of 1866 should take effect before them. I think that Section 50 must be read as applying to instruments, the registration of which is optional under Section 18, but not as applying to instruments registered under Section 100.

I think, therefore, that this appeal ought to be dismissed with costs.

Bayley, J.—I concur in the above judgment and the reasons for it. The transaction took place under the old law, and I do not think the deeds then executed can be set aside, if *bond fide* in every way, and supported by long possession as this is. I also would dismiss this special appeal.

The 18th June 1868.

Present:

The Hon'ble G. Loch and F. A. Glover, *Judges.*

Sale of a decree after the decree-holder has lost his interest in it.

Case No. 2863 of 1867.

Special Appeal from a decision passed by the Judge of Purneah, dated the 17th June 1867, affirming a decision passed by the Principal Sudder Ameen of that District, dated the 9th May 1866.

Dhunput Singh (Defendant), *Appellant,*

versus

Tohul Doss and others (Plaintiffs), *Respondents.*

Mr. R. T. Allan and *Baboo Kishen Dyal Roy* for Appellant.

Baboos Unnoda Pershad Banerjee and *Anund Gopal Paleet* for Respondents.

D obtained a decree against *K* and *G*, and applied to the Court to attach a decree held by them against *C*. They sold the decree against *C* to *B* and *M*, notwithstanding the objections raised by *D*, who then in execution of his decree against them (*K* and *G*) attached the same decree, and caused it to be sold, notwithstanding their objections. *K* and *G* in consequence sued *D* for damages to the amount of the decree against *C*.

HELD that no damage was proved, and there was nothing to prevent plaintiffs (*K* and *G*) executing the decree against *C*, for, at the time of its sale in satisfaction of the decree of *D*, the judgment-debtors, who had previously sold it to the plaintiffs, had no interest in it, and as only their rights and interest were sold, the auction-purchasers took nothing.

Loch, J.—DHUNPUT SINGH brought a suit to recover the amount of certain hoondees

b

from Ram Kishen Doss and Gudadhur Doss, and applied to the Court to attach a decree held by the defendants against one Chunder Kant Chuckerbutty. The defendants, however, sold their decree against Chunder Kant to the plaintiffs in this case, Betul Doss and Muddun Mohun Doss, by a deed of sale, bearing date 27th May 1864, and had it registered, notwithstanding the objections raised by Dhunput Singh.

In execution of the decree he obtained against Kishen Doss and Gudadhur Doss, the special appellant, Dhunput Singh, attached the above-mentioned decree against Chunder Kant, and caused it to be sold, notwithstanding the objections raised by the plaintiffs, who claimed it as their purchase. The plaintiffs have in consequence brought the present suit for damages, calculating them at the amount of the decree against Chunder Kant which was sold at the instance of Dhunput Singh in execution of his decree against the plaintiffs' vendors.

The Lower Courts have found that the sale of the decree against Chunder Kant to the plaintiffs by Kishen Doss and Gudadhur Doss was a *bond-fide* sale, and have in consequence given a decree for the amount of that decree as damages incurred by the plaintiffs.

It is urged in special appeal that no damage has been proved; that the decree against Chunder Kant may not be worth the paper upon which it is written; that as the Court have declared the plaintiffs' purchase to be in good faith, the sale by the special appellant of the rights and interests of his judgment-debtors in that decree can in no wise affect the plaintiffs' right, for at the time of the sale the judgment-debtors had parted with their rights in that decree, and the auction-purchaser had bought nothing; that this view of the case is supported by a judgment of this Court, reported at VI. Weekly Reporter, page 47; and that, if the decree against Chunder Kant is worth anything, the plaintiffs can execute it as well now as before the sale of the rights and interests of the judgment-debtors in it.

We concur with the argument of the pleader for the special appellant. The plaintiffs have not shown that they have suffered damage. It may be that the decree against Chunder Kant is worth nothing. He may be a man of straw. If it be otherwise, there is nothing to prevent the plaintiffs executing the decree, for at the time of its sale in satisfaction of the decree of Dhunput Singh, the judgment-debtors who had previously sold it to plaintiffs had no interest in it whatever, and as only their rights and interests in the decree were sold, the auction-purchaser took nothing by his purchase. Under this view of the case, we think the judgments of the Courts below are erroneous, and should be reversed. We, therefore, decree the special appeal, and dismiss the suit of the plaintiffs with all costs.

The 20th June 1868.

Present:

The Hon'ble G. Loch and F. A. Glover, *Judges.*

Intention—Beneficial ownership—Jurisdiction—Section 77, Act X., 1859.

Case No. 2461 of 1867 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of Sylhet, dated the 14th August 1867, reversing a decision passed by the Deputy Collector of that District, dated the 15th June 1867.

Dyal Kishen Deb (Intervenor), *Appellant,*

versus

Kaleenath Kur (Plaintiff), *Respondent.*

Baboo Debendro Narain Bose for Appellant.

Baboo Kalee Mohun Doss for Respondent.

It is not sufficient for an intervenor, under Section 77, Act X., 1859, to prove mere receipt of rents; he must also prove enjoyment thereof.

Where a Deputy Collector decides between a plaintiff and intervenor as to beneficial ownership, his decision settles an interest in land, and is therefore appealable to the Judge.

Glover, J.—The plaintiff in this case sued certain parties for arrears of rent, amounting to one rupee. The defence was that the money had been already paid to a third party, who was the person entitled to receive it.

This third party, Dyal Kisto, intervened under Section 77, declaring that he was the real owner of the land, the plaintiff being only his benameedar.

On which, the plaintiff, whilst admitting that the intervenor had collected the rent of land, alleged that he did so as his (plaintiff's) agent.

The Deputy Collector dismissed the suit, holding that plaintiff had not proved that the intervenor collected rent as his agent

only, whilst he admitted that Dyal Kisto was in the actual receipt of the rent.

The Judge reversed this order, considering that the intervenor on whom the *onus* lay had not proved that he had "enjoyed" the rent as well as received it, and that both points were required to be proved before a party could succeed under Section 77. In this view of the case, the Judge called upon the plaintiff and the intervenor to prove the fact of "beneficial" ownership, and decided in favor of the plaintiff.

The intervenor now appeals specially, urging—

1. That under Section 153 of Act X. of 1859, no appeal lay to the Judge.

2. That the *onus* has been wrongly placed by the Judge.

Neither of these objections appear to us valid.

Section 153 lays down that, whenever a suit under certain Sections of this Act shall be decided by a Collector, and such suit settles any interest in land as between parties having conflicting claims thereto, an appeal lies to the Judge.

Now, in this case, the plaintiff was admittedly the legal owner of the land, and the intervenor the person who received the rent; the dispute being as to the capacity in which the latter received it, whether as agent for the plaintiff or on his own account. It was, therefore, impossible to decide the issue between the parties without finding which of the two was the beneficial owner.

This the Deputy Collector did, and his decision, therefore, "settled an interest in land," and was, therefore, appealable to the Judge.

It was impossible for the Collector to try the issue between the parties without going into title to a certain extent; but even if he had been wrong in doing so, the appeal would still have lain to the Judge, as ruled in the case of Bebee Zumeerun, June 12th, 1865.*

With regard to the second objection, we think that the Judge was right in calling upon the intervenor to prove, not only the receipt, but the enjoyment of the rent by him. The plaintiff was the legal owner of the land, and it was for the intervenor who claimed to be the beneficial owner to prove his case, which extended, not to the mere receipt of rent which he might have had as agent, but also to the enjoyment thereof.

The intervenor was not able to support this *onus*, whilst the plaintiff, according to the Judge's decision, satisfactorily proved that he was the beneficial owner.

There is no ground, therefore, for interference, and we dismiss this special appeal and also special appeal No. 2462, which is on all fours with it, with costs.

* *See* 3 W. R., Act X. Rulings, p. 27.

The 23rd June 1868.

Present:

The Hon'ble G. Loch and F. A. Glover, *Judges.*

Accretion—Construction of Clause 4, Section 4, Regulation XI. of 1825.

Case No. 2878 of 1867 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of Moorshedabad, dated the 4th July 1867, affirming a decision passed by the Deputy Collector of that District, dated the 12th January 1867.

Mirza Syfoollah (Plaintiff), *Appellant,*

versus

Bhuttun *alias* Butessur and others (Defendants), *Respondents.*

Baboo Gopal Lall Mitter for Appellant.

Baboo Juggadanund Mookerjee for Respondents.

Land forming the dry bed of a canal belongs to the estate in which the canal itself was included.

In Clause 4, Section 4, Regulation XI. of 1825, the words "subject to the provisions stated in the first Clause of the present Section" do not apply to the formation and position of the newly-accreted land, but to the owner's rights in them in relation to the Government.

Glover, J.—THIS was a suit for possession of land forming the dry bed of the Bhadooree dhara, or canal, which the plaintiff alleged to belong to his estate of Radhabullubpore.

The facts of the case appear to be undisputed. Many years ago, one Bhadooree dug a canal between the rivers Bhyrub and Gomanee, and this canal was the boundary-line of the two estates Radhabullubpore and Romeepore, the canal itself being included in the former estate.

For some years past, the whole or the greater part of the waters of the river Bhyrub have been flowing down this canal, and have at last changed its course altogether, carrying it into the middle of the plaintiff's estate, and leaving the old bed of the canal dry.

As a matter of course, the old bed became accreted to the defendant's estate of Romeepore, and as an accretion he took possession of it.

The Lower Appellate Court held that, as the plaintiff's estate included the bed of the canal, he was entitled to the disputed land as part of that bed, and that the provisions of Regulation XI. of 1825 did not apply.

It is urged in special appeal that, as the disputed land is admittedly a gradual accretion, it belongs to the tenure of the person to whose land it is thus annexed; and that Clauses 1 and 5 of Section 4, Regulation XI. of 1825, apply to the case.

It appears to us that, on the facts found by the Judge, his decision was correct, and that, as the bed of the canal belonged to the plaintiff (a fact not contested in the petition of special appeal), the land in dispute, which forms part of that bed, must appertain to his estate, and not to the special appellant.

Clause 4, Section 4 of the Regulation, shows distinctly that this is the case. It recites that, "in small and shallow rivers, the "beds of which are recognized as the property of individuals, any sand-bank or *chur* "that may be thrown up shall belong to the "proprietor of the bed of the river, subject "to the provisions stated in the 1st Clause "of the present Section."

The special appellant's vakeel wishes to construe the last words of this, *viz.*, "subject to the provisions stated in the 1st Clause of the present Section" as meaning that such lands belong to the estate to which they join; but it is clear from reading the latter part of the Section in question in conjunction with Clause 4, that these words do not apply to the formation or position of the newly-accreted lands, but to the owner's right in them, in relation to the Government, after they are formed; in fact, any other explanation would result in the contradiction that Clause 4, Section 4 of the Regulation, would in one and the same sentence declare that the owner of the bed of a shallow river had right to all sand-banks and *churs* thrown up in it, and that the same sand-banks and *churs* belonged, not to him, but to the riparian proprietor to whose estate they were joined.

The real point in dispute in this case is very simple, and as the bed of the Bhadooree dhara is found to belong to the special respondent, it must clearly remain his, whether it be wet or dry.

The special appeal is dismissed with costs.

The 23rd June 1868.

Present:

The Hon'ble F. B. Kemp and E. Jackson, *Judges.*

Butwarra — Breach of contract — Absence of consideration — Specific performance.

Case No. 3361 of 1867.

Special Appeal from a decision, passed by the Additional Judge of Tirhoot, dated the 6th September 1867, affirming a decision passed by the Principal Sudder Ameen of that District, dated the 22nd March 1866.

Nukchad Singh and others (Defendants), *Appellants,*

versus

Hunooman Dutt Singh and others (Plaintiffs), *Respondents.*

Mr. R. T. Allan and *Baboos Unnoda Pershad Banerjee* and *Mohinee Mohun Roy* for Appellants.

Baboos Onookool Chunder Mookerjee and *Ashootosh Chatterjee* for Respondents.

Certain putteedars applied for a butwarra under the provisions of Regulation XIX. of 1814. At the time of the butwarra, it was stipulated between the putteedars of a 6-annas and 7-annas shares that, in the event of a particular village falling by division wholly to either of them, they would re-unite and hold the 13-annas share joint as before.

One party having resiled from this agreement, it was HELD that the other party was entitled to sue for specific performance, and such a suit would lie only in the Civil Court.

HELD that the absence of mention of any money-consideration in the agreement was no bar to its being enforced, as the parties thereto had waived all objection on the score of the particular village named, or any other, falling wholly or in part to their respective shares.

Kemp, J.—THIS is a suit for specific performance of an agreement entered into between the parties to this suit under somewhat peculiar circumstances. It appears that Mouzahs Pugrah and Muhsaree were held in three puttees, *viz*, a 7-anna

puttee (which again was sub-divided), a 6-anna puttee, and a 3-anna puttee. The 3-anna putteedar being obnoxious to other putteedars, they applied for a butwarra under the provisions of Regulation XIX. of 1814. Under the butwarra, Gooroodyal Singh's share—the 3-anna share—fell exclusively in the village of Muhsaree, and he had nothing further to do with the village of Pugrah. So far the object for which the butwarra was applied for was obtained. But at the time of the butwarra, by the agreement, it was stipulated between the putteedars of the 7-anna and 6-anna shares that, in the event of the village of Pugrah falling by division wholly to either of those putteedars, they would re-unite and hold the 13-anna share joint as heretofore. The object of this suit is to enforce that agreement, from which it is alleged the defendants have resiled.

The Court of first instance found that the agreement had not been proved; the suit was, therefore, dismissed. On appeal, the Additional Judge has found as a fact upon the evidence that the defendants did execute this agreement; the suit was, therefore, decreed.

In special appeal, four main grounds of objection have been taken: *first*, that the suit is barred under Clause 9, Section 1 of Act XIV. of 1859, inasmuch as the suit, being on a breach of contract, ought to have been brought within three years of the time when the breach of contract took place; *second*, the Civil Court had no jurisdiction to try this suit; *third*, that the agreement cannot be enforced, inasmuch as there was no consideration, and it was never acted upon; *fourth*, that the consent of Nukchad Singh, one of the defendants, would not bind the other defendants who were not present, and who were not consenting parties to the transaction.

The issue in bar of limitation was not taken in the Courts below. It is not shown by the special appellant when the butwarra was completed, and when the breach of contract occurred. This plea at this late stage of the case is, therefore, overruled.

On the question of jurisdiction, we are of opinion that a Civil Court is competent to entertain this suit. It is clear that, if the parties were consenting to the re-union of the 13-anna puttee, they might have applied to the Collector under Section 6 of Regulation XIX. of 1814; and there cannot be any doubt that the Collector would have acceded to their request, inasmuch as the Government revenue would not have been prejudiced; on the contrary, it would have been easier to collect from one joint body of 13-anna putteedars than from that body split up. The defendants having resiled from the agreement, the plaintiffs were entitled to sue for specific performance, and such a suit would lie only in a Civil Court.

The third objection is on the question of consideration. No money-consideration is mentioned in the agreement, but it is clear from the terms of the agreement that the parties thereto were not to object before the Collector with reference to Pugrah or any particular mouzah falling wholly or in part to their respective shares. They waived all objections on this score, and agreed that, however the butwarra might turn out, they would, as between themselves, re-unite. The agreement has, of course, not been acted upon, and this is the cause of the present suit.

On the last point the Judge has found that the defendants were consenting parties. One of these, Burpsee Singh, whose defence below was that he was not present at all, has not appealed. Indeed, the answer of the defendants below was not so much to the effect that they were non-consenting parties, but amounted to a total denial of the execution of agreement.

We, therefore, dismiss the special appeal with costs.

The 23rd June 1868.

Present:

The Hon'ble F. B. Kemp and E. Jackson, *Judges.*

Law of distraint — Cutting and carrying away crops.

Cases Nos. 3353, 3354, and 3358 of 1867 under Act X. of 1859.

Special Appeals from a decision passed by the Judge of West Burdwan, dated the 13th September 1867, affirming a decision passed by the Deputy Collector of that District, dated the 31st May 1867.

Ador Mohun Chuckerbutty and another (Defendants), *Appellants,*

versus

Thakoor Monee Dabee and others (Plaintiffs), *Respondents.*

f

Baboos Luckhee Churn Bose and *Nubo Kishen Mookerjee* for Appellants.

Baboo Bungshee Dhur Sein for Respondents.

Certain putneedars, who in execution of a decree for *khas* possession had been put into nominal possession of their lands, instead of ousting the ryots, allowed them to cultivate, and when they had cultivated, cut and carried away their crops.

HELD that the act of the putneedars was an abuse of the Law of Distraint, and rendered them liable for damages.

Jackson, J.—IN all these cases, the defendants (putneedars) obtained a decree for *khas* possession and in execution of decree were put into nominal possession of the lands in suit. They have since distrained the crops of the ryots which were growing on the land, and have cut and carried them away. The plaintiffs are those ryots and their vendors. They have obtained a decree for the value of the crops as having been illegally distrained.

It is said that the ryots had no right after the decree for *khas* possession to cultivate the land, but as they chose to cultivate the land, the defendants (putneedars) were entitled to carry off the crops. The defendants did not, it appears, distrain the crops as the crops of the ryots who had cultivated them, but as the crops of another ryot to whom they alleged that they had leased the lands, but who had not cultivated them.

We think that the Lower Courts were right in holding the act of the defendants to be an abuse of the Law of Distraint, and in making the defendants liable for damages. The defendants might have ousted the plaintiffs in due course of law if they were entitled to do so; and if the proceedings in execution of the Civil Court decree had not had the desired effect in securing that end, they might have taken other more effectual legal means to that effect. But they stood by and allowed the plaintiffs to cultivate the lands, and when they had cultivated the lands, then they carried away the crops.

We have also been told that the decree for *khas* possession obtained by the defendants has been reversed on special appeal by this Court. However this may be, the decision of the Lower Court is correct, and we dismiss the appeal with costs.

The 24th June 1868.

Present:

The Hon'ble G. Loch and F. A. Glover, *Judges.*

Suit—Survey award—Possession — Limitation.

Case No. 2848 of 1867.

Special Appeal from a decision passed by the Judge of Sylhet, dated the 11th August 1867, affirming a decision passed by the Officiating Principal Sudder Ameen of that District, dated the 18th March 1867.

Mozuffur Ali and others (Plaintiffs), *Appellants,*

versus

Grish Chunder Doss (Defendant), *Respondent.*

Mr. C. Gregory and *Moulvie Murhamul Hossein* for Appellants.

Baboos Debendro Narain Bose and *Rajendurnath Bose* for Respondent.

Where a plaintiff sued not only for the cancelment of a survey award, but also to be restored to possession of land from which he had been subsequently dispossessed, his suit was held not to be barred because not brought within three years of the award, the latter claim being a different cause of action, to be governed by the limitation of 12 years in Clause 12, Section 1, Act XIV., 1859.

Glover, J.—THIS was a suit for recovery of possession of land and for the cancelment of a survey award.

The first Court dismissed it on the merits, but the Judge on reading the plaint considered that the suit was barred by Clause 6, Section 1, Act XIV. of 1859, not having been brought within three years of the date of the survey award, and threw out the plaintiff's case on the issue of limitation.

The points taken in special appeal are that the Judge was wrong (1) in taking up the question of three years' limitation at all, inasmuch as the defendant never pleaded it; and (2) in considering it material to the case, inasmuch as besides praying for the reversal of the survey award, the plaintiff distinctly asked for recovery of possession, dating his dispossession from a time considerably subsequent to the passing of the survey award.

The objections must, we think, be allowed. The rulings of this Court, to which the Judge alludes, go no further than this, that where a plaintiff is barred on the face of his own plaint, an Appellate Court is justified in

raising the issue, although it may have never been raised below. This refers to cases where a plaintiff sues for arrears of rent for six years, or for wassilat for 12, and such like, where the very recital of the plaint shows a considerable portion of the relief sought to be impossible under the Limitation Laws.

Now, in this case, the plaintiff asked for two kinds of relief; he wished to have the survey award altered, and also to be restored to possession of his land, the two wrongs not having been done at one and the same time, but at a considerable interval. Thus the survey award was made on the 23rd of September 1863, whilst the plaintiff dates his dispossession from the 14th of January 1864.

If the plaintiff had come into Court merely to ask for the cancelment of the survey award, he would have been obliged to bring his suit within three years of that award: but his claim to be restored to possession of land from which he had been subsequently dispossessed, would be an entirely different cause of action, and one that would be governed, not by Clause 6, Section 1, Act XIV. of 1859, but by Clause 12, Section 1 of that Act. He would have, that is to say, twelve years to bring his suit.

This, we remark, was the view the defendant took of the plaint, for he raised the issue of twelve years' limitation, which the Principal Sudder Ameen tried.

The Judge's order must be reversed with costs of this appeal on the special respondent, and the case be remanded for trial on its merits, and the costs will follow the result.

The 24th June 1868.

Present:

The Hon'ble G. Loch and F. A. Glover, *Judges.*

Mokurruree tenure—Admissions by zemindar.

Case No. 2909 of 1867.

Special Appeal from a decision passed by the Judicial Commissioner of Chota Nagpore, dated the 23rd July 1867, affirming a decision passed by the Deputy Commissioner of that District, dated the 30th April 1867.

Messrs. R. Watson and Co. (Plaintiffs). *Appellants,*

versus

Nobin Mohun Baboo (Defendant). *Respondent.*

Messrs. R. T. Allan and *J. S. Rochfort* for Appellants.

Baboo Ashootosh Dhur for Respondent.

Where tenants sued for a declaration that their holding was mokurruree at a given rent, and the surburakar of their zemindar admitted their right on behalf of the zemindar, who himself filed a petition corroborating his surburakar's statements, it was held that these admissions would bind any subsequent zemindar not being an auction-purchaser at a sale for arrears of Government revenue.

Glover, J.—This was a suit by Messrs. Watson & Co., the ijaradars, under the Rajah of Chota Nagpore, of Pergunnah Phoolkosina, to recover arrears of rent at enhanced rates after notice, against the defendants, who are holders of the village of Jyenuggur. The defendant pleaded a mokurruree title at 6 rupees a year, granted by the zemindar in 1237 B. S.

Both Lower Courts held that the defendant's tenure was mokurruree, and therefore protected from enhancement.

In special appeal, the plaintiffs contended that the defendants ought to have produced and proved their mokurruree title-deed, and that the recital in a Civil Court decree, on which the Judicial Commissioner proceeded, did not bind the plaintiffs, nor was it sufficient to prove the defendant's mokurruree right.

We see no reason to interfere in this matter. The Civil Court decision above referred to, was given in a suit brought by the present defendants against the holders of the zemindaree, represented for the occasion by the Collector, and by the present lessor of the plaintiffs as surburakar of the disqualified Rajah, his father, for a declaration that their holding was mokurruree at a rent of Rupees 6. In that case, a *char* was produced, and the present zemindar admitted on behalf of his father, the then holder of the estate, that the defendant's tenure was mokurruree.

It is argued that this admission, which was made by the plaintiff's lessor whilst he was merely surburakar, does not bind the special appellants. But this is an error. As surburakar, the present Rajah admitted the tenant's right on behalf of his father; and his father, also, as appears from a memorandum in the decision of 1852, filed a petition

corroborating his surburakar's statement, and admitting the mokurruree title of the parties then suing.

These admissions would undoubtedly bind any subsequent zemindar not being a purchaser at an auction-sale for arrears of Government revenue, and the present holder of the estate would be estopped from setting up a different state of things.

We do not find, however, that he has in any way done so, and the present suit has been brought by the ijaradars on their own responsibility.

We think that the evidence on which the Judicial Commissioner came to his finding that the defendants' tenure was mokurruree, was legally sufficient, and that there is, therefore, no ground of special appeal. It has been brought to our notice that the defendants claim to hold their tenure as mourosee as well as mokurruree. But we find that the decree on which the Judicial Commissioner has relied does not go further than establish the mokurruree title. Whether it is also mourosee is a point not decided.

We reject the appeal with costs.

The 24th June 1868.

Present:

The Hon'ble G. Loch and F. A. Glover, *Judges.*

Waste by widow—Appointment of manager—Leases.

Cases Nos. 2951 and 2952 of 1867.

Special Appeals from a decision passed by the Principal Sudder Ameen of Bhaugulpore, dated the 12th August 1867, affirming a decision passed by the Moonsiff of that District, dated the 10th April 1866.

Mussamut Moharanee and another (Defendants), *Appellants,*

versus

Nuddu Lall Misser (Plaintiff), *Respondent.*

Moulvie Syud Murhamut Hossein and *Baboo Romanath Bose* for Appellants.

Mr. R. E. Twidale for Respondent.

Where waste is proved on the part of a widow, the Court should not put a reversioner into possession; but should appoint a manager (who might be the reversioner) who should be required to render accounts periodically. Leases which have been given by the widow cannot be interfered with, unless the lessees be making waste.

Loch, J.—WASTE on the part of the widow has been proved, and the Lower Courts have given the reversioner possession, and directed that his name be registered as a joint proprietor with the widow. We think the order is wrong. The Court should not have converted the reversioner into an actual proprietor. It should have appointed a manager accountable to the Court for all his acts in respect of the estate, who should be required to render accounts periodically, and be put in possession of all the property in the widow's own possession. Leases which have been given by her cannot be interfered with as laid down by the Full Bench decision in the Special Number of the Weekly Reporter, pages 165 and 166, unless the lessees be making waste; and if the charge be proved, then the Court can take measures to preserve the property given in lease. There is nothing to prevent the Court appointing the reversioner to be manager if he be a fit person for the appointment. We modify the orders of the Lower Court accordingly. Parties to pay their own costs in these appeals.

The 24th June 1868.

Present:

The Hon'ble G. Loch and F. A. Glover, *Judges.*

Documentary evidence—Mokurruree title—Enhancement.

Case No. 2851 of 1867 under Act X. of 1859.

Special Appeal from a decision passed by the Judicial Commissioner of Chota Nagpore, dated the 28th July 1867, affirming a decision passed by the Deputy Commissioner of that District, dated the 30th April 1867.

Messrs. Robert Watson and Co. (Plaintiffs), *Appellants,*

versus

Sham Loll Pundah (Defendant), *Respondent.*

Messrs. R. T. Allan and *J. S. Rochfort* for Appellants.

Baboos Ashootosh Dhur and *Nubo Kishen Mookerjee* for Respondent.

A copy of a pottah cannot be received in evidence without cause being shown for the absence of the original.

Where a ryot relies on a mokurruree pottah as protection against enhancement, he is bound to prove his special title; mere possession and payment of rent for a number of years cannot bar a farmer's right to enhance where such a title is pleaded.

Glover, J.—THIS was a suit by an ijaradar for arrears of rent at enhanced rates after notice. The defendant pleaded a mokurruree pottah granted to him by a former zemindar in Assin 1253 B. S., under which he held at a fixed rate of Rupees 51.

Both Lower Courts held that the defendant had made out his case, and dismissed the plaintiff's claim to enhancement.

It is contended in special appeal that the Lower Appellate Court has held the defendant's documents to be genuine, without the slightest proof having been given that they are so.

We think that this objection must be allowed. The defendant claimed exemption from enhancement under a pottah. This pottah he did not file. A copy was produced and accepted by the Court, but no cause was shown for the absence of the original document, nor was any evidence taken in support of copy of the pottah which was filed. It was considered apparently to be proved, or rather corroborated, by certain admissions made by a former zemindar in another case, by a *char* granted by the present zemindar, and by receipts for rent paid during the last 20 years.

The so-called admission of the zemindar is worth nothing, for during the progress of the very same suit he filed a petition, stating that his amlah had filed an answer, admitting the mokurruree without his knowledge and consent, and that the holding was not mokurruree. This was clearly no evidence in favor of the defendant.

The *char*, setting aside the objection taken to it that the grantor had at the time no power to give it, has not been proved in any way, and consequently does not assist the defendant's case.

The receipts have not been proved either; and, if we accept those granted by the Collector, there is no evidence that rent has been paid at the rate claimed by the defendant.

Mere possession and payment of rent for a number of years, even if proved, cannot bar a farmer's right to enhance, where the ryot relies on a mokurruree pottah. He is bound to prove his special title; and if he fail to do that, he is in no better position than any other occupant ryot.

In the present case, the defendant has given no proof at all of his mokurruree pottah. He has filed certain documents, and expected them apparently to prove themselves.

We regret to observe that on more than one recent occasion we have remarked a lax system of admitting documents as evidence, without any proof of them being genuine, as prevailing in some of the Courts of Chota Nagpore.

It cannot be too particularly impressed upon parties to suits that documents are no evidence in a case unless they are proved, and that the mere possession of a lease, which purports to be mokurruree, will not protect its holder from enhancement unless he can show how and when that lease was granted, and the reception of such unsupported documents as evidence by the Civil Courts is a source of evil to all concerned.

It may be that in this very case, the defendant could have proved the loss of his original pottah, and could have established the fact of its having been granted to him by the zemindar, had the Court refused to accept his documents without such proof.

But be this as it may, we are bound to decide on the case as it is now before us, and to say that the defendant (special respondent) has given no evidence whatever of his claim to hold under a mokurruree pottah, and that the plaintiff's claim to enhanced rents must be allowed.

The rate at which such enhancement is to be given must form the subject of separate enquiry, and the case is remanded to the Deputy Commissioner for the purpose.

The Lower Appellate Court's order is reversed with costs on the special respondent.

The 25th June 1868.

Present:

The Hon'ble L. S. Jackson and F. A. Glover, *Judges.*

Suit for rent prior to Act X. of 1859—Question of title—Section 2, Act VIII., 1859.

Case No. 29 of 1868.

Regular Appeal from a decision passed by the Principal Sudder Ameen of Bhaugulpore, dated the 29th November 1867.

Chowdhry Teeluck Pershad Singh and others (Plaintiffs), *Appellants,*

versus

Deg Narain Singh and others (Defendants), *Respondents.*

Baboos Onookool Chunder Mookerjee and *Chunder Madhub Ghose* for Appellants.

Baboo Kishen Succa Mookerjee for Respondents.

Where a suit for rent was instituted and heard in a Civil Court before Act X. of 1859 came into force, and an issue as to title between plaintiff and an intervenor was raised and decided—HELD that a subsequent suit by plaintiff for possession was barred by Section 2, Act VIII., 1859.

Jackson, J.—THIS was a suit for possession of 14 dams and a small fraction share of mouzahs Dheera and Mothoorapore, which form part of Pergunnah Bisthazaree in Bhaugulpore, and for mesne-profits.

The plaintiffs' allegation was that they had purchased at a sale in execution of a decree the interest of a certain party in that pergunnah to the extent previously stated, and that, being denied possession of the purchased share, they had sued and obtained a decree, and had been put in possession; that subsequently they had given a lease of this share in the mouzahs comprised in that Pergunnah to Ahlad Singh, one of the defendants; that afterwards, on suing Ahlad Singh for rent on account of the two mouzahs in question, he alleged that he had never been put in possession of the share leased to him in those mouzahs.

In that suit, Deg Narain Singh, the other defendant, intervened, denying that the plaintiffs had any interest in, or were ever in possession of, any share in the mouzahs.

The suit for rent, which was prior to Act X. of 1859, was instituted and heard in the Court of the Principal Sudder Ameen. Finally, the plaintiffs' suit was dismissed, and it is now alleged that, upon such dismissal, Deg Narain Singh, with the aid of Ahlad Singh, had dispossessed the plaintiffs from the mouzahs in question, and therefore plaintiffs brought their suit.

It seems that, on the suggestion of the defendant, Deg Narain Singh, in his written statement, a number of other parties, co-sharers in the Pergunnah, were brought in as co-defendants and entered appearance; for what reason they were made defendants is not apparent.

The principal defendant raised two issues in bar at the hearing of the suit:—

First.—That the Court was precluded from entertaining it under Section 2 of the Civil Procedure Code.

Secondly.—That the suit was barred by limitation.

The Principal Sudder Ameen appears to have selected for trial the issue of limitation, and he gives no judgment on the other issue in bar. He held that the plaintiffs' suit was barred, inasmuch as no possession of the lands in dispute within 12 years was made out to his satisfaction.

Against this decision, the plaintiffs have appealed, and the defendant Deg Narain Singh on his part has tendered an objection under Section 348, on the ground that the suit should have been thrown out under Section 2 of Act VIII. of 1859.

We first heard the argument upon the objection last mentioned, and it appears to us that, although the objection cannot be maintained precisely in the form which it bears, yet, in effect, the plaintiffs' suit must fail on the ground that it involves a material issue of fact which has been already determined by a competent Court between the same parties, and which issue disposes of the present suit. The finding of the Court in the former case may, in our opinion, be used as evidence, and as conclusive evidence, against the plaintiffs in this suit.

We have been much pressed on the side of the appellants with the contention that the previous decree, being merely a decree in a suit for rent against the plaintiffs' lessee, was not evidence against the plaintiffs; and we are referred to the case of Mussamut Edun *versus* Mussamut Bechun, decided by a Bench of three Judges, and reported in VIII. Weekly Reporter, page 175, Civil Rulings.

It seems to us that the decision in that case was based mainly on the consideration that the Court which had given the previous

decision relied upon was not a Court of concurrent jurisdiction with that in which the latter suit was brought. That was a decision in a rent-suit in the Collector's Court under Act X. of 1859; the Collector's Court being a Court limited in its jurisdiction, and competent to determine the matter immediately before it, but not competent finally to determine the other questions which arose incidentally in the case.

This is not the case here, for the previous decision was given in a suit in the Civil Court, originally a suit between the plaintiff and his lessee, but in which a third party, the appellant before us, who claimed the whole title to the land in question, was allowed to intervene: whereon, by the direction of the High Court on special appeal, an issue was ordered to be tried as between the intervenor and the plaintiff, namely—"Whether the whole interest which the "plaintiffs' predecessor in estate may have "had in these mouzahs had not passed out "of them by deeds of sale, compromise, or "otherwise, prior to the date of the pottah "to Ahlad Singh."

The very issue which is intended to be decided in this case was thus raised between the same parties, and in a Court competent to decide this question. It is true that the original object of the suit was to recover rent, but by the intervention of a third party the question of title was gone into, not under Section 77 of Act X. of 1859 and in a Court restricted in its jurisdiction, but in a Court competent to decide that question finally.

It would, perhaps, suffice for us to stop here, and to say that the point of title involved in the present suit being one which has been already raised and determined between the same parties by a Court of competent jurisdiction, the plaintiff must necessarily fail. But as the parties may question our decision on this point, we have thought it advisable to enquire further if the Court below was right on the point which it did decide, *viz.*, on limitation; and having the evidence before us, and having heard that evidence, we have no hesitation in affirming its judgment.

It seems to us that there is nothing like any evidence to show that, the plaintiffs were in possession within 12 years; on the contrary, the decision in the suit above referred to goes to show that at the period of Ahlad Singh's lease, the plaintiffs were not in possession of the land, and we see no reason to believe that they ever got into possession afterwards.

We think it right to state that Baboo Chunder Madhub Ghose proposed to submit to us certain documents, and what he called "the history of the previous litigation," commencing from the year 1828, but having ascertained from him that the documents in question do not contain any evidence of possession within 12 years, and that they are not corroborative of the evidence of the witnesses as to that possession, we declined going into that mass of documents.

We think, therefore, for these reasons and for those referred to above, that the plaintiffs' suit has been rightly dismissed, and that this appeal also must be dismissed with costs.

An application for costs has been made to us by certain parties who have been made respondents in the case, but as we see no reason why they should make a separate case and entertain separate pleaders, they are not entitled to separate costs.

The 25th June 1868.

Present:

The Hon'ble J. B. Phear and C. Hobhouse, *Judges.*

Limitation—Suit by Government lessee—Clause 12, Section 1, and Section 17, Act XIV., 1859.

Case No. 3137 of 1867.

Special Appeal from a decision passed by the Deputy Commissioner of Cachar, dated the 23rd September 1867, reversing a decision passed by the Moonsiff of that District, dated the 15th June 1867.

Assoo Meah and others (Plaintiffs), *Appellants,*

versus

Rajoo Meah and others (Defendants), *Respondents.*

Baboo Luleet Mohun Sein for Appellants.
No one for Respondents.

In a suit for the recovery of immoveable property, where the cause of action arose more than 12 years previously, the fact of plaintiff claiming as lessee under Government does not take it out of the operation of Clause 12, Section 1, Act XIV. of 1859, or bring it within the reservation of Section 17.

Phear, J.—In this case, the suit is brought for the recovery of immoveable property, and the Lower Appellate Court has substantially found that the cause of action

d

arose more than 12 years previous to the institution of the suit. The Lower Appellate Court has accordingly held that the suit is barred by the operation of Clause 12, Section 1, Act XIV. of 1859. The special appellant taking the facts as found by the Lower Appellate Court, objects that the period of limitation in this case is not 12 years, but 60 years, because the plaintiff claims the land which is the subject of suit as lessee under Government.

The words of Clause 12 are perfectly general. They certainly apply in terms to this case, and therefore the objection of the special appellant cannot be supported, unless there is something either in Act XIV. of 1859 or in some later Act to prevent Clause 12 of Section 1 from having operation in cases where the plaintiff sues as lessee of Government property. Now, the only legislative provisions which bear upon this point are those contained in Section 17, Act XIV. of 1859. That Section says: "This Act shall not extend "to any public property or right, nor to "any suits for the recovery of the public "revenue, or for any public claim whatever, "but such suits shall continue to be go-"verned by the laws or rules of limitation "now in force." If, therefore, this is a suit brought to recover public property, or to assert a public right, or is a suit for the recovery of public revenue, or to make good any public claim whatever, then Clause 12, Section 1, has no operation in the case. But obviously the claim of the plaintiff is a purely private claim. He seeks to assert a private right. The remedy that he asks for would result solely in his own benefit. It does not appear by the terms of his plaint, nor is any fact disclosed by the answer of the defendant which serves to indicate in any way that public property is in question in this suit, or that any public right or claim is sought to be vindicated. In truth, if the statements of the plaintiff and the defendant are taken together, it would seem that the Government, so far from having suffered or being likely to suffer any loss in regard to public property or public right under the circumstances of the case, is actually receiving rent from two parties, namely, the plaintiff and the defendant, simultaneously, for the plot of land which is the subject of suit. In short, there is no pretence for saying that this is a suit falling within the reservation of Section 17, Act XIV. of 1859, and consequently the words of Clause 12, Section 1 of that Act must have full operation. That being so, on the finding of fact of the Lower Appellate Court, which is not impeached by the special appellant, the plaintiff's suit is barred, and the decision of the Lower Appellate Court is right. We, therefore, dismiss the appeal, but without costs, as no one appears for the respondent.

The 25th June 1868.

Present:

The Hon'ble J. B. Phear and C. Hobhouse, *Judges.*

Suit for kubooleut at enhanced rates—Failure to prove specific claim—Legal objection first taken in appeal.

Case No. 3180 of 1867 under Act X. of 1859.

Special Appeal from a decision passed by the Additional Judge of Nuddea, dated the 30th August 1867, affirming a decision passed by the Deputy Collector of that District, dated the 23rd May 1867.

Deen Dyal Puramanick (Defendant), *Appellant,*

versus

Surendurnath Roy (Plaintiff), *Respondent.*

Baboo Issur Chunder Chuckerbutty for Appellant.

Baboo Mohendro Lall Shome for Respondent.

In a suit for a kubooleut at a specified rate of rent, the first Court found that plaintiff was not entitled to a kubooleut at the rate claimed, but decreed that he should obtain one at the old rates. Defendant appealed to the Judge on the ground that as plaintiff had not proved his claim to a kubooleut at enhanced rates, no decree for a kubooleut should have been given.

HELD that an objection of this kind, which is founded upon law only, may be made by a party to the suit in the Court of appeal, although it has not been made in the Court below.

HELD, in special appeal from the Judge's decision dismissing the appeal, that the objection was a perfectly good one, and that as plaintiff had failed to make out his title to a kubooleut at the rent claimed, his suit ought, under a late Full Bench ruling, to have been dismissed.

Phear, J.—THE plaintiff in this suit seeks to obtain a kubooleut from the defendant at a certain rate of rent specified. The first Court has found that he is not entitled to obtain a kubooleut at the rent so specified and claimed, but nevertheless has decreed that he shall obtain one at the old rates paid by the defendant, which were less than those of the kubooleut in question.

Against this decision, the defendant appealed to the Judge, in whose judgment we

find it stated : "The next plea is that as the "Lower Court found that the plaintiff had not "proved his claim to a kubooleut at enhanced "rates, no decree for a kubooleut even at the "old rates should have been given." The Judge went on to make some observations with regard to this plea, and eventually overruled it. Finally, he dismissed the appeal, and confirmed the decision of the first Court.

The defendant appeals to this Court specially, and one of the grounds of appeal is, "that when the Lower Courts found that "the plaintiff could not prove the rent for "which he tendered the pottah to your pe-"titioners, they should have dismissed the "plaintiff's case without making any further "enquiry." There can be no doubt that this objection is a perfectly good objection to the Judge's determination of the matter of law, which, as we have mentioned, the appellant raised before him ; and the only question that has occurred to us with regard to the defendant's right to succeed in special appeal on this head is this, namely, whether this defence to the plaintiff's suit which the defendant first set up in the Appellate Court below and now relies upon, not having been taken, as in fact it was not taken, in the Court of first instance, ought to have been allowed to be taken in the Court of appeal.

After a little consideration, we are of opinion that an objection of this kind, which is founded upon law only, may be made by a party to the suit in the Court of appeal, although it has not been made in the Court below. Perhaps, it might be said generally that points which have not been taken in the Court below ought not to be taken in a Court of appeal, and at any rate whenever so taken, if they are founded in any material degree upon matters of fact, the Court of appeal would probably do right as a general rule to refuse to entertain them, because it can never be known with certainty whether, if the point had been taken in the Court of first instance, and the opposite party been allowed to bring forward evidence which might have seemed to him necessary in consequence, the facts before the Court would not have assumed a different aspect from that which they do exhibit under the existing circumstances of the case. As regards a pure point of law, no doubt this argument does not apply, but still it is inconvenient, to say the least of it, both to the Court and to the parties, that a point of law should be sprung in a Court of appeal which had not been raised and discussed before the Court. It is, too, somewhat unfair to the Lower Court that its judgment should be objected to on the ground of omission to decide a question to which its attention had not been directed by the parties, or which was not necessarily involved in the substance of the contest between them. And we do not think that an appeal Court would act improperly, if it declined to listen to an objection of this sort so made before it. However, in the present case, the Judge has, as we have already mentioned, entertained the objection of the special appellant, and given a judicial decision upon it ; and we think that there is certainly nothing necessarily wrong on the part of a Court of appeal in entertaining a point of law for the first time which had not been raised in the Court below. This being so, we cannot see how we can avoid giving liberty to the special appellant to object in law before us to the decision which the Judge has pronounced.

We have already said that the decision is not a correct one. In a case lately determined by a Full Bench of this Court, it was expressly held that when a plaintiff claims of the defendant a kubooleut at a specified rent, his suit fails and ought to be dismissed, if he does not succeed in establishing his right to a kubooleut at that specified rent. Obviously (indeed it is admitted by the respondent in this case) the plaintiff here, whatever were the merits of the suit in other respects, did fail to make out to the satisfaction either of the first Court or the second Court, that he was entitled to obtain from the defendant a kubooleut at the amount of rent which he claimed. Under the ruling, then, of the High Court, to which we have already referred, the Courts below ought, as a matter of law, to have dismissed the plaintiff's suit on this ground.

The objection of the special appellant, therefore, is made out. We decree the appeal and dismiss the plaintiff's suit, but without costs in either of the Courts below ; the special appellant to have his costs of this Court only.

The 26th June 1868.

Present:

The Hon'ble L. S. Jackson and F. A. Glover, *Judges.*

Salvage—Zemindar's claim to property wrecked—Jurisdiction—Section 27, Act XXIII., 1861.

Case No. 3203 of 1867.

Special Appeal from a decision passed by the Principal Sudder Ameen of Bhaugulpore, dated the 4th July 1867, reversing a decision passed by the Sudder Ameen of that District, dated the 15th December 1866.

Mr. Thomas Grant and others (Plaintiffs), *Appellants,*

versus

Modhoo Soodun Singh and others (Defendants), *Respondents.*

Mr. R. E. Twidale for Appellants.

Baboo Opendro Chunder Bose for Respondents.

A quantity of rice having been recovered from the wreck of a boat, a portion was left on the river-bank by the owner for the remuneration of the salvors, including some left as "*huk semindary,*" which the owners of a neighbouring jote carried away. In a suit brought by the farmer against the jotedar for the value of the portion last mentioned, the Court of first instance went into the question of the custom entitling to property so saved.

HELD that this question was only incidentally raised for the purposes of the suit, which was simply one for the value of moveable or personal property and cognizable by a Court of Small Causes, and, the value being less than 500 rupees, special appeal was taken away.

Jackson, J.—THIS was a suit by the plaintiff, who farms an estate from Government against the defendant, who holds a mouroosee jote within that estate, for the recovery of 400 rupees, being the value of 200 maunds of rice, which the defendant is alleged to have wrongfully carried away.

The plaintiffs' case was, that a boat containing 2,000 maunds of rice having been wrecked on the spot, the cargo had been recovered by the exertions of people living in the neighbourhood, and that 400 maunds, being a portion of the rice so recovered, had been left on the river-bank by the owner for the remuneration of the salvors. Out of this, 200 maunds had been taken by the actual salvors, and 200 had been left as "*huk semindary,*" and the defendants, as owners of the neighbouring jote, considering themselves entitled to this rice, had carried it away.

The Court of first instance went into the question of the custom entitling the zemindar to property so saved, and it also went into the evidence as to the actual assistance rendered by the zemindar in rescuing the cargo, and found on that in the negative, but found in the affirmative as to the custom entitling the zemindar to a share.

The Lower Appellate Court, however, found that there was no such custom, and dismissed the suit.

The plaintiff appeals, and a preliminary objection is taken by the defendant (special respondent) that the special appeal is barred by Section 27 of Act XXIII. of 1861.

Against this objection, it is urged by the special appellant that the suit involves a trial of questions of right beyond the cognizance of Courts of Small Causes.

But it appears to us that the suit was simply a suit for the value of moveable or personal property. It might possibly have been decided without going into the question of rights taken up by the Courts below, but at any rate, the question, if taken up and decided, was only incidentally raised for purposes of the suit. Consequently, the suit is of a nature cognizable by a Court of Small Causes, and the value being less than 500 rupees, the special appeal is taken away.

The appeal is dismissed with costs.

The 26th June 1868.

Present:

The Hon'ble L. S. Jackson and F. A. Glover, *Judges.*

Suit to recover collections from co-sharer under agreement — Jurisdiction — Section 27, Act XXIII., 1861.

Cases Nos. 3205 to 3222 of 1867.

Special Appeals from a decision passed by the Principal Sudder Ameen of Bhaugulpore, dated the 7th August 1867, modifying a decision passed by the Moonsiff of that District, dated the 22nd March 1867.

Shah Ali Ahmed (Defendant), *Appellant,*

versus

Oodhraj Ram (Plaintiff), *Respondent.*

Baboo Debendro Narain Bose for Appellant.

Baboo Otool Chunder Mookerjee for Respondent.

A suit by a co-sharer to recover from defendant collections which are in his charge, and which he is under agreement to pay to the other co-sharers, is a suit for money due under contract, and, if it amounts to less than 500 rupees, the appeal is taken away by Section 27, Act XXIII. of 1861.

Jackson, J.—THE special appeal in all these cases, which are admitted to be similar in character, is barred.

The plaintiff in each of them sued the defendant Shah Ali Ahmed for his share of the collections for the years 1271 and 1272. The collections are said to be "in the charge of the defendant." These are the words used by the Lower Court; it is admitted that this is a correct statement, and it seems that the defendant was under agreement to pay the other co-sharers.

These were consequently suits for money in the hands of the defendant said to be due to the plaintiff under a contract, and amounting to less than 500 rupees. Therefore, the appeal is taken away by Section 27 of Act XXIII. of 1861.

All these special appeals must, therefore, be dismissed with costs.

The 26th June 1868.

Present:

The Hon'ble F. B. Kemp and E. Jackson, *Judges.*

Limitation — Cause of action — Zur-i-peshgee lease—Assignment of rent to creditor.

Case No. 3112 of 1867.

Special Appeal from a decision passed by the Additional Judge of Tirhoot, dated the 24th September 1867, reversing a decision passed by the Principal Sudder Ameen of that District, dated the 30th December 1865.

Zoolfee Begum and another (Plaintiffs), *Appellants,*

versus

Ram Surun Roy and others (Defendants), *Respondents.*

Messrs. R. E. Twidale and *C. Gregory* for Appellants.

Mr. J. S. Rochfort and *Baboos Unnoda Pershad Banerjee, Chunder Madhub Ghose,* and *Romesh Chunder Mitter* for Respondents.

Plaintiff executed a zur-i-peshgee lease to defendant for a term of years, and arranged with him contemporaneously that he (the lessee) was to make an annual payment (out of the rents payable to plaintiff) to a creditor of the plaintiff with a view to clear off a debt. These payments, though made punctually for a time, were withheld while a balance of the debt still remained due, to recover which the creditor sued the lessor (plaintiff), and obtained a decree.

HELD that plaintiff's (lessor's) cause of action against the defendant (lessee) arose from the date of the latter's breach of contract, *i. e.*, the date on which he failed to pay.

Kemp, J.—THE point for decision in this case is whether the Judge has properly applied the law of limitation, which in this case is Act XIV. of 1859, or not.

The facts of the case are these: The plaintiff (special appellant) executed a zur-i-peshgee lease to the defendants for a term of 9 years from the year 1258 to the year 1266 Fuslee. It is alleged that contemporaneously with this lease, an arrangement was entered into between the plaintiff (the lessor) and the defendant (the lessee) that the latter was to make an annual payment of 1,000 rupees out of the rents payable to the lessor; the said 1,000 rupees to be paid to one Kishen Bhullub, the plaintiff's creditor. By this arrangement, the debt due to Kishen Bhullub, amounting to 7,000 rupees, was to be cleared off.

It is alleged that, up to February 1860, Rupees 5,830, instead of 7,000, were paid by the lessee to the plaintiff's creditor, the aforesaid Kishen Bhullub. Kishen Bhullub then brought a suit to recover Rupees 1,170, being the difference between 7,000 rupees and 5,830 rupees, against his debtor, the plaintiff (special appellant), and he obtained a decree. Upon this, the plaintiff, treating the sum of 1,170 rupees as rent due to him, sued his lessee, the special respondent, under Act X. This suit, under that Act, was, we think, rightly dismissed; but rightly or wrongly, it was dismissed by this Court on special appeal, and we must accept that finding.

The plaintiff then brings the present suit on the 10th of March 1865. The Principal Sudder Ameen, on the issue in bar, observes that the plaintiffs' cause of action in this suit arose on the 14th of February 1860, when the Mahajun Kishen Bhullub sued him, and, therefore, applying the provisions of Clause 16, Section 1 of Act XIV. of 1859, the suit having been instituted within six years from that date, was in time. The Principal Sudder Ameen also went into the merits of the case, with which we have at

h

present no concern. The Judge, on appeal, has reversed the decision of the Principal Sadder Ameen, and has held that the plaintiff's cause of action arose, not from the date of the suit brought by the Mahajun, but from the date of the breach of the contract; and further that "it was useless for the plaintiff "to plead want of knowledge of the breach, "for there was no period at which he could "not have informed himself whether the "money under the contract had been duly "paid or not." The suit of the plaintiff was therefore dismissed.

In special appeal the pleaders for the special appellant contended that their client's cause of action arose when they were compelled to pay to the Mahajun the sum which, under the assignment, their lessee was bound to pay to that Mahajun; and as an alternative plea, that if the cause of action arose when the lessee failed to pay the Mahajun as he ought to have paid him, the period of limitation would only run from the time when the plaintiff became cognizant of that fact.

We think that the decision of the Judge is substantially correct. The Mahajun was no party to the contract of assignment under which it was arranged that the defendant (the lessee) would pay 1,000 rupees per annum for 7 years to the plaintiff's creditor out of the rent of the properties leased. The Mahajun could not have sued the defendant as assignee, for there was no privity between these parties. As long as the debt due to the Mahajun was gradually and punctually paid off, he did not sue his debtor; when the payments were withheld, he brought his action in 1860. The plaintiff was bound to see that the moneys due to his creditor were regularly paid by the assignee. Instead of doing so, he first sued in a Court which had no jurisdiction, and after 5 years from the date of the suit brought by the Mahajun, he brings this suit charging interest for a period of no less than 14 years. We hold that the plaintiff's cause of action arose when these lessees failed to pay the yearly sum of 1,000 rupees, which they were bound to pay under the letter of *Barat*, and not from the date when they had to pay the amount due to the Mahajun under the decree obtained by him. The Mahajun had not accepted the assignment, nor had he consented to accept the assignee as his debtor. He was in no way bound by that agreement, and if the lessees (the defendants) did not pay according to that assignment, the plaintiff's cause of action clearly arose from the date on which they failed to pay.

The suit was, therefore, properly dismissed by the Judge, and this special appeal must be dismissed with costs, including the costs of the Mahajun, who has most improperly been made a respondent.

The 26th June 1868.

Present:

The Hon'ble F. B. Kemp and E. Jackson, *Judges.*

Suit for arrears of rent at enhanced rates — Intervention — Section 77, Act X., 1859.

Case No. 3413 of 1867 under Act X. of 1859.

Special Appeal from a decision passed by the Officiating Judge of Tirhoot, dated the 19th August 1867, affirming a decision passed by the Officiating Assistant Collector of that District, dated the 28th December 1866.

Phoolabutty Kooer (Plaintiff), *Appellant,*

versus

Gossain Luchmun Doss and another (Defendants), *Respondents.*

Baboos Chunder Madhub Ghose and *Shib Chunder Chatterjee* for Appellant.

Baboos Hem Chunder Banerjee and *Anund Gopal Paleet* for Respondents.

In a suit for arrears of rent, where plaintiff alleged himself to be proprietor of an 8-annas share, and a third party intervened, claiming to have been in possession and enjoyment of the rents of 4-annas out of the 8-annas, the Judge, in appeal, finding that neither plaintiff nor intervenor had been in possession and enjoyment of the 4-annas of the rent in dispute, dismissed plaintiff's suit.

HELD that the Judge, having found against the intervenor as between him and the plaintiff, was bound under Section 77, Act X., 1859, to decree for the plaintiff.

The plaintiff's claim to a higher rate than the defendant admitted not having been proved, the decree in favor of the plaintiff would be only to the extent and at the rate admitted by the ryot.

Jackson, J.—THIS was a suit for arrears of rent. The plaintiff, alleging himself to be the proprietor of an 8-annas share of Mouzah Gedwah, sued one of the ryots in the village for rent. A third party intervened, and alleged that he had been in possession and enjoyment of the rents of 4-annas out of the 8-annas, which the plaintiff had claimed. The ryot supported the intervenor. The Judge, on appeal, has found that the plaintiff has not proved his possession and enjoyment of the rents of the 4-annas, and he goes on

also to state that he is of opinion that the intervenor has not proved his possession and enjoyment of that 4-annas of the rent. On these two findings, the Judge has dismissed the plaintiff's suit.

On behalf of the special appellant, it is said that the question that the Judge had to try was as to the actual receipt and enjoyment of the rents by the intervenor, and that the Judge, having found that the intervenor was not in receipt and enjoyment of the rents, should then, in accordance with Section 77, Act X. of 1859, have decided the suit according to the result of such inquiry. It is said that, by the words of that Section, the Judge was bound under his finding to give a decree in favor of the plaintiff. The words of the law, we think, support this contention of the special appellant, and that, as between the claim of the plaintiff and that of the intervenor, the Judge, having found against the intervenor, was bound to decree for the plaintiff.

We, therefore, reverse the decision of the Judge, and decree this appeal with costs.

As between the ryot and the plaintiff, we observe that there is also a point in dispute as to rates of rent. The document under which the plaintiff claims a higher rate than the defendant admits, namely, a shareenamah, has been held not to have been proved. The decree in favor of the plaintiff will, therefore, be only to the extent and at the rate admitted by the ryot.

The 27th June 1868.

Present:

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble Dwarkanath Mitter, *Judge*.

Pleaders of Mofussil Courts — Calcutta Small Cause Court — Act XX. of 1865.

Reference to the High Court, by the Judges of the Small Cause Court of Calcutta, in the matter of an application of Shushee Bhoosun Bhadooree, a pleader of the second grade, to be enrolled as a pleader of the Calcutta Small Cause Court.

The Small Cause Courts intended to be included in the Pleaders, Mooktears, and Revenue Agents' Act (XX. of 1865), were the Small Cause Courts established under Act XI. of 1865, and pleaders of Mofussil Courts are not, as such, entitled to practise in the Small Cause Court at Calcutta.

Peacock, C. J.—This appears to us to b a very different case from the one which wa referred to.* That case was decided wit reference to the construction to be put upo Section 45 of Act XX. of 1865. By th Section, it is enacted that every advocate o vakeel on the roll of any High Court sha be entitled as such to practise in any Cou in British India other than a High Cou in which he is not enrolled. An advoca or vakeel of one High Court is not entitle as such to practise in any other High Cou in which he is not enrolled; but with th exception, he is entitled to practise in an Court in British India. We thought that th Small Cause Court in Calcutta was not High Court, but that it was a Court in Briti India; and consequently that an advocate o vakeel of any High Court was entitled practise there.

The present applicant's right does n depend upon that Section. His rig depends upon Section 12, which states th every person who shall have been admitte to practise as a pleader or mooktear und the Act may, subject to the conditions his certificate as to the class of Courts which he is authorized to practise, apply be enrolled in the Court in which he sha desire ordinarily to practise; and on suc application, he shall be enrolled in a book be kept for that purpose in such Court.

It is only by the terms of his certificate that he is entitled to practise in a Small Cause Court at all. There is no express direction in the law to that effect. The certificate is the form of certificate set out in the 2nd Schedule to the Act, in which the words "Small Cause Courts" are used. The question, then, is—What is the meaning of the words "Small Cause Courts" as used in that form of certificate? Do those words extend to the Small Cause Court in Calcutta, or are they confined to the Small Cause Courts in the Mofussil? It appears to us that the words refer to the Small Cause Courts in the Mofussil, and not to the Small Cause Court in Calcutta.

By the 4th Section of the Pleaders' Act, the High Court is authorized and required to make rules for the qualification, admission, and enrolment of proper persons to be pleaders and mooktears of the Courts in the territories to which the Act extends; and the word "Court" is defined to mean "all Courts subordinate to the High Court, in-

* Case of Toolsee Doss Seal.—*See* 7 W. R. 228.

b

cluding Courts of Small Causes," which we understand to mean "including Courts of Small Causes subordinate to the High Court."

We pointed out in the case to which reference has been made the reasons for thinking that the Small Cause Court of Calcutta was subject to have a writ of *mandamus* issued to it by the High Court; but we do not think that the Small Cause Court of Calcutta was, therefore, intended by the Legislature to be included as a Court of Small Causes subordinate to the High Court. In fact, that has been the construction hitherto put upon the Act, inasmuch as this Court has never considered that Section 4 authorized the High Court to make rules for the admission of pleaders in the Calcutta Small Cause Court. We are of opinion that the Small Cause Courts intended to be included in Act XX. of 1865 were the Small Cause Courts established under Act XI. of 1865, which, according to Section 4 of that Act, are, like the Mofussil Courts, made subject to the general control and orders of the High Court.

For these reasons, it appears to us that the Small Cause Court should be informed that we do not think that pleaders of the Mofussil Courts are, as such, entitled to practise in the Small Cause Court at Calcutta.

The 27th June 1868.

Present:

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble Dwarkanath Mitter, *Judge*.

Jurisdiction—Suit to recover rents from tehsildar.

Reference to the High Court by the Judge of the Small Cause Court at Pubna, dated the 8th May 1868.

Thomas Rennie Grant and Stephen Edward Collis, Executors to the estate of James Pilham Mackilligan, *Plaintiffs*,

versus

Ram Tonoo Bhoomick, *Defendant*.

A suit to recover from defendant an amount of rent collected by the latter on behalf of the plaintiffs in his capacity of tehsildar, for the due performance of the duties of which office he had bound himself by an agreement under security, was held to be maintainable in the Revenue Court, and not in any other.

Case.—THE plaintiffs seek to recover from the defendant Rupees 299-10-3, being the amount of rent of Turuf Beauleah and other villages, collected by him on their behalf from the year 1271 to 1273 B. S., in his capacity as tehsildar appointed by the plaintiffs under kubooleut or agreement executed by him on the 30th Assin 1271 B. S. The plaintiffs produced certain *jumma-khuruch* papers alleged to have been furnished by the defendant, showing a balance in his hands corresponding with the sum claimed, which he promised to pay on the 15th Assin 1274 B. S. Failing to perform this promise, this action has been brought.

The defendant, while he admits that he acted as a tehsildar for collection of rents on behalf of the plaintiff, pleads that he held in his hands only Rupees 15-2-3¾ *gundas*, out of which he paid Rupees 11-8 to the plaintiff's manager, and that he did not make any contract, written or parol, either with the plaintiffs or their officer, to pay the money, and therefore this action cannot lie in the Small Cause Court.

The only question to be decided is, whether this suit is cognizable by the Small Cause Court?

It is clearly admitted by the parties that the defendant was employed as an agent for collection of rents of lands, and therefore the Revenue Court, and not the Small Cause Court, has jurisdiction to try suits for the recovery of moneys collected by such agent. The plaintiffs seem to have taken a wrong view of the case to state that the defendant has failed to perform his agree-

ment. and to describe this action as one for breach of contract. The agreement, an extract translation from which is herewith submitted, only binds down the defendant under security for the due performance of his duties as tehsildar. It cannot be taken as a contract entered into by the defendant to pay the money collected by him as viewed by the plaintiffs. Besides, there is no other document on record given by the defendant, subsequent to the execution of the agreement, purporting to be a contract of that nature. This case, therefore, falls under Sections 24 and 33 of Act X. of 1859, and I have, accordingly, given a verdict for the defendant, contingent upon the opinion of the Hon'ble Judges of the High Court.

To—Messrs. Gilmore, Mackilligan, and Company, Proprietors of Majeeparah Factory.

I, Ram Tunoo Bhoomick, of Majeeparah, Pergunnah Eslampore, do hereby execute this kuboolent. Whereas you have appointed me, at my own request, as a tehsildar for collection of rents of Neez Beauleah, otherwise called Nazirpore, and Mouza Dear Beauleah, in Turuf Beauleah, in Pergunnah Bajoorush Nazeerpore, and of Mouzah Deear Pachooreah, &c., in Pergunnah Eslampore, the collection whereof amounts to Rupees 1,327-2-2, under security of the property mentioned at foot, that I shall always be present at the known Cutchery, and perform the duties of the collection of rents; that I shall immediately grant dakhilas for the rents which I shall collect from the ryots, and shall not receive one single pie without giving such dakhilas; that, at the end of every week, I shall remit the amount of collection made during such week to the manager of your Sudder Cutchery with a set of *amdaney* papers, and obtain a receipt for the same. Any objections made by me as to payments without a receipt will not be valid. When making the remittance at the end of every week, I shall not keep back one single pie in my hands.

Judgment of the High Court.

Peacock, C. J.—We are of opinion that the Judge of the Small Cause Court was right. The suit was maintainable in the Revenue Court, and not in any other Court. The provisions of Section 24 of Act X. of 1859 are clear to that effect.

The 27th June 1868.

Present:

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble Dwarkanath Mitter, *Judge*.

Summary application under Section 53, Act XX. of 1866.

Reference to the High Court by the Judge of the Small Cause Court at Jessore, dated the 21st May 1868.

Gour Mohun Dass, *Plaintiff*,

versus

Ram Roop Mozoomdar and others, *Defendants*.

A summary application under Section 53, Act XX. of 1866, cannot be entertained at the suit of the assignee of the obligee.

Case.—This is an application to this Court under Section 53 of Act XX. of 1866, by the assignee of the bond or obligation filed with the application, to enforce the agreement recorded therein by the registering officer under Section 52, and the question arises: Can the obligor be called on summarily under the Section cited at the instance of the assignee?

It appears to be considered a rule of practice that an assignor must be a party to a suit by the assignee. (*See* Macpherson's Civil Procedure, page 131, and In the Matter of the Petition of Bhunjien Mundul, page 94, Sudder Dewanny Reports, 1848.) I have, therefore, referred the applicant to a regular suit, as it would be necessary to make the assignor a party defendant, but his pleader has asked that the assignor be made a party under Section 73 of Act VIII. of 1859.

It appears to me that the provisions of Act VIII. of 1859 will not apply to an application made under Section 53 of Act XX. of 1866, except as to enforcement of decrees passed under that Section, and that none but the obligee can apply to enforce the agreement recorded under Section 52, and that I ought to refuse to make the assignor a party defendant, as this would take more the form of a regular suit, and it would be necessary to summon the assignor, which I could not do under the ruling in Kisto Kishore Ghose *versus* Brojonath Mozoomdar, Sutherland's Weekly Reporter, Volume VII., page 11, Small Cause Court Rulings. I must, therefore, refuse to call upon the obligor summarily, and the applicant must be referred to a regular suit, making the necessary parties defendants.

Judgment of the High Court.

Peacock, C. J.—The Judge of the Small Cause Court is correct in holding that a summary application under Section 53, Act XX. of 1866, cannot be entertained at the suit of the assignee of the obligee.

d

The 27th June 1868.

Present:

he Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble Dwarkanath Mitter, *Judge*.

ivate arbitration-award—Jurisdiction of Small Cause Courts—Section 327, Act VIII., 1859.

eference to the High Court by the Judge of the Small Cause Court of Kooshtea, dated the 14th May 1868.

Elam Puramanick, *Plaintiff*,

versus

Sefaetullah Sheikh, *Defendant*.

A Small Cause Court has jurisdiction, under Section 7, Act VIII. of 1859, to entertain an application to e a private arbitration-award relating to a debt not ceeding the amount cognizable by such a Court, if e defendant resides within its jurisdiction.

Case.—The plaintiff, having had dealings f paddy and cash with the defendant, lent im paddy and cash on different occasions, nd, failing to obtain satisfaction of his demands, referred the matter to arbitration ithout the intervention of any Court of ustice. The arbitrators gave their award or the plaintiff, and directed him to enforce through the medium of the proper Court, n case defendant refused payment of the mount awarded. Now, the plaintiff appears efore this Court with an application praying hat the award may be filed, and the necessary orders passed.

But the question whether a private award may be filed in this Court or in the ordinary Civil Court appears a doubtful one. I am of opinion that the Court of Small Causes cannot have jurisdiction over the matter. Section 6, Act XI. of 1865, which defines the jurisdiction of the Court, gives it no power for filing such a document. If it be taken for a contract by judgment, the Court has no power to proceed to enforce it at once. Under Section 327, Act VIII. of 1859, when any person applies to file a private award, the Court having jurisdiction in the matter shall direct notice to be given to the opposite party to show cause why the award should not be filed. If no sufficient cause be shown against the award, it shall be filed, and may be enforced. But if the validity of the agreement of the parties to the arbitration be called into question, the Court shall have to settle it before proceeding to pronounce judgment upon the matter for giving effect to the private award.

The late Sudder Court's Circular, dated 14th April 1860, provides that an application to give effect to a private award "should be brought on the file as a regular "suit, but that it should be on a stamp of "the value required for miscellaneous "petitions." The simple suits cognizable by the Court of Small Causes cannot possibly include such a regular suit amongst their number.

The Section 327, Act VIII. of 1859, directs that any person interested in the award may make application to the Court having jurisdiction in the matter to which the award relates. The word "Court" in this Section cannot possibly refer to the then not existing Courts of Small Causes, but to the ordinary Civil Courts which are empowered to entertain all suits not falling within the exclusive jurisdiction of the Small Cause Courts by Section 6, Act XI. of 1865, or of any other Court by special Acts.

From the circumstances stated above, it would appear that the matter is cognizable by the ordinary Civil Courts, and not by the Courts of Small Causes, which are not required to make any preliminary enquiries for bringing a case on their file, but to enter at once into the merits of cases made cognizable by Section 6, Act XI. of 1865.

I therefore beg most respectfully to submit the case for the decision of the Hon'ble Judges of the High Court on the point whether an application for giving effect to a private award is to be presented to the ordinary Civil Courts of local jurisdiction, or whether the Court of Small Causes constituted under Act XI. of 1865 is competent to entertain it.

Judgment of the High Court.

Peacock, C. J.—If the award related to a debt not exceeding the amount cognizable by a Small Cause Court, we are of opinion that the Small Cause Court has jurisdiction, under Section 327, Act VIII. of 1859, to entertain the application to file the award, provided the defendant resides within the jurisdiction. In such a case, the Small Cause Court would have jurisdiction over the matter to which the award relates.

The 27th June 1868.

Present :

The Hon'ble F. B. Kemp and E. Jackson, *Judges.*

Purchaser from Mortgagor—Legal representatives—Regulation XVII. of 1806.

Case No. 3449 of 1867.

Special Appeal from a decision passed by the Principal Sudder Ameen of Tirhoot, dated the 5th September 1867, reversing a decision passed by the Sudder Ameen of that District, dated the 21st December 1866.

Golam Dustageer Khan (Defendant), *Appellant,*

versus

Juggur Singh and others (Plaintiffs), *Respondents.*

Baboo Debendro Narain Bose for Appellant.

Baboo Kalee Kishen Sein for Respondents.

Following precedents of the High Court, it was held that the purchaser from a mortgagor comes within the category of legal representatives under Regulation XVII. of 1806.

Jackson, J.—THIS was a suit by the mortgagee after foreclosure of mortgage to recover possession of the mortgaged property from the mortgagor. A third party intervened, alleging that, previous to the foreclosure, he had purchased the rights and interests of the mortgagor, and that, when no notice of foreclosure had been served upon him, the plaintiff could not obtain a decree. This third party was made a defendant in the suit.

The Principal Sudder Ameen of Tirhoot has interpreted Section 8 of Regulation XVII. of 1806, which states that notice of foreclosure must be made upon the mortgagor or his legal representatives, to signify that a purchaser from the mortgagor is not such a legal representative. He seems to confine the meaning of legal representatives to the heirs of the mortgagor, and he holds that, the defendant (appellant) not being an heir of the mortgagor, it was not requisite that such a notice be served upon him. In support of this view, he quotes a precedent of the Sudder Court, dated the 1st of September 1847; but there are other and later precedents to be found in the reports of this Court, and more especially those at page 230, Volume III. of the Weekly Reporter, and at page 230, Volume VI., Weekly Reporter. Following these precedents, we are of opinion that the purchaser from a mortgagor does come within the category of legal representatives under Regulation XVII. of 1806; and in this case it is alleged that the mortgagee had notice of the sale, and that there is evidence to that effect on the record. We think that it was incumbent upon the Principal Sudder Ameen to ascertain whether he had such notice. If he had notice of the sale, then it was incumbent upon him to serve a notice of foreclosure upon the purchaser.

We reverse the decision of the Principal Sudder Ameen, and remand the case to him to decide this point.

The 27th June 1868.

Present :

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice,* and the Hon'ble Dwarkanath Mitter, *Judge.*

Powers of Recorder's Court—Certificate under Act XXVII., 1860—Suit for a share of an estate—Section 73, Act VIII. of 1859.

Reference to the High Court by the Recorder of Moulmein, dated the 9th May 1868.

Oh Ling Tee, *Plaintiff,*

versus

Awkinifee, *Defendant.*

Where one son of a deceased party sued in the Recorder's Court another son who had obtained a certificate under Act XXVII. of 1860, for his share of the deceased's estate, it was held that the Recorder had no power to transform the suit into a general administration-suit. The Court may, under Section 73, Act VIII. of 1859, order all necessary parties who claim a share in the subject-matter of the suit to be made parties.

Case.—THE facts of the case in which the above reference is made are these :—

In July 1865, one Mewsoon, a Chinaman, died in Moulmein possessed of considerable personal property, including outstanding money-debts.

The legitimacy of parties claiming to be the next of kin of the deceased is a matter in issue in the suit.

Ling Tee is the son of Mee Noy, who alleges herself to be the widow of the deceased.

Awkinifee is the son of one Nonia Tau shon, who is alleged by the defendant to have been the only legitimate wife of Mewsoon.

Awkinifee, after considerable litigation created by the opposition of Mee Noy, obtained a certificate under Act XXVII. of 1860.

My own opinion is, that it is competent to, and incumbent on, the Court to convert the suit into one for the general administration of Mewsoon's estate, and for this purpose to add as parties all persons alleged by plaintiff and defendant to be entitled to share in the distribution of the estate. As regards the question of stamp, I have great difficulty in expressing an opinion. It does not appear to me that the Court has the power of requiring the parties added to furnish additional stamps.

The judgment of the High Court was delivered as follows:—

Peacock, C. J.—We are of opinion that the Recorder has not the power to transform this suit into a general administration-suit.

The second question, therefore, does not arise.

If, at the hearing of the suit, it appear to the Court that all the persons who may be entitled to, or who may claim, some share or interest in the subject-matter of the suit, that is to say, in the one-eleventh (for which the plaintiff is suing), have not been made parties to the suit, the Court may, by virtue of Section 73, Act VIII. of 1859, order them to be made parties.

The plaintiff is suing for his own share, and not for a general administration of the estate of the deceased; and we do not see how the other children of his mother can have an interest *in the plaintiff's share.* It is probably because Section 73 refers to the *claim in the suit* for which the stamp-duty must be paid, that no further stamp-duty is necessary, if other persons are made parties. The plaintiff might possibly have sued to have the estate divided and paid to the persons entitled to the several shares, and to have an account rendered of the whole estate, but he is not doing this, and claims only his own share. It is like the case of a legatee suing merely for his own legacy.

The 27th June 1868.

Present:

The Hon'ble G. Loch and F. A. Glover, *Judges.*

Enhancement — Adverse testimony of plaintiff's own witnesses — Amendment of plaint — Discretion of Lower Court.

Case No. 3246 of 1867.

Special Appeal from a decision passed by the Judicial Commissioner of Chota Nagpore, dated the 31st August 1867, affirming a decision passed by the Deputy Commissioner of that District, dated the 1st June 1867.

Messrs. R. Watson & Co. (Plaintiffs), *Appellants,*

versus

Nidhoo Digwar (Defendant), *Respondent.*

Mr. J. S. Rochfort for Appellants.

No one for Respondent.

In a suit for arrears of rent at enhanced rates after notice, in which defendants did not appear, but plaintiff's witnesses deposed to the village being a Ghatwalee one—HELD that plaintiff had called all the assessable lands mâl lands, and the case could not proceed in the form in which it was made.

A Lower Court has discretion to permit or not the filing of a petition to amend a plaint, and its refusal is no ground for special appeal.

Glover, J.—THE plaintiffs in this case, Messrs. Watson and Co., ijaradars of Pergunnah Phoolkoosina, sued the defendants for arrears of rent at enhanced rates, after notice, on his village of Kadoband.

The defendants did not appear, but the plaintiffs' witnesses, who were examined to prove service of notice on the defendants, having deposed that the village was a Ghatwalee one, and the defendants the Ghatwals, the Lower Courts held that the plaintiffs' suit must fail, they having claimed to enhance the rent on the village as consisting wholly of mâl land.

In special appeal, it is contended that the Judicial Commissioner was wrong in dismissing plaintiffs' suit without trying the question whether the lands on which rent was demanded were Ghatwalee or not, and that plaintiffs were entitled to an adjudication as to whether or not the defendants held lands in excess of their Ghatwalee tenure, and for which they would be liable to pay enhanced rent.

We think that this special appeal must be dismissed. As the record stands, the plaintiffs sued for enhanced rent on all the

assessable lands of the village, calling them mâl lands. There was nothing in their plaint to show, nor do their witnesses show, that any Ghatwalee lands were excepted; and it is, therefore, clear that, on the face of the evidence given by their own witnesses, the case could not have proceeded in the form in which it was made.

With regard to the special appellants' petition to amend their plaint, we observe that, by Section 29 of Act VIII. of 1859, it was in the discretion of the Lower Court to allow such petition to be filed or not, and a refusal of permission would form no ground of special appeal.

The special appellants have only themselves to thank for the miscarriage of their suit. They had ample time and opportunity to make enquiries, and to ascertain the nature of their rights in the defendant's village. They cannot plead ignorance of what was required of them; for ever since they have taken the farm of Pergunnah Phoolkoosina, they have been instituting suits against the tenants of the estate for resumption, assessment, and enhancement.

There will be no costs in this appeal, as no one has appeared for the special respondent.

The 27th June 1868.

Present:

The Hon'ble G. Loch and F. A. Glover, *Judges.*

Sale in execution of a money-decree.

Case No. 2642 of 1867.

Special Appeal from a decision passed by the Officiating Judge of Bhaugulpore, dated the 17th June 1867, affirming a decision passed by the Principal Sudder Ameen of that District, dated the 17th April 1866.

Sooney Ram Marwaree (Plaintiff), *Appellant,*

versus

Byjnath Kooer (Defendant), *Respondent.*

Baboos Sreenath Doss and *Bhugobutty Churn Ghose* for Appellant.

Baboos Juggodanund Mookerjee, Unnoda Pershad Banerjee, and *Oopendur Chunder Bose* for Respondent.

When an estate is sold in execution of a simple money-decree, the purchaser buys merely the right and interest of the debtor in the estate; and if the estate is burdened with a debt, *e. g.*, hypothecated under a bond, he buys subject to that lien.

Glover, J.—The plaintiff in this suit lent money to Ram Koomar and others on a bond, dated the 7th of March 1864, which bond pledged, as security for the loan, a talook called Dyalpore.

In the following June, plaintiff sued upon this bond, and got a decree for the money lent on the 3rd of June 1864.

He took out execution, and endeavoured to bring to sale the property hypothecated in his bond.

But he was successfully opposed by the defendant, who claimed to have bought the talook at an execution-sale in satisfaction of another money-decree obtained against the same debtor by a third party.

Plaintiff, therefore, brought this suit to enforce his lien on the property.

The defendant purchased the talook on the 20th of April 1864, and the decree in satisfaction of which the sale was made was passed in February 1864.

Both Lower Courts dismissed the plaintiff's suit, the Judge holding that the talook itself passed to the defendant at the execution-sale, and that the plaintiff had no lien upon it.

We think that this decision was wrong. The decree under which the defendant purchased at the execution-sale was a simple money-decree, and therefore the thing sold was not the estate which was hypothecated under the bond, but the right and interest of the debtor in that estate at the time of the sale. The point has been frequently ruled by this Court; the last reported case appears to be Erskine *versus* Dhun Krishno Sein, VIII. Weekly Reporter, 291, but the principle was laid down long before in the Full Bench decision of the 14th December 1864, Gopeenath Singh *versus* Sheo Suhai Singh, I. Weekly Reporter 315.

The Judge has followed a ruling of this Court in the case of Beckwith *versus* Omesh Chunder, III. Weekly Reporter, 110.

But in that case the facts were different. The bond not only pledged certain property, but covenanted that no other alienation should be effected.

In that case, moreover, the property had not reached the hands of a subsequent purchaser, and the Judges taking all the circumstances of the case into consideration, held that the property itself was liable. They say: "Though the decree did not "specifically recite that the property in

"question was liable for the debt, yet from "the filing of the deed in the suit, and from "the presence of the parties, both the de-"fendant and the surety, we cannot avoid "the conclusion, that the property was put "up and sold, not as that of an ordinary "debtor, but as what had been avowedly "pledged for the debt."

In this case, the defendant got a simple money-decree, and took out execution in the ordinary way upon this particular property, as he might have done upon any other property, in the possession of his judgment-debtor; and according to the rule in such cases, only the rights and interests of the judgment-debtor were sold.

Now, at the time of the sale, the property was admittedly burthened by the debt due to the plaintiff, and following the ruling of the Full Bench above referred to, we consider that the defendant bought subject to that lien, and that to retain possession he must pay off the plaintiff's claim.

We, therefore, reverse the decision of the Lower Appellate Court, with costs on special respondent.

The 29th June 1868.

Present:

The Hon'ble J. B. Phear and C. Hobhouse, *Judges.*

Suit by sebayet to recover possession—Statements made by ancestors—Evidence.

Case No. 57 of 1868.

Special Appeal from a decision passed by the Judge of Cuttack, dated the 17th September 1867, reversing a decision passed by the Moonsiff of that District, dated the 28th June 1867.

Nund Pandah (Plaintiff), *Appellant,*

versus

Gyadhur and others (Defendants), *Respondents.*

Baboo Greesh Chunder Ghose for Appellant.

Baboos Chunder Madhub Ghose and *Obhoy Churn Bose* for Respondents.

In a suit to recover property claimed by plaintiffs as *sebayets* lately in possession, and wrongfully ousted therefrom, it was held that statements made by the ancestors of plaintiffs and defendants were receivable as evidence.

In a suit of this kind, it is incumbent upon the plaintiffs to prove the title which gives them the right to recover possession of the property, just as it would if they were seeking to recovor upon a secular, instead of a *quasi*-religious, title.

Phear, J.—As far as the small portion of the property which is involved in this special appeal is concerned, the plaintiff sued to recover it, claiming as *sebayet* lately in possession, and wrongfully ousted therefrom, by the defendants. There can be no doubt that, in a suit of this kind, it is incumbent upon the plaintiffs to prove the title which gives them the right to recover possession of the property, just as it would if they were seeking to recover upon a secular, instead of a *quasi*-religious, title. The Lower Appellate Court, after discussing the evidence before it, has come to the conclusion that the plaintiffs have not made out any right to recover possession of these 10 ghauts of land. It places the evidence of title, which is favorable to the plaintiffs, on the one side; and this evidence seems to reside solely in the fact that the plaintiffs were for some time in possession of the 10 ghauts of land, and acting as *sebayets* of the temple; and on the other side it puts certain statements, which the Court says were made by the ancestors of the plaintiffs and by the ancestors of certain of the defendants on an occasion when these lands were, with others, sought to be resumed by Government as invalid lakheraj lands, and which, the Court considers, amount to a declaration "that these lands "were not rent-free lands, but were *khalsa* "or *mál* lands, and that they themselves "had taken no engagement for them, and "persistently denied having any claim to "them." Then, balancing these two classes of evidence, the Lower Appellate Court came, as we have already said, to a conclusion adverse to the plaintiffs.

It is now objected in special appeal that the plaintiffs had a right in law to recover possession, assuming only that they had previously been in possession in the capacity of *sebayets;* and, *secondly*, that the statements which have been used against them were not properly evidence between them and the defendants in this suit. With regard to the first, it is enough to say that, possibly, possession and user in the apparent capacity of *sebayets* might, if unrebutted by any other evidence at all, be sufficient as evidence of title (so far as it goes) to make out a *primâ-facie* case in favor of the plaintiffs. Still even that *primâ-facie* case would be a weak one, and here certainly there is evidence on the other side which

the Lower Appellate Court has considered to over-balance it in weight, that is to say, there is certainly evidence on the other side, if the statements to which we have referred are legally receivable as between the parties to this suit. And as to that, nothing has been put forward by the pleader for the special appellant, upon which we can at all reasonably come to the conclusion that the Lower Appellate Court made an error in attributing those statements to the persons to whom he has attributed them. If they were made by the plaintiffs' and the defendants' ancestors, as the Judge says they were, they are indubitably receivable as evidence in this suit. We cannot, therefore, see that any mistake has been made in the trial of the suit in the Lower Appellate Court, and we dismiss the appeal with costs.

The 29th June 1868.

Present:

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble Dwarkanath Mitter, *Judge*.

Appointment of administrators.

Case No. 151 of 1868.

Miscellaneous Appeal from an order passed by the Judge of Dacca, dated the 14th January 1868.

Mr. Aratoon Stephen, *Appellant*,

versus

Mr. Carapiet Stephen, *Respondent*.

Baboo Chunder Madhub Ghose for Appellant.

Mr. C. Gregory for Respondent.

A Judge was held not to have exercised an unwise discretion in rejecting the claim of an applicant to be a co-administrator to his deceased brother's estate, when it was in evidence that the intestate had stated that he had to receive money from his brother (the applicant), although such statement was not in legal evidence.

Peacock, C. J.—We do not think that the Judge has exercised an unwise discretion in rejecting the claim of Mr. Aratoon Stephen to be a co-administrator in the present case. The Judge says that there is cause to suppose that he is indebted to the estate. One of the witnesses of Mr. Aratoon Stephen stated that he knew that Mr. Aratoon had had an advance made to him by the deceased, Mr. Stephen, but he did not consider that the advance was a loan, otherwise he would have taken a security. The other witness stated that the intestate told him that he had to receive money from his brother, Mr. Aratoon. According to these witnesses, it is a matter which will have to be considered by the administrators of the intestate, whether his brother, Mr. Aratoon, was or was not a debtor to the estate; and if they should consider that he was, and he should deny his liability, it will be a further question for the administrators to consider whether legal proceedings ought or ought not to be adopted against him. In determining such questions, it would hardly be expedient that he himself should be consulted and have a voice. Further, if legal proceedings should be adopted, it would scarcely be expedient to have the estate so represented that one of the representatives should be a party to the suit in two capacities, *viz.*, as one of the plaintiffs and as the defendant. It is said that the statement of the intestate himself, that he had to receive money from his brother, Mr. Aratoon, would not be evidence against him; but although not legal evidence, it would be a matter for the representatives to take into consideration in deciding upon the course which they ought to adopt.

The circumstance of Mr. Carapiet Stephen's residing at Delhi, out of the province and out of the jurisdiction of the Judge, is not a matter which can be properly taken into consideration in determining whether Mr. Aratoon ought to be one of the administrators or not.

Under these circumstances, we think that the order of the Judge must be affirmed with costs.

The 29th June 1868.

Present:

The Hon'ble H. V. Bayley and A. G. Macpherson, *Judges*.

Objection to evidence first taken in special appeal—Lakheraj title—Regulation XXXIX. of 1793—Registration—Onus probandi.

Case No. 3094 of 1867.

Special Appeal from a decision passed by the Principal Sudder Ameen of Gya, dated the 2nd September 1867, reversing a decision passed by the Sudder Ameen of that District, dated the 30th March 1867.

b

Chadee Singh and others (Defendants), *Appellants*,

versus

Beharee Tewaree (Plaintiff), *Respondent*.

Baboos Nil Madhub Sein and *Khetturnath Bose* for Appellants.

Mr. R. E. Twidale for Respondent.

In a case in which plaintiff claimed, as lakheraj, certain land situated within the share of his co-sharer, and, though his claim was dismissed in the first Court, obtained a decree in the Lower Appellate Court, it was held that, as defendant did not object in the Lower Court to the admissibility as evidence of certain khusrah butwarrah-papers, on which that Court relied, he could not be allowed to take that objection in special appeal.

HELD that this case, being a question as to whether certain land claimed as lakheraj lay within defendant's share or not, did not come under Regulation XXXIX. of 1793, and registration was not necessary to make the alleged lakheraj title a valid one. Where possession under such a title is shown, the question is rather whether the *onus* should not fall on the party claiming it as *mil*.

Bayley, J.—IN this case, plaintiff claims this land as lakheraj, situated in the 12-annas share of Mouzah Lodipore, the property of a co-sharer, the 4-annas portion being with the plaintiff.

The defendant's case is that the land which the plaintiff claims as lakheraj, and as situated in defendant's 12-annas share. is not therein, and that there is no lakheraj within that 12-annas share.

The first Court dismissed the plaintiff's suit.

The Lower Appellate Court has reversed that decree.

The main portion of the judgment of the Lower Appellate Court is contained in the following words: "On a reference to the "butwarrah khusrah prepared by the But-"warrah Ameen and filed by Byjnath Bhar-"tee, proprietor of 4-annas of the said mou-"zah, it appears that, in No. 27 of the said "khusrah, 15 beegahs 12 cottahs 5 dhoors "of lakheraj land are entered in the name of "Grijjoo Tewaree, ancestor of plaintiff, and "the boundaries thereof tally with those "given in the plaint. Hence, as it is "proved by documentary evidence that "there exists lakheraj land in the said "mouzah, and that the ancestor of plaintiff "and the plaintiff held possession of the "disputed land till the date of ouster, the "first Court acted unjustly in dismissing the "present suit."

The Lower Appellate Court having given plaintiff a decree, the defendants have made three objections:—

1st.—That the khusrah butwarrah-papers, upon which the Lower Appellate Court has relied, are not admissible in evidence.

2nd.—That no decree can pass, admitting a lakheraj title as valid, without its being shown that the lakheraj land has been registered under Regulation XXXIX. of 1793.

3rd.—That in a certain deed of adoption, the plaintiff himself has clearly admitted that he has no right to any lakheraj right in the 12-annas share of defendants.

As to the *first* of these grounds, it is clear that there were many opportunities, both in the first Court and in the Lower Appellate Court, for defendant to object to the admissibility of these butwarrah-papers, but no such objection was taken. The pleader for the respondent urges before us that he had obtained a decree in the first Court, and that it was not necessary for him in appeal to press objection as to the admissibility of these khusrah butwarrah-papers, as then they had not operated injuriously against him.

But a case in appeal is merely a trial in another *forum*, and the same opportunities of pleading by argument and pressing the insufficient character of the evidence adduced are ordinarily as available in an Appellate Court as in a Court of first instance.

Further, it is not shown to us that there had been the slightest attempt on the part of the defendant to urge the inadmissibility of these papers on account of their not being authenticated, or that he took any steps to ask for, or to procure, any verification by means of the original butwarrah-papers admittedly existing in the Collector's record-room, or by examination of the Ameen whose papers they purported to be.

This objection, therefore, appears to be taken too late when mentioned for the first time in the stage of special appeal.

As to the admission in the deed of adoption, we find, on comparing the plaint with the recital in that deed, that the plaint uses the general term "*Lodipore*" only, and that the recital in the deed of adoption in no way specifies the 4-annas share so as clearly to identify the land, and to make out a real admission.

As to the necessity for registration, so as to make the alleged lakheraj title a valid one, it may be remarked that cases coming under the provisions of Regulation XXXIX. of 1793 are such as are cases of the resumption or the release of lakheraj lands. This, however, is a case of quite another description, *viz.*, a question as to whether certain lands claimed as lakheraj lie within the share of one defendant or not.

It is also to be observed that registration has been held not to be absolutely necessary when a lakheraj title has been put forward, and possession under that title can be shown. According to the circumstances of each of such cases, the question rather is whether a party claiming the land as *mál* has not to prove that he has collected rent as from such *mál* land.

On the whole, it does not seem that the Lower Appellate Court has erred in law, so as to make it necessary for us to interfere in special appeal.

The special appeal is, therefore, dismissed with costs.

Macpherson, J.—I concur.

The 29th June 1868.

Present:

The Hon'ble J. B. Phear and C. Hobhouse, *Judges.*

Documents sent for by Court—Evidence.

Case No. 3399 of 1867 under Act X. of 1859.

Special Appeal from a decision passed by the Additional Judge of Nuddea, dated the 18th September 1867, reversing a decision passed by the Deputy Collector of that District, dated the 13th June 1867.

Dwarkanath Shaha and others (Plaintiffs), *Appellants,*

versus

Ram Lochun Biswas (Defendant), *Respondent.*

Baboo Issur Chunder Chuckerbutty for Appellants.

Baboo Mohinee Mohun Roy for Respondent.

A suit for arrears of rent under a kubooleut, the execution of which was denied by defendant, having been decreed in favor of plaintiff, an appeal was preferred to the Additional Judge, who sent for copies of two documents (previously filed by defendant in the Assistant Magistrate's and Registrar's offices respectively), which neither of the parties had put in the Court below, and used them as evidence in favor of the defendant.

HELD that neither of the documents could be properly used as evidence between the parties to this suit except for the purpose of cross-examination of the witnesses in the Court of first instance, and that the use made of them by the Lower Appellate Court was unfair to plaintiff, and caused a mis-trial.

Phear, J.—IN this case, the plaintiff sues to obtain from the defendant certain arrears of rent according to the terms of a kubooleut upon which he relies. The defendant resists the claim of the plaintiff, on the ground that he never executed the kubooleut. The Court of first instance disbelieved the testimony brought forward by the defendant to support his case, and gave a decree in favor of the plaintiff.

The Lower Appellate Court has reversed this decision of the Deputy Collector, but we think that it has come to this conclusion under circumstances which have rendered the trial of the case before it a mis-trial. It seems that the Officiating Additional Judge sent for copies of two documents which neither of the parties had put before the Court below. We do not doubt that the Judge recorded his reasons for sending for this additional evidence, because he was bound to do so by the provisions of the Civil Procedure Code; but these reasons are unfortunately not contained in the portion of the record which has been sent to this Court, and we have not the advantage of knowing what led him to send for these two documents, which certainly appear to us, as the case stands, not admissible as evidence between the parties. The first is the copy of a petition presented to the Assistant Magistrate by the defendant some 10 months before the institution of the present suit, complaining of his signature having been obtained, by duress or extortion, to a blank paper; and the second is the copy of objections made by the defendant at the Registrar's office when the kubooleut was registered. No doubt, the Officiating Additional Judge, with his experience of the different offices in the Mofussil, must be as well aware as we are of the intrinsically small value which attaches to documents of this kind if treated as evidence on behalf of the person making them. But in this particular instance it would seem that there was less than even average value to be given to them, because the fouzdaree proceedings which were originated by the proceeding in question were never prosecuted by the defendant, and the kubooleut was actually registered in his presence, notwithstanding his objections.

d

But even apart from this, neither of these documents could properly be used as evidence between the parties to this case, except for the purpose of cross-examination of the witnesses in the Court of first instance. It was, to say the least of it, very unfair to the plaintiff that the words of the defendant himself, as he had chosen to put them upon paper, should be brought up as evidence in favor of the defendant for the first time in the Appellate Court, where the plaintiff had no opportunity whatever, by cross-examination or otherwise, of showing the value which attached to those words. It appears from the written judgment of the Lower Appellate Court that the reversal of the decision of the Court of first instance was the effect of this new evidence almost solely. In the Court of the Deputy Collector, the issue between the parties depended, as naturally might have been expected, upon the oral testimony of witnesses, and the Deputy Collector gave his reasons for believing the witnesses on the one side rather than those on the other. The Lower Appellate Court has entirely reversed the conclusion on this head at which the Deputy Collector arrived, but he has given no other reasons than such as are furnished by the written documents of which we have spoken, for changing the relative credibility of the witnesses who gave their evidence in Court—evidence which the Judge did not himself hear given, and which, therefore, he could not test by observation of the demeanour and bearing of the witnesses in the witness-box. It seems to us that the sending for and using of the documents has thus caused a mis-trial of the issue between the parties in this suit. We therefore remand the case, in order that it may be re-tried solely with regard to the evidence which was given before the Deputy Collector. The costs will abide the event.

The 30th June 1868.

Present:

The Hon'ble F. B. Kemp and E. Jackson, *Judges.*

Decree for maintenance—Execution—Opposition by heirs of judgment-debtor.

Case No. 146 of 1868.

Miscellaneous Appeal from an order passed by the Judge of West Burdwan, dated the 4th January 1868, reversing an order passed by the Moonsiff of that District, dated the 17th August 1867.

Premoo Beebee (one of the Judgment-debtors), *Appellant,*

versus

Dassoo Debia (Decree-holder), *Respondent.*

Baboo Kalee Kishen Sein for Appellant.

Baboo Nil Madhub Sein for Respondent.

Where the holder of a decree for maintenance is opposed in execution by the heirs of her judgment-debtors, the questions arising between them cannot be determined in execution, but must be tried in a regular suit.

Quære.—If the original judgment-debtor were alive, could the decree-holder enforce her claim for maintenance by execution without a fresh suit for each instalment unpaid?

Jackson, J.—I AM of opinion that the first Court was right in law in ruling that the questions which arose between the decree-holder in this case and the heirs of the judgment-debtors could not be tried in execution of decree, but that the decree-holder must bring a suit to obtain what she asks for against those heirs, and in that suit the questions which have arisen can be properly determined. I incline to the opinion that, even if this execution had been taken out against the original judgment-debtor, it would not have stood good in law. If a plaintiff obtains a decree for maintenance at the rate of 5 rupees a month and for arrears due at that rate for certain months for which such plaintiff has sued, that same plaintiff, in execution of that same decree, could not, three years subsequently, obtain a further maintenance on the strength of that decree. The plaintiff could, in my opinion, only execute the decree for the amount decreed to her for the time for which she sued. It appears to me that there is no difference between a suit for a declaration of the amount of maintenance a person is entitled to, and a suit for a declaration of the amount of rent a person is entitled to. If a plaintiff obtain a decree for 100 rupees, a year's rent, he could not execute that decree until he had sued to obtain rent for a certain time, and he would be obliged to bring a separate suit for any additional term's rent which he would not pay. It does not follow that, because the plaintiff was entitled to maintenance from *A* in 1265, she is entitled to it from *A's* grandson in 1275. In execution, the Courts cannot go beyond the decree, and the question arising between the decree-holder and the heirs of the judgment-debtor in this case go far beyond the decree.

One point is, that that decree was founded on a compromise, and that the plaintiff is not legally entitled to maintenance; and though the original judgment-debtor might bind

himself by a compromise, he cannot bind his heirs. If it is held that a decree for maintenance can be executed at any time, it will follow that all the maintenance after such a decree must be paid through the Court, or certified to the Court. This is certainly not the custom in our Courts at present. I would reverse the decision of the Judge, and confirm that of the first Court.

Kemp, J.—I concur so far in this judgment that I am of opinion that the points raised by the heirs of the original judgment-debtor ought to be tried in a regular suit, and not in the execution-stage of the case. If the original judgment-debtor had been alive, I see no reason why the decree-holder should not enforce her claim to maintenance in execution of the decree which fixed the same, payable to her by the judgment-debtor (in this case her father-in-law) during her life. As long as the claim is not barred, I see no good reason why it should not be enforced by executing the decree, instead of having recourse to a fresh suit for every instalment of maintenance which may be unpaid.

The 1st July 1868.

Present:

The Hon'ble J. B. Phear and C. Hobhouse, *Judges.*

Disclaimer — Right of appeal — Suit by reversioner—Legal necessity—Onus probandi.

Case No. 3464 of 1867.

Special Appeal from a decision passed by the Judge of Sarun, dated the 25th September 1867, modifying a decision passed by the Principal Sudder Ameen of that District, dated the 28th February 1867.

Nund Coomar Singh and others (some of the Defendants), *Appellants,*

versus

Gunga Pershad Narain Singh (Plaintiff), *Respondent.*

Mr. R. T. Allan and *Baboos Onookool Chunder Mookerjee* and *Debendro Narain Bose* for Appellants.

Baboos Romesh Chunder Mitter and *Kalee Kishen Sein* for Respondent.

The fact of a defendant having, in the Court of first instance, disclaimed any right or interest in the land in a suit does not deprive him of the right to appeal if a judgment is given against him with costs.

Where a reversionary heir sues to recover property on the allegation that it had been improperly alienated, it is incumbent on the alienee to show that there was actual necessity for the sale-transaction under which he claims, or that he was reasonably led to suppose that such necessity existed.

Phear, J.—So far as concerns the matter in suit between the plaintiff and the present special appellants, the plaintiff's title is equally good, whether Nowlasee Kooer's life-interest were derived from her deceased husband or from Uttum Narain. Therefore the defendant's admissions afford him a *primâ-facie* case, and in this important respect this appeal differs from the two preceding appeals which have just been decided by us, although, in other features, the three cases very closely resemble each other. In addition to the objections to the judgment of the Lower Appellate Court raised by the special appellants, the plaintiff puts forward several objections by way of cross-appeal.

The first of all these objections which it is convenient that we should deal with in this case is one made by the special respondent, who says that Hurdassee Lall, one of the special appellants, has no right to appeal, because, in the Court of first instance, he disclaimed having any right or interest in the land in suit. But it appears that, notwithstanding the disclaimer on his part, there has been a judgment given against him in both the Lower Courts with costs, and we think that that circumstance entitled him, at any rate, to keep the place among the defendants which had been given to him by the special respondent himself. He is, therefore, entitled to appear here as an appellant.

The special appellant first objected that the decision of the Lower Appellate Court with regard to two of the mouzahs, namely, Kasim Chuck and Mirzapore Anunt, was wrong, because these two properties were Uttum Narain's property, and were sold for his debts, and were not sold in respect of the Mussamut's debts. This is admitted by the special respondent. It will, therefore, follow that the special respondent, the plaintiff in the suit, is certainly not entitled to recover these two mouzahs, and the judgment of the Court below must be reversed so far as regards them.

On the other hand, the special respondent said that these two mouzahs had been mentioned by mistake on the part of the Judge instead of two other mouzahs, namely, Panapore Amee and Amee Khas. We understand the pleader for the special appellant to say that, as regards Amee Khas, this is so, and also

that Amee Khas was sold as being enjoyed by Nowlasee Kooer for her life, and liable to be taken to meet her debts. Therefore, the right of the plaintiff to recover Amee Khas stands upon the same footing as his right to recover the remaining mouzahs Bishamburpore, Pooria Haut, and Panapore Amee, all of which have been decreed to him. The special appellants, however, say that, although they, no doubt, bought these mouzahs in execution of judgments against the widow on personal debts, still they are entitled to the benefit of the presumption that necessity for sale of the mouzahs existed, unless the special respondent, on the other side, shows that necessity did *not* exist, and they add that, as a matter of fact, in this case, the plaintiff has not shown that there was not any such necessity. This argument, if good, is only applicable on the supposition that the Mussamut's right of enjoyment of the property was derived from her husband—a supposition which has no evidence to support it. Moreover, it throws the burden of proving necessity upon the reversionary heir, who sues to recover property on the allegation that it had been improperly alienated. But it has always been held by this Court that, in a suit of this kind, it is incumbent on the alienee, who desires to support and maintain the validity of the sale-transaction under which he claims, to show either that there was actual necessity for it, or that he was, in the course of the enquiries, reasonably led to suppose that such necessity existed. In other words, it lies upon the defendant to establish necessity, and not upon the plaintiff to show that there was no such necessity. It follows, therefore, that, with regard to these four mouzahs, the plaintiff, special respondent, is entitled to succeed so far as this objection is concerned.

However, the special appellant further objects that, with regard to Panapore Amee, a decree had been passed in June 1852 between the substantial parties to the present suit, in which it was declared that the mouzah was only to be recovered upon payment of the consideration-money which the defendants in the present case, or their predecessors, had paid for it. But upon looking more closely to the terms of the decree, it turns out, as might, indeed, have been expected, that the return of the purchase-money which was directed had reference to the purchase-money of so much of the mouzah as belonged originally to the share of Uttum Narain. It had no reference to the 8-pie share of the mouzah which was in the possession and enjoyment of the widow by the permission of Uttum Narain, or otherwise. But it is this latter share only for which the plaintiff sues in this suit, and consequently his claim is not affected by that particular condition in the decree of 1852.

We have mentioned, we think, all the objections which have been made on the one side and on the other to the decree of the Lower Appellate Court, and the result is that, in our opinion, that decree must be modified to a certain extent, that is, it must be reversed so far as it decrees possession of Kasim Chuck and Mirzapore Anunt to be given to the plaintiff. At the same time, the plaintiff must also, on the other hand, obtain a decree for the possession of Amee Khas, and finally the appeal must be dismissed in so far as it concerns Bishamburpore, Pooria Haut, and Panapore Amee.

We think that, under the peculiar circumstances of this case, somewhat intricate as they are, and with reference to the fact that the defendants have partially succeeded, the parties ought to pay their own costs.

The 2nd July 1868.

Present:

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble Dwarkanath Mitter, *Judge*.

Joint-judgment for damages—Death of some of the decree-holders—Execution by survivors—Execution—Section 207, Act VIII., 1859.

Case No. 156 of 1868.

Miscellaneous Appeal from an order passed by the Judge of Patna, dated the 22nd January 1868, reversing an order passed by the Principal Sudder Ameen of that District, dated the 20th June 1867.

Teja Singh and others (Decree-holders), *Appellants*,

versus

Pokhur Singh and others (Judgment-debtors), *Respondents*.

Baboo Hem Chunder Banerjee for Appellants.

Mr. R. E. Twidale and *Baboo Luckee Churn Bose* for Respondents.

Where a joint-judgment for damages is obtained by several persons some of whom die, the heirs of the deceased need not be substituted for the purposes of execution, which may be carried out by the survivors alone for the benefit of all interested. At any rate, they may proceed under Section 207, Act VIII., 1859.

A Court which executes a decree has no power to modify or alter it.

Peacock, C.J.—About fourteen years and three months ago, the plaintiffs recovered a decree, and we are now engaged in discussing whether they are barred by limitation from executing it. It appears that, from 1854 to 1861, the plaintiffs were trying to execute the decree, and that the decree was admittedly kept alive up to that time by the plaintiffs' endeavours to execute it. Subsequently, upward of a year appears to have been wasted in a discussion as to the costs in the original decree; for, on the 15th June 1861, the costs of the original decree were modified by order of the Court, whose duty it was to execute the decree, and not to amend it. That order was, on the 19th August 1862, reversed on appeal; and, no doubt, properly so, for the Court which had to execute the decree had no power in the execution department to modify or alter it. During the time occupied with these unnecessary proceedings, some of the plaintiffs died, and, on the 28th July 1863, an application was made by the heirs of the deceased plaintiff to be substituted as decree-holder. Nearly another year was occupied in this petition, and, on 26th May 1864, an order was made for substitution of the heirs. One would have thought that things would then have been allowed to go on; but in December 1864, about nine months after the order for substitution had been made, a new Principal Sudder Ameen came in, who appears not to have been satisfied with the order of his predecessor, and who, although he had no power to reverse the order of his predecessor upon appeal, thought fit to require a certificate of heirship before he would execute the decree. Nine months were occupied in obtaining this certificate, which was not obtained till the 16th of September 1865. On the 20th of the same month, an application for execution was made, which the Judge on appeal has now held to be too late.

This case is one, among many instances, of the truth of the remark which we have frequently made, that, as soon as a man obtains a decree, his difficulties appear to commence.

We would remark that from the 28th July 1863 to the 16th September 1865 was occupied in substituting the heirs of the deceased plaintiff, decree-holder, for the purpose of executing the decree. This appears to us to have been wholly unnecessary. The judgment was a joint-judgment for damages obtained by several persons, and might, we think, have been executed by the survivors alone for the benefit of all who were interested in it. At any rate, they might have proceeded under Section 207 of Act VIII. of 1859.

The order of the Lower Appellate Court is reversed with costs.

The 2nd July 1868.

Present:

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice*, and the Hon'ble Dwarkanath Mitter, *Judge*.

Decree for possession—Share of undivided estate—Specific lands representing that share—Preparation of decrees.

Case No. 196 of 1868.

Miscellaneous Appeal from an order passed by the Judge of Chittagong, dated the 31st January 1868, affirming an order passed by the Principal Sudder Ameen of that District, dated the 30th March 1867.

Ram Lochun Doss and others (Decree-holders), *Appellants*,

versus

Munsoor Ali and others (Judgment-debtors), *Respondents*.

Baboo Sreenath Banerjee for Appellants.

Baboo Greeja Sunkur Mojoomdar, for Respondents.

Where a Judge merely decrees possession with wassilat, without declaring specifically that plaintiffs are to recover the share which they have purchased in an undivided estate or specific land representing that share, plaintiffs are not entitled to be put in possession of any specific lands.

Duties of Judges and pleaders in preparing decrees pointed out.

Peacock, C.J.—We think that the decision of the Judge is right, and that what the plaintiffs recovered was a share of an undivided estate, and consequently that they were not entitled to be put into possession of any specific lands as the share which they had purchased. The specific lands which

constitute the share of the plaintiffs, can be ascertained only by partition, and not in execution of this decree. If the plaintiffs had been entitled to specific lands as the share which they had purchased, they would have been able to give in their plaint the boundaries of the specific lands which they claimed: but they have not done so. The whole of the confusion and of the litigation subsequent to the decree of 18th April 1864 has been caused by the want of sufficient care on the part of the Judge who pronounced that decree in specifying what he intended that the plaintiffs should recover. Instead of declaring specifically whether the plaintiffs were to recover the share in an undivided estate which they had purchased, or specific lands as representing that share, the judgment merely says that the plaintiffs will get possession with wassilat. But the land of which they were to get possession is wholly undefined, and it is uncertain whether the Judge meant that they should get possession of a share of an undivided estate, or of some specific lands. The Principal Sudder Ameen and the present Judge, Mr. Alexander, have both, as it appears to us, put a proper construction upon the judgment of Mr. Balfour.

In preparing decrees, the Judges ought clearly to define what are their intentions, and the vakeels who represent the parties do not perform their duty simply by arguing their case, but they ought always to see that the decrees are drawn up according to the judgments of the Judge. If the Judges and the vakeels were more attentive to their duties in this respect, much of the litigation which commences after a decree is pronounced, and which frequently lasts for many years afterwards, would be avoided. A little time bestowed in seeing that the decrees are drawn up properly would save the expenditure of much valuable time, which is often incurred in endeavouring to arrive at the real meaning of the decree.

The order of the Lower Court is affirmed. The pleaders' fees are assessed at two gold mohurs. The suit was originally valued at 700 odd rupees. The full pleaders' fees upon that sum, as between party and party, would be 35 rupees. In this case, we see the Judge has allowed 50 rupees. We merely call attention to this; but there is no appeal upon this ground, and the Court, under all the circumstances, will not interfere with the Judge's assessment.

The 2nd July 1868.

Present:

The Hon'ble J. B. Phear and C. Hobhouse *Judges.*

Suit for kubooleut at enhanced rates—Intervention.

Case No. 88 of 1868 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of Backergunge, dated the 4th November 1867, affirming a decision passed by the Deputy Collector of that District, dated the 27th April 1867.

Omed Ali (one of the Defendants), *Appellant,*

versus

Prosunno Coomar Chowdhry (Plaintiff), *Respondent.*

Baboo Kalee Mohun Doss for Appellant.

Baboo Greeja Sunkur Mojoomdar for Respondent.

In a suit for a kubooleut at higher rates, where a third party intervened under Section 77, Act X., 1859, the first Court determined the case between the plaintiff and the intervenor upon a matter of title, and allowed that determination to govern his decision between the plaintiff and the defendant, decreeing to the plaintiff the kubooleut sued for. The decision was affirmed by the Lower Appellate Court.

HELD that there had been a mis-trial, the sole question to be decided between the intervenor and plaintiff having been whether the latter had *bonâ fide* received the rent up to the date of suit; and the question between the plaintiff and defendant was whether they stood in the relation of landlord and tenant, and, if so, whether plaintiff was entitled to the kubooleut which he asked for.

Phear, J.—IN this case, the plaintiff sued in the Court of the Deputy Collector to obtain from the defendant a kubooleut in respect of a tenure, which, he says, the defendant called an ousut talook. A third person intervened in the proceedings under Section 77 of Act X. The Deputy Collector says that "the intervenor and the defendant in this suit state that the share in the "ousut talook appertains to the talook of "the intervenor." He then goes on to say that they have produced no documents which establish that fact, and he accordingly finds against them. He adds that the plaintiff has filed a copy of a petition, which had, on some previous occasion, been presented by one of the defendants before the Revenue authorities, and from this petition it appeared that that defendant "admitted that "the ousut talook in dispute appertains to "the share of the plaintiff." Upon these two grounds—the first, that the defendant and the intervenor had failed to satisfy him, that the ousut talook belonged to the intervenor;

and the second, that one of the defendants had, in a previous proceeding, admitted the ousut talook to appertain to the plaintiff —the Deputy Collector held that the plaintiff and defendant stood in the relation of landlord and tenant, and that the defendant was bound to give the plaintiff a kubooleut in respect of this ousut talook at rates of rent higher than those he had hitherto paid. Against this decision, the defendant alone appealed, and the Lower Appellate Court affirmed the decision of the first Court.

It appears to us that there has been altogether a mis-trial in this case. When the third person intervened under the provisions of Section 77, the sole question which had to be decided between him and the plaintiff was, whether or not the intervenor had, up to the date of filing the plaint, *bond fide* received the rent of the lands which are in suit. This question the first Court does not seem to have considered in the least. It determined the case between the plaintiff and the intervenor upon an entirely different ground, namely, upon a matter of title. The intervenor has not appealed, and therefore our decision will not affect the case as regards him. But the Deputy Collector did not stop there. He allowed his decision, with regard to the question of title between the plaintiff and the intervenor—a decision which he never ought to have passed at all—to govern the decision which he delivered between the plaintiff and the original defendant, and which ought to have been placed solely upon such evidence before him as tended to show whether or not those two persons stood in the relation of landlord and tenant. And even supposing for the moment that he had, upon proper evidence and proper consideration, come to the conclusion that the plaintiff and defendant stood in the relation of landlord and tenant, there remained still the further question for him to determine, whether the plaintiff was entitled to obtain from the defendant the kubooleut which he asked. This is a question which, no doubt, may depend upon various considerations in different cases, but the answer to it must generally be governed by the actual terms of the hitherto-existing relationship of landlord and tenant between the parties; and those terms, we apprehend, will seldom allow the landlord to demand a kubooleut at a higher rate than the rate which his tenant has already been paying him. In short, the kubooleut which he seeks must express the terms of the tenancy existing before and up to the date of the suit, unless something has happened, directly or indirectly, to alter the relations between him and his tenant, and to entitle him to say that the tenant has undertaken to hold of him on altered terms. Neither of the Lower Courts appear to have thought it necessary to enter upon this matter at all, although the defendant strenuously denied the plaintiff's right to recover. We think, as we have already said, that there has been an entire mis-trial of this case. We therefore remand it to the Lower Appellate Court with directions that the Judge send it to the Deputy Collector to be re-tried upon its merits as between the plaintiff and the original defendant. We think that, under the circumstances of the case, the costs of all the Courts must abide the event.

The 2nd July 1868.

Present:

The Hon'ble F. B. Kemp and E. Jackson, *Judges.*

Petition—Legal relinquishment of title.

Case No. 2457 of 1867.

Special Appeal from a decision passed by the Judge of West Burdwan, dated the 25th June 1867, reversing a decision passed by the Moonsiff of Bakoonda, dated the 28th November 1866.

Ooma Churn Koondoo and others (Plaintiffs), *Appellants,*

versus

Bhoobun Mohun Pal Poddar and others (Defendants), *Respondents.*

Baboo Motee Lall Mookerjee for Appellants.

Baboo Khettur Mohun Mookerjee for Respondents.

A mere petition by a widow to the effect that she has relinquished her title in certain property in favor of parties suing the lessees of the property for possession is no legal relinquishment of her share therein.

Kemp, J.—THIS is a suit for possession of a shop, or rather of a portion of a shop, and for arrears of rent. The undisputed facts are that Boloram and Sheedam were the joint owners of the shop; that the plaintiffs are the heirs of Boloram, and the defendants the sub-lessees of Sheedam's lessee. The defendants do not dispute the title of the plaintiffs as heirs of Boloram, but they aver that they have no title to the share of Sheedam from whom they derive their title, and are in possession.

b. —

The Judge has found that there is nothing to support the plaintiffs' claim. The plaintiffs, we observe, have filed no title-deeds, and it is admitted that the widow of Sheedam is alive. No legal relinquishment of her share has been filed by the plaintiffs; a mere petition, to the effect that she has relinquished her title in favor of the plaintiffs, who would succeed to the estate of Sheedam in the event of her death, is not sufficient.

We dismiss this special appeal with costs.

The 2nd July 1868.

Present:

The Hon'ble J. B. Phear and C. Hobhouse, *Judges.*

Sale of attached property—Setting aside of decree under which the attachment was made—Section 119, Act VIII., 1859.

Case No. 81 of 1868.

Special Appeal from a decision passed by the Principal Sudder Ameen of Sarun, dated the 17th December 1867, reversing a decision passed by the Moonsiff of that District, dated the 24th July 1866.

Juggut Narain and others (Plaintiffs), *Appellants,*

versus

Toolsee Ram and others (Defendants), *Respondents.*

Baboo Kalee Kishen Sein for Appellants.

Baboo Hem Chunder Banerjee for Respondents.

Where a decree is set aside, and a new trial granted on an application under Section 119, Act VIII., 1859, any attachment made under the decree falls to the ground, and the validity of a sale of the property attached is not affected.

Phear, J.—THE Lower Appellate Court has dismissed the plaintiff's suit on the ground that the property which was the subject of suit was bought by him, the plaintiff, while it was under attachment from a Civil Court, and that, consequently, the sale was null and void by reason of the provisions of Section 240, Act VIII. of 1859.

It appears that the plaintiff's purchase was effected on the 13th of March 1865, and a short time before, namely, on 2nd of February 1865, one Toolsee Ram had obtained a money-decree against the plaintiff's vendor, and in process of execution of this decree, the property which was the subject of suit was attached by order of Court on the 2nd of February 1865. Afterwards, the plaintiff's vendor applied to the Court under Section 119 of the Civil Procedure Code for a new trial, and the Court granted his application, proceeded with the trial afresh, and eventually gave a second decree against him on the 22nd of August 1865. As the plaintiff's purchase was effected on the 13th of March, after the attachment was issued and before his vendor's application for a new trial on the 4th July, it was evidently made while the attachment was pending.

But we think that the effect of granting an application made under Section 119, Act VIII. of 1859, is to declare that there has not been yet a valid decree in the suit. There are two sets of grounds upon which the Court may set aside its own decree within Section 119. The *first* is that the summons was not duly served upon the defendant who applies for a new trial; and the *second*, that the defendant was prevented by sufficient cause from appearing when the suit was called on for hearing. If the Court is satisfied that either of these two grounds is made out, it sets aside its original judgment, and proceeds with the hearing of the suit. But the attachment of the 20th February 1865 was issued in process of execution of the first decree. It owed its validity as an attachment entirely to the foundation afforded by the decree, and when that decree was set aside and declared invalid, the attachment, in our opinion, fell with it. Without a decree the attachment could not be made. The mere fact of seizure and affixing a notice would alone have no legal effect. And therefore, as soon as it appeared that a valid decree had not been passed, necessarily the form of attachment which had been gone through by the officer of the Civil Court came to nothing.

We, therefore, think that the Principal Sudder Ameen was wrong in holding that the plaintiff's purchase was necessarily void, merely because it was made between the 2nd of February and 4th of July 1865. It may yet be that the plaintiff's purchase on the facts of the case may turn out to have been a pretence, and not to have been a real transfer on the part of his alleged vendor, but that is a question which has not yet been tried by the Lower Appellate Court. We therefore reverse the decision of the Principal Sudder Ameen, and remand the case for re-trial on its merits.

The costs will abide the event.

The 2nd July 1868.

Present:

The Hon'ble J. B. Phear and C. Hobhouse, *Judges.*

Estoppel — Res adjudicata.

Case No. 80 of 1868.

Special Appeal from a decision passed by the Principal Sudder Ameen of Sarun, dated the 12th January 1867, affirming a decision passed by the Moonsiff of that District, dated the 3rd May 1866.

Kripa Ram (Plaintiff), *Appellant,*

versus

Bhugwan Doss (Defendant), *Respondent.*

Baboo Doorga Doss Dutt for Appellant.

Baboos Onookool Chunder Mookerjee and *Greeja Sunkur Mojoomdar* for Respondent.

A plaintiff who sues to obtain property which belonged to a Hindoo widow, on the ground that he is the adopted son of a brother of the deceased husband, is not barred from setting up this title, because in a former suit against the same defendants for other property it was decided that he was not the adopted son of that brother.

Phear, J.—The plaintiff's cause of action in this suit is, that he is entitled to obtain certain property which belonged to Kudum Lall in consequence of Kudum Lall's widow having forfeited her right to the enjoyment of the same by reason of her profligate conduct. The plaintiff seeks to make out his title to this property on the occurrence of the contingency we have mentioned by setting up that he is the adopted son of Ramnath, Kudum Lall's brother. The Lower Appellate Court has held that he is barred from setting up this title, because, in a former suit against the same defendants, when he sought to obtain other property which had belonged to Ramnath, it was decided between the parties that he, the present plaintiff, was not the adopted son of Ramnath.

We think that this last-mentioned decision does not afford a legal bar to his proving in the present suit, if he can, by legal evidence, that he is the adopted son of Ramnath, for he here seeks to obtain a different property upon a different cause of action. It seems to us, therefore, that the Lower Appellate Court has made a mistake in this respect, and that the suit ought to be remanded for re-trial. The first issue will, of course, be whether the plaintiff is, as he says he is, the adopted son of Ramnath, and the other issues will be those which properly arise on the merits of the question, whether or not he is (supposing him to be found to be the adopted son) entitled now to recover the property which he seeks. The costs will abide the event.

The 2nd July 1868.

Present:

The Hon'ble F. B. Kemp and E. Jackson, *Judges.*

Appellate Court's reasons for concurring with first Court—Section 359, Act VIII., 1859.

Case No. 158 of 1868.

Special Appeal from a decision passed by the Additional Judge of Tirhoot, dated the 17th August 1867, affirming a decision passed by the Sudder Ameen of that District, dated the 12th March 1866.

Imrit Lall Thakoor and others (Defendants), *Appellants,*

versus

Nuckshed Suhaye (Plaintiff), *Respondent.*

Baboo Kalee Mohun Dass for Appellants.

Baboo Romesh Chunder Mitter for Respondent.

In a case decided on pure questions of fact, no point being left undetermined, in which the Judge in appeal endorsed the opinion of the first Court without giving detailed reasons, the High Court did not consider it right to remand the case to the Judge to set forth in his judgment the same reasons which influenced the Court of first instance.

Kemp, J.—The ground taken in special appeal is that the judgment of the Lower Appellate Court is defective in law, as it does not contain the reasons for the decision arrived at by the Judge, and that the Judge was bound, under Sections 359 of the Civil Procedure Code, to give his reasons. This appeal has been ably argued on both sides, and several decisions of this Court have been quoted.

In this particular case, the judgment of the first Court is very clear. The question turns upon whether the conveyance by Sheobunsee Lall to Kebul Kishen, the plaintiff's vendor, was proved, or that by Sheobunsee Lall to Nuckshed Suhaye.

The first Court found that the plaintiff's vendor's purchase was not proved, and that Kebul Kishen was a mere ticcadar.

In appeal, the Judge records the points for determination, and says that he concurs in the findings of the first Court; he also found as a fact upon the evidence that Sheo-Gunsee Lall sold the share in question to Luckshed Suhaye on the 7th of May 1864.

We think that the ends of justice do not require that this case should be remanded to the Judge for him to certify whether, in saying that he concurred in the findings of the first Court, he also concurred in the reasons of the first Court. In Section 359 it is laid down that the decision shall contain the point or points for determination and the reasons for the decision; but we think that, in a case where, as in the present instance, the suit is decided on pure questions of fact, and no point is left undetermined, and the Judge, without giving detailed reasons, endorses the opinion of the Court of first instance, it would not be right to remand the case simply for the purpose of the Judge setting forth in his judgment the same reasons which influenced the Court of first instance in coming to the conclusions at which it did.

The special appeal is dismissed with costs.

The 2nd July 1868.

Present:

The Hon'ble H. V. Bayley and A. G. Macpherson, *Judges.*

Tender and deposit of rent—Act VI. (B. C.) of 1862—Registration in zemindar's serishtah—Section 27, Act X., 1859.

Case No. 1967 of 1867.

Special Appeal from a decision passed by the Principal Sudder Ameen of East Burdwan, dated 12th June 1867, affirming a decision passed by the Sudder Ameen of that District, dated the 17th May 1866.

Wooma Churn Sett (Plaintiff), *Appellant,*

versus

Huree Pershad Misser and others (Defendants), *Respondents.*

Mr. J. S. Rochfort for Appellant.

Baboos Romesh Chunder Mitter, Bama Churn Banerjee, and *Umbicca Churn Banerjee* for Respondents.

In a suit to recover possession of land which plaintiff had purchased from the tenant-defendant, and which (while in plaintiff's possession) the talookdar-defendant, in collusion with the tenant-defendant, had caused to be sold by auction in execution of a decree obtained for arrears of rent, notwithstanding plaintiff had tendered the rent, and deposited it with the Collector:

HELD that the tender, followed by a deposit under Act VI. (B. C.) of 1862, was legal and sufficient.

HELD also that, the tenure being a ryotee tenure, registration in the talookdar's serishtah was not necessary under Section 27, Act X. of 1859, which applies to tenures intermediate between the zemindar and the Collector.

Macpherson, J.—UNDER the circumstances of this case, I think that the tender was sufficient, for it was made to Huree Pershad and Doorga Monee, the widow of Huree Pershad's deceased brother. The mistake in the name of the talook was of such a nature as to be immaterial, specially when there is no doubt that the talookdar was aware of the tender being made.

Section 27, Act X. of 1859, is not applicable in this case, inasmuch as the tenure in dispute is not a tenure intermediate between the zemindar and the Collector, but a ryotee tenure; registration in the talookdar's serishtah was, therefore, unnecessary. The talookdar had full notice of the plaintiff's claim, which, indeed, was the subject of a suit to which the talookdar was a party so long back as 1860. It appears to me that the judgment of the Lower Appellate Court is wrong, and that it ought to be reversed, and that the plaintiff is entitled to a decree as prayed by him, with all costs of this Court and of the Lower Courts.

Bayley, J.—I think Section 27, Act X. of 1859, is specific in its terms, and applies to the case of "*intermediate*" tenures. The tenure in suit is not intermediate. Consequently, registration in the zemindar's serishtah under that Section was not necessary. I know not, and am not shown, any other Section in Act X. or law, which makes the registration of a ryotee tenure necessary.

I concur with Mr. Justice Macpherson in thinking that the tender of the money followed by a deposit in Court under Act VI. of 1862 was quite legal.

Upon these two grounds, I hold that the decision of the Lower Appellate Court is one which must be reversed.

The 3rd July 1868.

Present :

The Hon'ble L. S. Jackson and Dwarkanath Mitter, *Judges.*

Possession—Dispossession—Title.

Case No. 89 of 1868.

Special Appeal from a decision passed by the Principal Sudder Ameen of Purneah, dated the 2nd November 1867, reversing a decision passed by the Moonsiff of that District, dated the 2nd March 1867.

Dabjee Sahoo and others (Plaintiffs), *Appellants;*

versus

Shaikh Tumeezooddeen and others (Defendants), *Respondents.*

Baboo Rajendurnath Mitter for Appellants.

Baboo Khettur Mohun Mookerjee for Respondents.

In a suit to recover possession of land where plaintiff alleged that he had entered into possession under a lease, and had been dispossessed by defendant, the first Court, finding that the plaintiff had been dispossessed, and that the defendants had no valid title to the land, gave the plaintiff a decree. The Lower Appellate Court, remarking that the lease had not been registered under Act XX., 1866, held that it was not admissible as evidence, and dismissed the suit.

HELD that it was not necessary for the Lower Appellate Court to go into the plaintiff's title until it found that there were grounds for believing that the case set up by the defendants was a good one.

Jackson, J.—THE plaintiff in this case alleged that he had got a lease of the lands in dispute from the mortgagor; that he had entered into possession under the lease, and had been dispossessed by the defendants.

The defendants set up various titles, which, however, were disallowed by the Court of first instance, and the plaintiff obtained a decree.

The case going before the Principal Sudder Ameen on appeal, he remarked that the pottah on which the plaintiff's title was based had not been registered; that such omission to register was in contravention of the provisions of Act XX. of 1866; and apparently, under Section 49 of that Act, he held the pottah to be inadmissible as evidence, and dismissed the suit, reversing the decision of the Court below.

Against this decision, the plaintiff has appealed specially; and although we have not derived much assistance from the argument of the vakeel retained by the special appellant, I observe that the point mooted by the Lower Appellate Court does not really arise in the present case.

The plaintiff alleged that he was the lessee of the land and in quiet possession thereof and that he was wrongfully dispossessed by the defendants. It seems there was evidence that went to show that he had been so dispossessed; that evidence was believed by the first Court, which found that the plaintiff *had* been dispossessed, and that the defendants had no valid title to the land. Therefore the Lower Appellate Court ought to have found whether the plaintiff had been dispossessed, and whether the defendants could show any justification for such dispossession; and if he found that there were any grounds for believing that the case set up by the defendants was a good one, then only would it have been necessary to go into the plaintiff's title.

The case is, therefore, remanded for a fresh finding with reference to the points above indicated.

Mitter, J.—I entirely concur with my learned colleague.

The judgment of the Lower Appellate Court is right, so far as it rejects the *pottah* propounded by the special appellant, on the ground that it could not be received in evidence or acted upon by any Court in any Civil proceeding under Section 49 of Act XX. of 1866. But the effect of that Section is not to place a plaintiff in a worse position than one who has proved dispossession by a party who has no title to the land. The Lower Appellate Court, therefore, before reversing the decision of the first Court, should have enquired into two facts: *first*, whether the plaintiff was in possession of the property in dispute before the alleged date of dispossession; and, *secondly*, whether the defendant had any right to dispossess the plaintiff.

If the plaintiff succeeds in proving the first point, namely, that he has been dispossessed, it will be for the defendant to establish his title to the property; and on the failure of the defendant to establish his title, the plaintiff would be undoubtedly entitled to a verdict.

This view appears to me to be fully in unison with the principle laid down in the judgment delivered by another Division Bench, in special appeal No. 3292 of 1867, on the 9th of June 1868.

The case must, therefore, go back to the Lower Appellate Court for a fresh finding in accordance with the above directions.

The 3rd June 1868.

Present:

The Hon'ble H. V. Bayley and A. G. Macpherson, *Judges.*

Resumption-decree—Settlement-proceedings—Jurisdiction of Civil Court.

Case No. 1599 of 1867.

Special Appeal from a decision passed by the Judge of Tipperah, dated the 22nd April 1867, reversing a decision passed by the Principal Sudder Ameen of that District, dated 16th August 1866.

Mahomed Gazee Chowdhry (Plaintiff), *Appellant,*

versus

Laul Beebee and another (Defendants), *Respondents.*

Baboo Romesh Chunder Mitter for Appellant.

Baboos Onookool Chunder Mookerjee and *Romanath Bose* for Respondents.

The ruling of the late Sudder Court as to the final and conclusive character of a resumption-decree was held not to apply to what is subsequently done administratively by a settlement-officer; the proper distinction being that the decree of the *Resumption* Court as to the liability of the resumed mehal to be assessed with a Government demand is final, but the subsequent dealing by the settlement-officer with alleged proprietary right and claim to land not mentioned in the decree is open to the jurisdiction of the Civil Court.

Bayley, J.—THIS case has been re-heard, owing to an objection taken in a petition for review, to the effect that the appellant's pleader had not been heard in reply when the case was first before us.

We have again most fully heard the Counsel for the appellant. Precisely the same grounds of appeal are stated now and argued before us as are recorded in our previous judgment. I am of opinion that the rule of law has been correctly laid down in our previous judgment with reference to the facts of this case. Those facts are briefly these: That the plaintiff, who is a private purchaser from a purchaser at a sale for arrears of Government revenue of a certain resumed mehal, named *Ashruffpore,* bearing No. 110 on the Collector's rent-roll, comes in and sues for possession of 2 drones 10 kanees of land, alleging that they formed a portion of the above resumed mehal purchased by his vendor and himself. The facts on the record, which cannot be disputed by either party, are these: That a resumption suit was instituted to try the validity of the title upon which Ashruffpore was held rent-free; that in that resumption-suit the area of the mehal was stated to be 71 drones 1 kanee 6¾ gundahs. The resumption was made of the mehal as of that area. A Deputy Collector, in measuring for the purposes of settling this resumed mehal, found the area to be 73 drones 12 kanees 3 gundahs, and *that* total area was settled with the party who, after the resumption, was considered the proprietor of *Mehal Ashruffpore,* bearing No. 110 on the Collector's towjee. But in the course of settlement, Laul Beebee objected and stated that 2 drones 10 kanees of her lakheraj lands, as a property called "Mukhun Lall," had been wrongly included as part of *Mehal Ashruffpore,* which had been resumed by the resumption-decree, but, in fact, those 2 drones 10 kanees were no part of the lands included in the resumption-decree.

We stated in our previous judgment: "The Deputy Collector decided that this "excess should *be liable to the Government* "*assessment* as part of the resumed mehal. "But neither the Deputy Collector, nor the "Commissioner, could go further than this. "They could not decide finally whether the "land in dispute belonged, as a matter "of civil right, to the proprietor of "Ashruffpore, or to the proprietor of "Mukhun Lall. This was peculiarly the "province of the Civil Courts, and consequently they had jurisdiction. What the "auction-purchaser bought was certainly "the resumed Mehal Ashruffpore; but "whether these 2 drones 10 kanees in dispute belonged to the proprietor of that "mehal or of Mukhun Lall was not decided, "so as to be beyond the jurisdiction of the "Civil Courts, either by the Revenue "Officer's decision as to liabilities to assessment, or by the purchaser at a sale for "arrears of Government revenue of the "Mehal Ashruffpore."

The point of law urged by the pleader for the appellant is that in the same way that a decree for resumption is final and conclusive in respect to a resumed mehal, so that a Civil Court shall not declare *that* to be *free* from assessment which a *Resumption* Court declares *liable* to assessment, so the decision in settlement by a *Deputy Collector* is final and conclusive when confirmed by the Commissioner. In support of this contention, he has cited, as the leading case, that of Hur Gobind Ghose, reported in Carrau's Summary Cases, page 131, and a case in the Sudder Dewanny Decisions of 1850, page 459,

and another in Weekly Reporter, Volume V., page 22.

I quite concur in the ruling laid down in all these three cases; but that ruling does not apply here. It is confined entirely to what is *decreed* in the actual decree by the *Resumption* Courts, and does not extend to what is subsequently administratively done by a settlement-officer. In the resumption-decree, there was no summons to Laul Beebee, no mention of *lakheraj* lands belonging to Mukhun Lall, no resumption of the 2 drones 10 kanees which make up the 73 drones 12 kanees 3 gundahs of the settlement proceedings; but the resumption-decree was entirely confined to resuming 71 drones 1 kanee 6¾ gundahs of Ashruffpore. In fact, the settlement officer merely decided in the ordinary course of settlement as an executive Deputy Collector a boundary-dispute. There may be a civil suit brought to set aside such an order, and it should be brought within a limited time, but, as regards this point, no special ground is mentioned in the petition of special appeal. The proper distinction is that the decree of the *Resumption* Court as to the liability of the *resumed mehal* to be assessed with a Government demand is final. But the subsequent dealing by the settlement-officer, with alleged proprietary right and claims to land, not being land mentioned in the resumption-decree, is not final, but open to the jurisdiction of the Civil Court. *See* case at page 503, Sudder Dewanny Adawlut Reports, 1852, Ramyad Singh, appellant, where the distinction is clearly laid down that the propriety of resumption is what alone is decided by a *Resumption* Court.

In this view, I would dismiss the special appeal with costs.

Macpherson, J.—I concur in thinking that this appeal must be dismissed with costs.

The 3rd June 1868.

Present:

The Hon'ble F. B. Kemp and E. Jackson, *Judges.*

Limitation—Fraud.

Case No. 222 of 1868.

Special Appeal from a decision passed by the Judge of West Burdwan, dated the 21st November 1867, reversing a decision passed by the Sudder Ameen of that District, dated the 13th March 1867.

Gopal Chunder Dey (Plaintiff), *Appellant,*

versus

Purnoo Beebee and others (Defendants), *Respondents.*

Baboo Anund Chunder Ghossal for Appellant.

Baboo Kalee Kishen Sein for Respondents.

Where the holder of a decree under Regulation VII. of 1799 sold his rights in the decree, and, after substituting the purchaser's name for his own as decree-holder, fraudulently received from the judgment-debtor moneys under that decree—HELD that limitation would run against the purchaser from the time he discovered the fraud.

Kemp, J.—THE decision of the Judge in this case is clearly wrong. The plaintiff's cause of action did not arise from the date of his purchase of the decree, but from the date of the order of the Collector referring him to a civil suit or to such remedy as he might think proper. Moreover, the conduct of the defendant being grossly fraudulent, the limitation would run from the time of the discovery by the plaintiff of such fraud. The suit was well within time from that date.

On the merits, Section 206 of Act VIII. of 1859 has nothing to do with this case, which is a case under Regulation VII. of 1799. The defendant, after selling to the plaintiff his rights in the decree obtained under the above Regulation, and after substituting the plaintiff's name in his place as decree-holder, fraudulently received from the judgment-debtor certain moneys under that decree, subsequent to the sale by him to the plaintiff. The plaintiff is, therefore, entitled to recover the amount claimed in the suit. The decision of the Judge is reversed, and the decision of the Court of first instance, which is correct in all respects, confirmed with costs in all the Courts.

h

The 3rd July 1868.

Present:

The Hon'ble H. V. Bayley and A. G. Macpherson, *Judges.*

Certificate—Act XXVII., 1860.

Case No. 149 of 1868.

Miscellaneous Appeal from an order passed by the Judge of East Burdwan, dated the 7th February 1868.

Waselun Huq (second party), *Appellant,*

versus

Gowhuroonissa Bibee, for self and as guardian of her minor children (first party), *Respondent.*

Baboo Bykuntnath Paul for Appellant.

No one for Respondent.

A certificate under Act XXVII. of 1860 cannot determine any question of title, or decide what property belongs to the estate of the deceased; it merely enables the holder to collect the assets of that estate, and is conclusive of his representative title as against all debtors to the deceased.

A certificate cannot be granted for the collection of fractions of the debts of the deceased.

Macpherson, J.—It appears to us in this case that the Judge below has not understood the relative positions of the appellant and the respondent, and that his order giving the respondent a certificate for a 12-annas share is wrong.

The appellant is the son by the first wife. The respondent, as the second wife of the deceased, asks for a certificate for herself and on behalf of her minor sons. It appears to us that the proper order to make in this case—and the respondent's pleader, Baboo Chunder Madhub Ghose, consents to it—is to set aside the Judge's order, and direct that a certificate be issued jointly to the appellant and the respondent.

The granting of a certificate does not and cannot determine any question of title, or decide what property does or does not belong to the estate of the deceased. It merely enables the person or persons to whom the certificate is granted to collect the assets belonging to the deceased; and the certificate is conclusive of his or their representative title as against all debtors to the deceased. A certificate cannot be granted for the collection of fractions of the debts of the deceased.

The 3rd July 1868.

Present:

The Hon'ble F. B. Kemp and E. Jackson, *Judges.*

Debuttur land — Suit by one of several brothers — Declaratory decree.

Case No. 195 of 1868.

Special Appeal from a decision passed by the Judge of West Burdwan, dated the 22nd November 1867, affirming a decision passed by the Principal Sudder Ameen of that District, dated the 6th May 1867.

Gunga Gobind Singh (one of the Defendants), *Appellant,*

versus

Joy Gopal Panda (Plaintiff), *Respondent.*

Baboo Romesh Chunder Mitter for Appellant.

Baboos Kishen Succa Mookerjee and *Nil Madhub Sein* for Respondent.

Where property in dispute was found by the Lower Court to be *debuttur* land belonging to plaintiff, and not *mál* land included in defendant's putnee, and it was contended in special appeal by defendant that plaintiff was entitled to one-fourth share only, as one of four brothers, it was held that plaintiff was entitled to a declaration that the whole land was *mál* land, and that he was entitled to a fourth share.

Jackson, J.—This special appeal is preferred by Gunga Gobind Singh, who was not one of the original defendants in the suit, but who was made a party to the suit while it was being carried on in the first Court.

The point at issue as between the plaintiff and the defendant Gunga Gobind Singh was whether the property in dispute was *debuttur* land belonging to the plaintiff, or *mál* belonging to the putnee of Gunga Gobind. Both Courts have concurred in finding that the lands are *debuttur* belonging to the plaintiff, and not *mál* lands included in the property held in putnee by Gunga Gobind.

In special appeal, it is contended that the plaintiff can only recover one-fourth of the property in dispute, as he is one of four brothers, and is consequently entitled to a one-fourth share only.

We think the plaintiff is entitled to a declaration that the whole land in dispute is *debuttur* land, and that he is entitled to a one-fourth share of it, and virtually that is the conclusion at which the Lower Court has arrived.

* * * * * * *
* * * * * * *

The 3rd July 1868.

Present:

The Hon'ble H. V. Bayley and A. G. Macpherson, *Judges.*

Minor—Sale by de-facto guardian.

Cases Nos. 3227 and 3252 of 1867.

Special Appeals from a decision passed by the Principal Sudder Ameen of Gya, dated the 6th September 1867, affirming a decision passed by the Moonsiff of Nowabad, dated the 23rd May 1867.

Gunga Pershad and others (Defendants), *Appellants,*

versus

Phool Singh and others (Plaintiffs), *Respondents.*

Baboos Hem Chunder Banerjee, Nil Madhub Sein, and *Khetturnath Bose* for Appellants.

Baboos Unnoda Pershad Banerjee and *Chunder Madhub Ghose* for Respondents.

A deed of sale (where full consideration is paid), executed by a member of a Hindoo family, acting *de facto* as the guardian of his minor brothers, is not invalid by reason of the father being alive at the time.

Where a guardian sells part of an estate, and applies the purchase-money to the expenses incurred in a suit undertaken and found, in fact, to be for the benefit of the whole property, the sale is valid.

Macpherson, J.—THESE two appeals, Nos. 3227 and 3252, are from one judgment. The suit is brought to recover possession of certain property under a kobalah, dated May 1861, which was executed by the defendant Duryah Lall for himself and as guardian of his minor brothers, the defendants Gunga Pershad, Hur Pershad, and Chooa Lall. Duryah Lall's defence is that he did not execute the bill of sale at all. The defence of his brothers is, *firstly*, that Duryah Lall never executed the deed of sale; and, *secondly*, that, if he did execute it, his act is not binding upon them. The appeal No. 3252 is by Duryah Lall, who, both the Lower Courts having found against him as to the fact of his having sold the property to the plaintiff, contends that the judgment of the Lower Appellate Court is insufficient, inasmuch as it does not show that the Principal Sudder Ameen took into consideration all the evidence adduced by the defendant. There is nothing whatever in this objection: for there is nothing to show or to lead me to suppose that the evidence upon this issue has not been fully considered by the Lower Appellate Court. The appellants, Gunga Pershad, Hur Pershad, and Chooa Lall, contend that, even if the kobalah was executed by Duryah Lall as their guardian, it is not binding upon them for two reasons: *firstly*, because he was not their legal guardian, their father being alive at the time of the execution of the deed; and, *secondly*, because there was no such necessity for the sale as makes the sale binding upon them.

As regards the objection of Duryah Lall's not being his brothers' guardian, the first observation which I have to make is that this plea was not raised in the Court of first instance, and that, although it was mentioned in the written grounds of appeal filed in the Court of the Principal Sudder Ameen, no issue was fixed raising this question. The objection taken in the Court of first instance to Duryah Lall's being their guardian was based only upon the ground that he had not obtained a certificate. If the defendants wished the Lower Appellate Court to decide the question whether Duryah Lall was or was not their guardian when their father was alive, it was their business to have seen that that issue was distinctly raised, and to have taken steps to ensure its being so if the Principal Sudder Ameen did not raise it himself. As matters stand, there is nothing to lead us to suppose that the Principal Sudder Ameen's attention was ever drawn to the fact that their father, and not Duryah Lall, was alleged to have been their guardian at the time when the sale was made.

But supposing that the father was alive at that time, it appears to me that, if Duryah Lall was *de facto* acting in the matter as the guardian of his brothers, the plaintiff's title would not be bad so far as that objection is concerned.

In Hunooman Pershad Panday's case (VI. Moore's Indian Appeals, page 393), their Lordships of the Privy Council expressed the opinion that a sale made by a *de-facto* guardian under pressing necessity would be good. Their Lordships say: "Under "the Hindoo law, the right of a *bonâ-fide* "incumbrancer, who has taken from a *de-*"*facto* manager a charge on lands, created "honestly for the purpose of saving the "estate, or for the benefit of the estate, is "not (provided the circumstances would "support the charge had it emanated "from a *de facto* and *de jure* manager) "affected by the want of union of the "*de facto* with the *de jure* title." In the present instance, the Principal Sudder

Ameen finds as a fact that Duryah Lall, for himself and as guardian of his minor brothers, executed the kobalah, and that the consideration-money was fully paid; and it is clear from the judgment of the Principal Sudder Ameen that Duryah Lall was acting as *de-facto* guardian of his minor brothers.

There remains the question, whether any sufficient necessity for the sale has been proved. As regards this point, their Lordships of the Privy Council observe (in Hunooman Pershad Panday's case) that, "where the charge is one that a prudent owner would make in order to benefit the estate, the *bond-fide* lender is not affected by the precedent mismanagement of the estate. The actual pressure on the estate, the danger to be averted, or the benefit to be conferred upon it, is the thing to be regarded. But of course, if that danger arises or has arisen from any misconduct to which the lender is or has been a party, he cannot take advantage of his own wrong to support a charge in his own favor against the heir, grounded on a necessity which his wrong has helped to cause. Therefore the lender, unless he is shown to have acted *mala fide*, will not be affected, though it be shown that with better management the estate might have been kept free from debt."

In the present case, the Lower Appellate Court says: "In this case the guardian, in order to save an entire property which was in danger of being ruined, sold a portion thereof, and thus saved the entire property; that is to say, he saved it by selling a part of it, and applying its purchase-money to the expenses incurred in a suit brought as against the whole estate. This was, therefore, an act every way beneficial to the minor, and consequently the sale of his share by his guardian is fit to be held valid by the Court." There is an express finding here that the sale to the plaintiff was beneficial to the estate, and that the necessity which called for it arose out of a suit which was pending at the time. It appears from the statement of the pleader for the special appellants that that suit was brought by Duryah Lall for himself and for his minor brothers in order to have it declared that a certain tenure set up by one Raot Suhay was not a mokurruree tenure, and that Duryah Lall was eventually successful in that suit. This being so, and the Lower Appellate Court having found as a fact that the bringing of the suit was beneficial to the whole estate, we, sitting in special appeal, cannot say that there is anything wrong in that finding, merely on a consideration of the possibility that it might have been equally beneficial to the estate, if the suit had not been instituted till the minor brothers had attained their full age.

On the whole, the Lower Appellate Court, finding as a fact that the deed of sale was executed by Duryah Lall for himself, and as *de-facto* guardian of his brothers, and the Court further finding that full consideration was paid, and that the money paid was applied for the benefit of the property, and that the transaction was beneficial to the minors—the judgment of the Lower Appellate Court must be upheld, and both the special appeals must be dismissed with costs.

Bayley, J.—I concur.

The 3rd July 1868.

Present:

The Hon'ble G. Loch and F. A. Glover, *Judges.*

Enhancement—Mokurruree lease—Non-production of pottah—Dakhilah.

Cases Nos. 3271, 3272, 3274, 3275, and 3276 of 1867.

Special Appeals from a decision passed by the Judicial Commissioner of Chota Nagpore, dated the 2nd September 1867, affirming a decision passed by the Deputy Commissioner of that District, dated the 17th June 1867.

Messrs. R. Watson and Co. (Plaintiffs), *Appellants,*

versus

Anjunna Dossee and others (Defendants), *Respondents.*

Messrs. R. T. Allan and *J. S. Rochfort* for Appellants.

Baboos Ashootosh Dhur and *Nubo Kishen Mookerjee* for Respondents.

In a suit for enhancement of rent where defendants plead a mokurruree lease of a date subsequent to the Decennial Settlement, but file no pottah, the existence of the tenure must be proved by evidence; dakhilahs or possession under color of these for 20 years not entitling them to exemption.

Glover, J.—These were suits brought by Messrs. Watson and Co. as farmers of

Court has full power to do complete justice between them. We think that, on the state of facts disclosed by the plaint and the written statements of the defendants, the plaintiff has made out no title to sue alone for one moiety of the rent. She ought to have sued together with her sister for the whole rent, and if she could not induce her sister to become plaintiff with her, then she might probably have made her sister a defendant. At any rate, if this could not be done in the Revenue Court, she would have her remedy in the Civil Court. She could there have sued her sister and the present defendants for an apportionment of the rent between herself and sister according to their respective beneficial interests therein. But this course has not been taken. The defendants are quite justified in urging that they would not be safe if they paid either the whole or any specified share of the rent to the plaintiff. Any decision which should be come to on the record, as it at present stands, could not possibly affect any right which Pudmabutee, the sister, enjoys either jointly with, or separately from, the plaintiff. We think, therefore, that the Lower Court was right in saying that the plaintiff had made out no title to sue alone, or to sue without making her sister a party to the suit.

It has been pressed upon us by the pleader for the plaintiff that the Court itself, upon becoming cognizant of the state of the record relative to the plaintiff's cause of action, ought to have added Pudmabutee as a party. This argument is based upon the assumption that the Deputy Collector has the power which the Judge of a Civil Court has in this respect, by reason of the provisions of Section 73 of Act VIII. of 1859. It is not necessary now for us to determine judicially whether the Deputy Collector has the authority which is given to the Civil Courts by Section 73, Act VIII. of 1859. But assuming for a moment that he has such authority, we observe that, in this case, he was never asked by the plaintiff to exercise his discretion in the matter, and, on the contrary, one of the grounds of appeal to this Court is substantially to the effect that it was perfectly unnecessary in this suit that Pudmabutee should be made a party at all, and that, consequently, the decision of the Deputy Collector, founded as it is upon the fact of her not being a party, is wrong in law. But even had he been asked by the party to exercise his power of adding another person to the record, either as plaintiff or defendant, and had he refused to do so, we think that, under the ruling of this Court, we, as a Court of appeal, would have no power to interfere with his discretion, always excepting, of course, any case in which we might see that this discretion had been exercised capriciously, or that it was otherwise absolutely necessary for the purpose of doing justice between the parties, that the additional person should be put upon the record. We have no cause whatever for saying that, had the Deputy Collector, under the circumstances of this case, judicially exercised his discretion, and refused to add Pudmabutee as a party, he would, in so doing, have acted capriciously, or in such a way as to endanger the proper administration of justice. We, therefore, think that this argument of the plaintiff's pleader ought not to induce us to remand the case.

On the whole, we are of opinion that the Deputy Collector was right, and that the plaintiff's suit was correctly dismissed. We dismiss the appeal with costs.

The 3rd July 1868.

Present:

The Hon'ble G. Loch and F. A. Glover, *Judges.*

Suit for rent—Intervention by farmer.

Cases Nos. 3277 and 3279 of 1867 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of Moorshedabad, dated the 27th August 1867, affirming a decision passed by the Deputy Collector of that District, dated the 26th June 1867.

Jumarut Mundul and others (Defendants), *Appellants,*

versus

Nil Kant Sircar (Plaintiff), *Respondent.*

Messrs. R. T. Allan and *J. S. Rochfort* for Appellants.

Baboos Sreenath Doss and *Ashoolosh Chatterjee* for Respondent.

N instituted a suit for rent against *Y*, who pleaded that he was not in possession, having sold his jote to *W*, who contended that *N* was entitled to recover only a moiety of the rent, the other half being due to *M* (the joint-putneedar with plaintiff), from whom *W* had taken a farming lease.

HELD that defendant should be allowed to prove that he was not in possession; and if *M* be not allowed to appear as an intervenor, there could be no objection to *W's* being allowed to do so, as deriving his title from *M*, and to show that plaintiff had not received the whole of the rent.

f

Loch, J.—In these cases, Nil Kant Sircar sued Jumarut Mundul for rent. He replied that he had sold his jote to Watson and Co., and was not in possession. Watson and Co. contended that they were in possession, but that Nil Kant was entitled to recover only a moiety of the rent, the other half being due to Monohura Dossee, the joint-putneedar with plaintiff, from whom Watson and Co. had taken a farming lease of her half of the putnee. Watson and Co. are, therefore, in the two-fold position of farmers of Monohura Dossee's half of the putnee and of tenants of the holding the rent of which is demanded by the plaintiff.

Monohura Dossee intervened, but her intervention was disallowed, as she admitted that she had given her share of the putnee in farm to Watson and Co.

Watson and Co. were not allowed by the Judge either to appear as intervenors or to defend the suit as tenants, the Judge holding that they did not seek to appear in the former capacity, and that they could not be added as parties interested in the suit, the provisions of Act X. not permitting such persons to be made parties to the suit.

We think the Judge has taken a wrong view of this case. The defendant Jumarut should be allowed to prove, if he can, that he is not in possession, and not liable for the rent, and if Monohura be not allowed to appear as an intervenor, there can be no objection to Watson and Co. being allowed to appear in that capacity as deriving their title from her as set forth in their petition, and showing that the plaintiff has not received the whole of the rent which he claims.

The case is remanded for disposal with reference to the above remarks.

The 3rd July 1868.

Present:

The Hon'ble L. S. Jackson and Dwarkanath Mitter, *Judges.*

Mahomedan law—Pre-emption—The Hedaya.

Case No. 104 of 1868.

Special Appeal from a decision passed by the Judge of Sylhet, dated the 12th November 1867, reversing a decision passed by the Moonsiff of that District, dated the 7th March 1867.

Abdool Guffoor (Defendant), *Appellant,*

versus

Mussamut Noor Banoo (Plaintiff), *Respondent.*

Baboo Debendro Narain Bose for Appellant.

Baboo Grish Chunder Ghose for Respondent.

Plaintiff sued to enforce her right of pre-emption in regard to property, sold as belonging to several co-sharers, some of whom were minors; the deed of sale containing a stipulation that, if the minors, on coming of age, should refuse to ratify the sale, the other vendors would compensate the purchasers for any loss they might suffer. The suit being dismissed, plaintiff appealed, and elected in the Appellate Court to withdraw her claim so far as the interests of the minors were concerned.

Held that this withdrawal entirely invalidated the plaintiff's claim to enforce the right of pre-emption.

By the Hedaya, where several purchase from one, the Shafee may take the proportion of any one of them; but where one purchases from several, the Shafee may take or relinquish the whole, but not any particular share or proportion.

Jackson, J.—It appears to us that the decision of the Judge in this case cannot be maintained.

The plaintiff sued to enforce her right of pre-emption. Her allegation was that, hearing that the property in dispute had been sold on the 13th of November 1866 by Abdool Guffoor, Nichut Ram, Bindabun, Doolung Dassee, and Sooburna Dassee, the defendants, she, on the next day, immediately on receiving the news, complied with the requirements of the Mahomedan law, and asserted her right, and therefore she sues to enforce that right.

It appears that the property had been sold as belonging to several co-sharers, certain of whom were minors, the other vendors claiming to act on their behalf; and the deed of sale contained a stipulation that, if the minors, on coming of age, should refuse to ratify the sale, the other vendors would compensate the purchasers for any loss that they might suffer.

The first Court dismissed the plaintiff's suit, holding that she was not entitled to enforce the right she claimed.

On appeal, the Judge was of opinion that the claim to the property could not be enforced as regarded the shares of the minor vendors, and he allowed the case to stand over for thirty days to let the plaintiff withdraw her claim so far as the interests of the minors were concerned. The plaintiff elected to do so, and the Judge allowed

the plaint to be amended, so as to ask the plaintiff's right of pre-emption to be enforced only as regarded the rights of the vendors who were of full age.

It seems to us that this withdrawal entirely invalidates the plaintiff's claim to enforcing the right of pre-emption.

If she elects to enforce her right of pre-emption, she must take the bargain with all its advantages and risks; and as she has thought fit to prosecute her claim only as regards the shares which are safe, such act of her invalidates the whole claim.

We cannot shut our eyes to the fact that this proceeding was not spontaneous on the part of the plaintiff, but suggested by the expressed opinion of the Judge; and it does appear probable that the plaintiff, in submitting to that suggestion, yielded to an influence which she thought herself unable to resist. But, however the idea may present itself to our minds, we are not at liberty to give effect to mere surmise, and to disregard what the plaintiff has deliberately done in having elected to amend her plaint. I am very doubtful whether the plaintiff could properly be allowed to amend her plaint at that stage of the proceedings, and it seems proper that, in the Appellate Court, the plaintiff should stand or fall by the case with which she came into Court originally.

The judgment of the Lower Appellate Court must, therefore, be reversed, this appeal must be decreed, and the plaintiff's suit dismissed, but, under the circumstances, I would make no order as to costs.

Mitter, J.—I entirely concur with my learned colleague. I think the plaintiff ought not to be permitted to split up the bargain entered into by the special appellant's vendors into two parts, and then to enforce her claim as to one part, and to renounce the other.

It has been said that there were various parties interested in the property in dispute, and that it was consequently at the option of the plaintiff to enforce her claim with respect to the share of any one of the other vendors, and to abandon her claim of the shares of the other vendors, though all these shares have been transferred under one and the same contract.

The *Hedaya*, Book 38, Chapter IV., page 606, lays down that, "if five persons purchase "a house from one man, the *Shafee* may take "the proportion of any one of them. If, on "the contrary, one man purchase a house "from five persons, the *Shafee* may either "take or relinquish the whole, but is not entitled to take any particular share or proportion. The difference between these two "cases is that, if, in the latter instance, the "*Shafee* were allowed to claim a part, it "would occasion a discrimination in the "bargain to the purchaser, and be productive "of very great inconveniences to him "whereas, in the former instance, the *Shafee* "being merely the substitute of one of the "five purchasers, no discrimination in the "bargain is occasioned."

As this case falls expressly within the principle laid down in the passage above cited, the special appeal ought to be decreed but without costs, under the circumstances mentioned by my learned colleague.

The 6th July 1868.

Present:

The Hon'ble H. V. Bayley and A. G. Macpherson, *Judges.*

Judgment in resumption-suit—Evidence.

Case No. 3298 of 1867.

Special Appeal from a decision passed by the Principal Sudder Ameen of West Burdwan, dated the 10th September 1867, reversing a decision passed by the Moonsiff of that District, dated the 27th November 1866.

Moha Moya Dossee (Defendant), *Appellant,*

versus

Joodishtir Deb (Plaintiff), *Respondent.*

Baboo Tarucknath Dutt for Appellant.

Baboo Poorno Chunder Mookerjee for Respondent.

In a suit for lands claimed as originally belonging to a lakheraj holding of plaintiff's ancestor, which had been resumed by the zemindar, who afterwards caused it to be sold in execution of a decree as the *lakheraj* of his debtor, it was held that the judgment in the resumption-suit was no evidence of plaintiff's title as against the auction-purchaser (defendant), who had been no party to the suit.

Bayley, J.—This case must be remanded for re-trial as to the plaintiff's title, in regard to which neither of the Courts below has made any proper adjudication.

The plaintiff sues for the lands in dispute as originally belonging to a lakheraj holding of his ancestor, which had been resumed by the zemindar. That zemindar is also the

decree-holder who caused a sale of the lands as the *lakheraj* of his debtor, at which sale the defendant Moha Moya became the purchaser.

The first Court found the plaintiff's possession not proved, and dismissed the suit.

The Lower Appellate Court gave the plaintiff a decree, finding upon the strength of copies of certain judgments in the previous resumption-suit that plaintiff's title was proved, and upon other evidence that plaintiff's possession was shown.

The defendant appeals specially, and her pleader contends that, as she is an auction-purchaser, and no party to the zemindar's resumption-suit, the judgment in that suit could be no evidence against her, and that the plaintiff has obtained a decree from the Lower Appellate Court without any evidence of his title at all. Further, that a mere finding of possession is not sufficient to justify a verdict for plaintiff in the present case. The special appellant also takes objection to the incorrect view by the Lower Appellate Court as to any support being given to plaintiff's case of alleged possession by the local enquiry.

I am of opinion that the title of the plaintiff rested upon his holding the lands in dispute as resumed *lakheraj*, which was alleged, and had to be proved by him; and that the Lower Appellate Court should have found plaintiff's title proved on legal evidence before a decree was pronounced in his favor. The resumption-judgment might be binding as against the decree-holder, who was the same person as the zemindar; but it could be no evidence of plaintiff's title as against an auction-purchaser, who was no party to the resumption-suit.

The Lower Appellate Court does not seem to rely upon any other evidence as to the plaintiff's title. In this view of the case, it must be remanded to the Lower Appellate Court to consider whether the plaintiff's title has been proved either by evidence of right or by evidence of such long possession as in cases of this nature may be sufficient proof of title. The Lower Appellate Court must also consider whether the Civil Court Ameen's local enquiry does support the plaintiff's alleged possession.

Macpherson. J.—I concur in the order of remand.

The 6th July 1868.

Present:

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble Dwarkanath Mitter, *Judge*.

Right of occupancy—Sub-letting does not transfer such right—Section 6, Act X., 1859.

Case No. 3357 of 1867.

Special Appeal from a decision passed by the Additional Principal Sudder Ameen of Dacca, dated the 23rd September 1867, reversing a decision passed by the Moonsiff of that District, dated the 28th December 1866.

Haran Chunder Paul (Plaintiff), *Appellant*,

versus

Mookta Soonduree and others (Defendants), *Respondents*.

Baboo Nuleet Chunder Sein for Appellant.

Baboo Onookool Chunder Mookerjee for Respondents.

A ryot, by merely sub letting his land, does not transfer, nor does his sub-lessee thereby gain, any right of occupancy, the rule laid down in Section 6, Act X. of 1859, not applying, as respects the actual cultivator, to land sub-let for a term of years by a ryot having a right of occupancy.

Peacock, C. J.—We think that this case must go back to the Principal Sudder Ameen to try whether the plaintiff had a right of occupancy. The substance of the plaint is that the plaintiff, by reason of the pottah and of the holding under it by his father and by himself, acquired a right of occupancy; that he under-let the land; and that the plaintiff in the rent-suit recovered the rent from his ryots. The issues which were laid down by the Moonsiff were, *1st*, whether or not the disputed land of the share was held by plaintiff as his ryotee right appertaining to the jumaye land alleged by him, and whether the pottah was genuine or not, and, *2ndly*, whether or not the plaintiff's jumaye right has been injured by the rent-decree.

There is no doubt that, if the plaintiff had a right of occupancy, and ryots holding under him have been compelled to pay rent to the defendant, the plaintiff's right has been injured by the rent-decree. The real question to be tried, therefore, is whether the pottah and the holding under it by the plaintiff and his father, or both of them, did create a right of occupancy in the plaintiff. Although the pottah may not have amounted to a perpetual ryotee lease, a holding

under it for 12 years, if proved, would create a right of occupancy.

The Principal Sudder Ameen who tried the case did not correctly understand the effect of a right of occupancy. He says "that a right of occupancy is not transferable, and that the plaintiff's position "was similar to that of a tenant-at-will, "whose interest and tenancy-at-will are "determined by his quitting the land." But the plaintiff did not transfer any right of occupancy, if he merely sub-let the land to ryots to hold under him. It is expressly provided by Section 6 of Act X. of 1859 that the rule therein laid down does not, as respects the actual cultivator, apply to land sub-let for a term of years by a ryot having a right of occupancy. It, therefore, recognizes the right of a ryot having a right of occupancy to sub-let the lands which he holds, although the ryot holding under him does not gain a right of occupancy as against him. If the plaintiff had a right of occupancy, his interest was not determined by under-letting the land, or by putting any other person into possession of it as his ryot.

In determining whether the plaintiff had a right of occupancy or not, the holding of his father must be taken into consideration by virtue of the last Clause of Section 6.

The decision of the Lower Appellate Court must be reversed with costs, and the case remanded to the Principal Sudder Ameen, to be re-tried upon the merits, having regard to the above remarks.

The 6th July 1868.

Present:

The Hon'ble F. B. Kemp and E. Jackson, *Judges.*

Jurisdiction—Right to profits from ceremonies at cremation.

Case No. 230 of 1868.

Special Appeal from a decision passed by the Second Principal Sudder Ameen of Hooghly, dated the 11th January 1868, reversing a decision passed by the Sudder Ameen of that District, dated the 26th August 1867.

Becharam Banerjee (one of the Defendants), *Appellant,*

versus

Sreemuttee Thakoormonee Debia (Plaintiff), *Respondent.*

Baboo Obhoy Churn Bose for Appellant.

Baboo Tara Prosunno Mookerjee for Respondent.

The obligation upon Jujmans to employ a particular *puroheet* to perform the ceremonies at the burning of Hindoo bodies may be a matter of conscience, and not one which a Court of law can enforce; but the question of the right to enjoy the joint-profits accruing from the performance of such ceremonies is cognizable by a Civil Court.

Kemp, J.—This is a somewhat peculiar case. The plaintiff sued on the allegation that her husband, as one of four brothers, had a right, in turn with his brothers, to perform certain ceremonies consisting of reciting muntr:s at a particular ghaut on the occasion of the burning of Hindoo bodies. The turn claimed was for seven days in the month. The plaintiff states that her husband enjoyed this right during his lifetime, and she also after his decease, until she was prevented from exercising that right by the defendant Becharam.

Some of the defendants admits her right, and the contest is mainly as between her and Becharam.

The Principal Sudder Ameen, a Hindoo gentleman and a Brahmin, in a carefully considered judgment, has found that the right of the plaintiff's husband to a *paldh*, or turn in performing the ceremonies, claimed by the plaintiff, is not denied by the defendants. He also found on the evidence that the accusation made by the defendant, that the plaintiff was not a chaste woman, was unfounded. He decreed the plaintiff's case, and, as the defendant did not file his account-book, the Principal Sudder Ameen fixed the mesne-profits at 60 rupees, instead of 240 originally claimed by the plaintiff.

In special appeal it is contended that the decision of the Principal Sudder Ameen is wrong, *first*, on the ground that the suit was one which was not cognizable by the Civil Courts; and, *secondly*, that the Principal Sudder Ameen has come to a wrong finding on the question of mesne-profits.

A decision of this Court, dated the 22nd of October 1862, published in Hay's Reports, pages 365 and 366, has been quoted by the pleader for the special appellant. That decision laid down this principle, that the obligation upon *Jujmans* to employ a particular *puroheet* is a simple matter of conscience, and not an obligation that a Court of law can enforce. We are not prepared to dissent from that proposition, but in this case it is not denied that the four brothers.

amongst whom was the plaintiff's husband, had a joint right in the performance of the ceremonies alluded to above, and in the profits thereby accruing to them. The parties frequenting a ghaut for the purpose of burning their dead, could not perhaps be obliged to employ a particular *puroheet;* but that has nothing to do with the question of the right to enjoy the joint profits accruing from the performance of these ceremonies. We are, therefore, of opinion that the first ground of special appeal is untenable.

On the question of mesne-profits, the defendant having failed to produce his jumma-khurch accounts, the Principal Sudder Ameen made the best estimate he could of those profits from the oral evidence; and his estimate does not appear to us to be an excessive one, it being about four annas in the rupee of the amount claimed.

We dismiss this special appeal with costs.

The 6th July 1868.

Present:

The Hon'ble F. B. Kemp and E. Jackson, *Judges.*

Jurisdiction — Damages for a false charge.

Case No. 280 of 1868.

Special Appeal from a decision passed by the Principal Sudder Ameen of West Burdwan, dated the 19th November 1867, reversing a decision passed by the Moonsiff of that District, dated the 30th July 1867.

Pran Kisto Banerjee (Defendant), *Appellant,*

versus

Nuddear Chand Chatterjee (Plaintiff), *Respondent.*

Baboo Poorno Chunder Shome for Appellant.

Baboo Nilmadhub Bose for Respondent.

A suit for damages on account of a false and malicious charge brought against plaintiff in a Criminal Court, is not cognizable by a Court of Small Causes.

Kemp, J.—A PRELIMINARY objection was taken by the pleader for the special respondent against the hearing of this appeal The pleader refers to Section 27 of Act XXIII. of 1861. This is a suit which, in our opinion, is not cognizable by a Court of Small Causes, it not being a suit for the recovery of damages on account of alleged personal injury, nor for actual pecuniary damages resulting from such injury. We, therefore, think that the special appeal may proceed. The suit was for damages laid at Rupees 150. It was alleged that the defendants brought a false and malicious charge of mischief by fire against the plaintiff in a Criminal Court. This charge was found not to be proved: hence this suit for damages.

* * * * * * *
* * * * * * *

The 7th July 1868.

Present:

The Hon'ble H. V. Bayley and A. G. Macpherson, *Judges.*

Payment by party in possession to save an estate — Reimbursement from real owner.

Case No. 2587 of 1867.

Special Appeal from a decision passed by the Judge of East Burdwan, dated the 29th May 1867, affirming a decision passed by the Principal Sudder Ameen of that District, dated the 7th May 1866.

Gopal Chunder Chuckerbutty (Plaintiff), *Appellant,*

versus

Uoodoy Lall Dey (Defendant), *Respondent.*

Mr. R. T. Allan and *Baboos Nubo Kishen Mookerjee* and *Dwarkanath Sein* for Appellant.

Baboo Boycuntnath Paul for Respondent.

A putnee-tenure, which had been attached by *G* in execution of a decree against *D*, was claimed by *S*, whose claim was allowed. Upon this, *G* instituted a suit against *S* and others to have the putnee declared to be the property of *D*, and being successful, had the putnee sold in execution of his decree against *D*, became the purchaser, and got possession. After this he saved the estate from being sold for arrears of rent which had accrued prior to his purchase, by paying up the amount due. He subsequently sued *D* and *S* to recover the amount so paid. *S*, who had meantime appealed to the Privy Council, succeeded in obtaining a reversal of the decree under which *G* had sold the putnee; but this reversal did not take place before *G* had instituted the suit for recovering the arrears he had liquidated.

HELD that *G* was entitled to recover from *S* the amount which had been paid by him to save the putnee from being sold.

Bayley, J.—THIS is a special appeal by plaintiff against the decision of the Judge of East Burdwan, affirming that of the Principal Sudder Ameen, holding that

plaintiff is not entitled to recover a certain sum of money for which he sues, as having paid it in due course of law for arrears of putnee rent, by which act the sale of the putnee was averted. Plaintiff's case is that as, since that payment was made, the defendant Sreeman Chunder has been declared by the Judicial Committee of Her Majesty's Privy Council to be the proprietor of the putnee, that defendant should re-pay to plaintiff the money thus advanced by him.

The whole contention before us in special appeal is, whether the payment was one legally necessary in behalf of defendant Sreeman Chunder, and not a voluntary or officious payment; and therefore a payment for which the defendant named is not legally liable. Plaintiff alleges that one Doorga Pershad Dey was in possession of the talook till Magh 1269; when plaintiff purchased the rights and interests of Doorga Pershad and another, in execution of a decree held by plaintiff against them, and that Doorga Pershad did not pay the putnee-rent for the first three months of the half year, *viz.*, from Assin to Magh 1269; that these rents and those due from Magh to the end of the half year kist of Bysack were paid by plaintiff.

On the other hand, Sreeman Chunder's case then was that he was not aware whether plaintiff paid the rents for Doorga Pershad or not, but that he (defendant Sreeman) was rightful proprietor of the talook, and on that being acknowledged, he would pay the sum now sought to be recovered by plaintiff. It was added that as plaintiff always denied that Sreeman was the proprietor, and he did so in his deposition in this case, the defendant Sreeman could not be held to be proprietor of the putnee for the purpose of re-paying plaintiff the money sued for.

In reply to this it is argued for plaintiff that his deposition was perfectly *bonâ fide* as the case then stood, and that it is only now that the Judicial Committee of the Privy Council has declared Sreeman Chunder to be the proprietor; that plaintiff looks to Sreeman *as such proprietor* for re-payment; that in fact the Privy Council's decree has put Sreeman in the very position in which Sreeman stated that, on its being recognized, he would pay the money now sued for; consequently, that plaintiff has a right to recover from Sreeman Chunder, as having made a legal payment for *him*.

I am of opinion that the proper test by which to try whether plaintiff's payment was legal or officious as to Sreeman Chunder, is to see in whose behalf it would have been legal to make the payment, and then to see if Sreeman is that person.

It is true that at the time plaintiff made the payment, he considered the putnee-rents should have been paid by Doorga Pershad as proprietor from Aghran to Magh, and by himself as *proprietor* from Magh to Bysack. But, throughout, the payment was made in behalf, not of the individual, but of any person occupying the character and position of the proprietor, and the putnee was in fact saved on such payment for the proprietor, whoever he might be.

Now, as by the decision of Her Majesty's Privy Council, Sreeman Chunder is declared that proprietor, and the putnee has been saved by that payment to the proprietor. *viz.*, now Sreeman Chunder, can the payment be deemed an officious and not a legal payment? I think it must be considered a legal payment against Sreeman Chunder as proprietor, and therefore recoverable from him.

I am supported in this view by the case cited from Weekly Reporter, Volume V., page 126. There is also a case decided on that principle in the case, Special No., page 180.

On the other hand is cited, page 480, Hay's Reports, 31st December 1862, to show that Sreeman could not be looked upon as the party in possession, but only as a benameedar for the judgment-debtors. It is argued that from this decision and the pleadings, plaintiff could not sue Sreeman, the proprietor.

But if my view be correct, that the payment made by plaintiff *bonâ fide* for the proprietor, whoever he might prove to be, should be recovered, such proprietor (Sreeman Chunder being now proprietor) should re-pay plaintiff the sum he had advanced.

In this view I would decree this special appeal with costs.

Macpherson, J.—I arrive at the same conclusion.

The plaintiff having a decree against Doorga Pershad Dey, attached a certain putnee-tenure, with the intention of selling it in execution of his decree. Sreeman Chunder Dey claimed the property, and his

claim was allowed. Thereupon the plaintiff instituted a suit against Sreeman Chunder and others to have it declared that the putnee in question was the property of Doorga Pershad, and was, as such, liable to be sold in execution of his decree against him. The plaintiff was successful in this country, and, relying upon his decree, the plaintiff had the putnee sold in execution of his decree, and at the sale was declared the purchaser, and got possession. After he was in possession, the zemindar was about to sell the tenure for arrears accrued due prior to the plaintiff's purchase; and in order to save the estate, the plaintiff paid the amount which was due. He subsequently instituted the present suit to recover the money so paid from Doorga Pershad and Sreeman Chunder. Meanwhile, Sreeman Chunder had appealed to the Privy Council from the decree under which the plaintiff had sold the putnee. He succeeded in his appeal, and the decree which had been passed in plaintiff's favor was reversed.

This reversal did not take place until after the present suit was instituted, nor until after Sreeman Chunder had expressed his readiness to pay the amount claimed if plaintiff would acknowledge his title. Sreeman Chunder having died, his representative now stands in his place upon the record. It is contended on his behalf that the payment made by the plaintiff was not made for his benefit or at his request, and that he cannot be liable for it, as the plaintiff all along denied his title.

I think the plaintiff is entitled to recover. The rent which was in arrear was in the nature of a charge upon the land; and the payment made by the plaintiff was made *bonâ fide* in the ordinary course of business in the management of the estate. Moreover, it was a payment which it was necessary to make in order to preserve the property. Under such circumstances, the plaintiff is entitled to be reimbursed the amount expended by him, by those for whom the putnee has been thereby saved. Sreeman Chunder having succeeded in the Privy Council, and having been restored to possession, his estate is liable, even although the plaintiff did formerly deny his right. The payment was made *bonâ fide*, and enured to the benefit of Sreeman Chunder and his heirs. I would, therefore, reverse the decree of the Lower Appellate Court, and pass a decree in favor of the plaintiff, as prayed by him, against the estate of Sreeman Chunder, with all costs here and in the Courts below.

The 8th July 1868.

Present:

The Hon'ble F. B. Kemp and E. Jackson, *Judges.*

Enhancement—New tenures at old rates of rent—Presumption under Section 4, Act X., 1859—Consolidation of tenures—Plea of lakheraj—Onus probandi.

Case No. 2971 of 1867 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of Hooghly, dated the 13th August 1867, affirming a decision passed by the Deputy Collector of that District, dated the 24th December 1866.

Raj Kishore Mookerjee (Defendant), *Appellant,*

versus

Hurechur Mookerjee (Plaintiff), *Respondent.*

Baboos Hem Chunder Banerjee, Mohendro Lall Shome, Nubo Kishen Mookerjee, and *Pearee Mohun Mookerjee* for Appellant.

Baboos Unnoda Pershad Banerjee and *Umbica Churn Banerjee* for Respondent.

In a suit for arrears of rent at an enhanced rate, where defendant claimed the presumption arising under Section 4, Act X., 1859, it was held, that the question to be decided was not whether defendant's tenancy was a continuation of former holdings or a new creation out of other holdings, but whether the rent had been changed or not for a period of 20 years before the suit.

HELD, also, that the principle laid down in a former decision, *viz.*, that consolidation of jummas into one tenure does not deprive the ryot of the benefit of the presumption arising where the rent has not been changed, applies equally to jummas derived in part, or in whole, with the consent of the landlord, and subsequently consolidated.

In a suit to assess land which defendant proves that he purchased as lakheraj, and of which he is in possession, the *onus* of proving that it is rent-paying lies on plaintiff.

Kemp, J.—THIS was a suit for arrears of rent from Bysack to Assar 1272 at an enhanced rate after service of notice. The plaintiff is the putneedar. The grounds for enhancement are stated to be—

1st.—That the rates paid by the defendant are below the rate prevailing for lands of a similar description and with similar advantages in the places adjacent.

2nd.—That the value of the produce and productive powers of the land have been increased otherwise than by the agency or at the expense of the ryot.

3rd.—That the quantity of land held by the defendant has been proved by measurement to be greater than the quantity for which rent has been previously paid by him.

The defendant answers that he holds 32 beegahs 6 cottahs mâl lands, and 5 beegahs lakheraj; that he has paid a uniform rent for more than twenty years before the commencement of the suit, and is, therefore, entitled to the presumption which Section 4, Act X., gives rise to; that his tenure consists of four jummas or holdings; and that, by digging a canal, he has improved the productive powers of the land at his own expense.

Both the Lower Courts have decreed the plaintiff's claim. The defendant appeals specially.

The Judge admits that the dakhilahs filed by the defendant are proved; indeed, they are not disputed by the plaintiff. But he holds that the question of protection from enhancement depends upon whether the defendant's pottah and kubooleuts show that defendant's tenancy was a continuation or confirmation of a former tenant's holding, or whether those documents originated the defendant's tenure. The Judge finds that the pottah and kubooleuts filed by the defendant create a new tenure out of many other holdings, and that, therefore, the defendant is not entitled to claim protection from enhancement.

The Judge, on the question of whether the land held by the defendant was in excess of the area recorded in his pottah and kubooleuts, found against the defendant on grounds which are not very clear, but, as in special appeal the pleader for the plaintiff (respondent) admits that his client claims no excess, this point has not been pressed.

With reference to the 5 beegahs claimed as lakheraj, the Judge allowed the claim for 2 beegahs, and disallowed it for the remaining 3 beegahs. The Judge also found that the improvement in the productive powers of the soil was not owing to the defendant's expense or agency. The plaintiff's claim to enhance was decreed, and the case remanded for an inquiry into the rates.

We think that the finding of the Judge on the question of whether the tenure of the defendant is protected from enhancement or not cannot be supported.

The question the Judge had to decide in this case was not whether the tenure of the defendant was created for the first time by the pottah and kubooleuts filed by the defendant, but whether it had been proved that the rent at which the defendant held the land had been changed or not for a period of twenty years before the commencement of the suit:

Now, it is clear that the defendant has shown by receipts, which are not disputed, that the rent has been paid by the defendant after his name was substituted for those of the former holders of the tenures purchased by the defendant, as also before that time by the defendant "Marfutwaree," the receipts being in the name of the registered occupants. The defendant has purchased a number of tenures either in whole or in part, and these tenures have been consolidated into four jummaee holdings: three in 1258, as per kubooleuts filed by the defendant, and which are not disputed: and the other is covered by the pottah of 1250, and was formerly the tenure of one Schidam.

We have examined the jummas stated in the kubooleuts and pottah, and find that they correspond, in as far as we have tested the matter, with the jummas paid in the name of the former tenants, through the agency of the defendant, and the dakhilahs are for a period covering 20 years prior to suit.

It has been held that a consolidation of jummas into one tenure does not deprive the ryot of the benefit of the presumption under Section 4, Act X. of 1859, if it can be shown that the rent has not been changed. (Volume 5, Weekly Reporter, page 53.) The plaintiff, by receiving rent through the agency of the defendant, and from him direct after the substitution of his name, has consented to the transfer of the holdings of the former ryots to the defendant.

We, therefore, remand the suit. The Judge will compare the dakhilahs with the pottah and kubooleuts, and find whether the rent has been changed or not within twenty years before the commencement of the suit, for, if that fact be established, it must be presumed in favor of the defendant that the land has been held at the same rent from the time of the Permanent Settlement, unless the contrary be shown by the plaintiff, or unless it be proved that such rent was fixed at some later period.

We may here observe that, in our opinion, the principle laid down in the decision quoted above applies equally to jummas which have been derived in part or in whole

h the consent of the landlord, and which subsequently consolidated into one nma. The presumptions of Section 4, Act of 1859, are not restricted to holdings, refer simply to the fact that land has en held by a ryot at a rent which has not en changed for a period of twenty years fore the commencement of the suit.

With reference to the three beegahs of kheraj land, we think tha. the Judge was ong in holding that the defendant "must ove that the land is not rent-paying," the s of proving that it was mâl being on plaintiff. and not on the defendant. The fendant has produced the bill of conveyce under which he purchased the land, as so the title-deed of his vendor, *viz.*, the ll of sale to him. He is also in possesn; he has, therefore, discharged himself of y obligation there may be upon him to oduce some *primâ-facie* evidence of the nd being lakheraj. The case must also remanded for the Judge to re-try the quesn of lakheraj or mâl, throwing the *onus* oon the plaintiff, and calling upon him to ove that he has received rent from these nds.

The question of excess of area having een given up by the pleader for the special spondent, the decision of the Judge on that rt of the case is reversed.

The order of remand to inquire into the tes must be re-called, and the point remain ndecided until the question of whether the nure of the defendant is protected from hancement under Section 4, Act X. of 1859, disposed of.

The 8th July 1868.

Present :

The Hon'ble J. B. Phear and C. Hobhouse, *Judges.*

Mahomedan law—Pre-emption.

Case No. 26 of 1868.

Special Appeal from a decision passed by the Principal Sudder Ameen of Sarun, dated the 25th September 1867, affirming a decision passed by the Moonsiff of that District, dated the 27th May 1866.

Jhootee Singh (Plaintiff), *Appellant.*

versus

Komul Roy and others (Defendants), *Respondents.*

Baboo Doorga Doss Dutt for Appellant.

Baboo Kalee Kishen Sein for Respondents.

To entitle a person otherwise favorably situated to the right of pre-emption, two conditions must be fulfilled, *first* (*Tulub-i-mowathubut*), on receiving information of the sale, he must *immediately* declare his intention to assert his right; and, *secondly* (*Tulub-i-ishtishuhad*), he must, as soon after as possible, make the demand of the vendor or purchaser, or upon the premises, and in the presence of witnesses.

Phear, J.—THIS is a case in which the plaintiff claims to have the benefit of the peculiar Mahomedan right of pre-emption. The Principal Sudder Ameen has found that the plaintiff has not complied with those forms which are necessary to complete the right, and accordingly he has dismissed the plaintiff's suit Against this decision of the Lower Appellate Court, the plaintiff appeals substantially upon one ground, which he expresses in this way: "The Principal Sudder "Ameen is wrong in throwing out the "plaintiff's suit on the ground of there being "no proof of the *Tulub-i-ishtishuhad*—a "second preliminary which is only neces-"sary to be performed to prove the essential "preliminary of *Tulub-i-mowathubut*, and is "not required, if the latter can be establish-"ed without it."

In our judgment, this ground of special appeal is based upon a misconception of Mahomedan law. In order to entitle a person otherwise favorably situated to the right of pre-emption, two conditions must be fulfilled. The *first* is that, the moment he hears of the sale, he must declare his intention to assert his right of pre-emption. and that action on his part is called the *Tulub-i-mowathubut.** And so strict, according to the Mahomedan Law-writers, were the old authorities upon this point, that they said, if he received information of the sale through the medium of a letter, and the information was contained in the middle part of the letter, he would lose his right of pre-emption, if he waited until he had read through the letter before he declared that he intended to assert his right. We only mention this to show that the essence of the *Tulub-i-mowathubut* was the *immediate* declaration on the part of the person having the right that he intended to assert it, and this declaration must be made quite independently of whether any body who might eventually be effected by it was present or not.

* This is the spelling adopted (*Mowathubut*) in Baillie's Digest of Mahomedan Law. – *Ed.*, W. R.

But, in addition to the *Tulub-i-mowathubut*, comes the second condition, which the Mahomedan writers termed *Tulub-i-ishtishuhad*. This is the making the demand of the vendor or purchaser, or upon the premises. And, unless this demand also is made as soon as possible after obtaining information of the sale, it is held that the right of pre-emption is waived. This demand should be made in the presence of witnesses, because otherwise, in the event of its being denied, the claimant would not be able to prove it. It is true that the witnesses are not necessary to the validity of the demand, and because Mr. Baillie, says this in his work upon Mahomedan law, the pleader of the special appellant argues that failure to prove the demand is not fatal to the plaintiff's case. But we apprehend that this is entirely an error. The right of pre-emption is one *strictissimi juris*, and this Court is certainly not disposed to relax any of the rules by which the Mahomedans themselves found it necessary to confine its operation. The declaration of intention to assert the right and the actual demand are two distinct overt acts on the part of the claimant. Generally, the occasions which call for these respectively would be different, and neither of them can be dispensed with.

The judgment, therefore, of the Lower Appellate Court is sufficiently supported by the finding of fact that the plaintiff had not proved the *Tulub-i-ishtishuhad*, and consequently this special appeal must be dismissed with costs.

We, further, think that, even if the special appellant's view of the law were correct, it would not avail him in this case, because it appears to us that the Lower Appellate Court considered the question whether or not the *Tulub-i-mowathubut* had taken place, and came to the conclusion on the evidence that it had not. It follows that, on the footing of the special appellant's own objection, this suit has been rightly determined against the plaintiff.

The 8th July 1868.

Present:

The Hon'ble J. B. Phear and C. Hobhouse, *Judges.*

Landlord's title implied in lease—Abatement of rent—Jurisdiction.

Case No. 3456 of 1867 under Act X. of 1859.

Special Appeal from a decision passed by the Officiating Additional Judge of Nuddea, dated the 24th September 1867, affirming a decision passed by the Deputy Collector of that District, dated the 30th July 1867.

Brojonath Paul Chowdhry and another (Defendants), *Appellants*,

versus

Heera Lall Paul (Plaintiff), *Respondent.*

Baboo Turucknath Sein for Appellants.

Baboo Bhuggobutty Churn Ghose for Respondent.

When a landlord leases any portion of land without any further stipulation with regard to the title, he does thereby impliedly undertake that he has sufficient title to support the lease, and he guarantees the tenant quiet possession and enjoyment. Where, therefore, a tenant is evicted under the paramount title of a third party from a part of his tenure, he is entitled to abatement of rent.

The Revenue Courts have jurisdiction in a suit for abatement of rent, where the holding has diminished since the tenant received possession from the landlord, whatever the cause of the diminution, and whether the effect was or was not absolute destruction of the subject.

Phear, J.—This is a suit brought by a putneedar to obtain an abatement of rent from his zemindar. It appears to be undisputed that a certain mehal, called a bheel, originally formed a portion of the land which was leased to the present plaintiff by the zemindar under the putnee-pottah. Since the first execution of that pottah, under which, we may mention by the way, the defendant enjoyed possession of this bheel for a time, the title of the zemindar to the bheel mehal has terminated, and the present plaintiff has been evicted from possession of it by a claimant under a title paramount. The Government, to which it belonged in reversion upon an ijarah held by the zemindar, has sold it to a third party, and the purchaser has taken possession. On that state

of facts alone, it is clear, we think, that the plaintiff is entitled to an abatement of rent from his zemindar. It must be taken that, when a landlord leases any portion of land without any further stipulation with regard to the title, he does thereby impliedly undertake that he has sufficient title to support the lease, and he guarantees the tenant quiet possession and enjoyment. That is the result of the law in England, and we believe that it has always been held to be the same here. Therefore, on the facts which have occurred, and on the footing of the original pottah alone, it seems to us that the plaintiff has a good cause of suit for abatement of rent.

Much has been made in this case of a certain ikrar which was executed by the parties after the execution of the original pottah; and if the ikrar were really in evidence between the parties, speaking for myself alone, I should have some doubt whether its effect on the whole would not be to do away with the right which, I conceive, the plaintiff has under the original pottah, *viz.*, the right, under the circumstances of the case, to an abatement of rent, because I think there would be good ground for arguing upon the terms of the ikrar that there was not, relative to this bheel, an unqualified undertaking on the part of the landlord to keep the tenant in due possession and enjoyment thereof. However, the defendant, with full advice we must presume, has, from the beginning, repudiated this ikrar, and said that it is not binding upon him, and ought not to be used as evidence between him and the plaintiff. We think, therefore, that, excluding that ikrar, as he desires, the case stands as we have already said it does, that is, the plaintiff has a good right to ask for an abatement of rent from the landlord.

At first, we had some doubts as to whether abatement for a cause of this kind was a matter which could properly be said to fall within the jurisdiction of the Revenue Courts; but, upon reference to several cases which have been decided in this Court, we think it is now too late to say that the Revenue Courts have no jurisdiction to entertain a suit for abatement in all cases where the holding of the tenant has diminished since the time when he received possession from the landlord, whatever may have been the cause of the diminution, and whether it effected an absolute destruction of the subject or not. We have, therefore, come to the conclusion that our views on this head were not well-founded, and that the Revenue Courts have jurisdiction to entertain suits of this nature.

The only question remaining then is, what ought to be the amount of abatement? The Deputy Collector has gone through a most elaborate calculation in order to arrive at the required result. We feel bound to say that it seems to us that his calculation is misplaced. When once it is determined that a tenant is entitled to an abatement of rent, in consequence of the subject of demise having been diminished, whether by reason of its destruction, as in the case of diluvion, or otherwise, as has happened in this case, the only thing that requires to be settled is, what was the amount, what was the portion of the original rent which was referable to the portion of the tenure which has disappeared? It might be, of course, that the original contract specified in terms how much rent was reserved out of the mehal in question. In this instance, however, we understand that there is nothing in the pottah to show that the rent was apportioned in parcels to the different parts of the whole land held in putnee. It seems to us, therefore, that the only way to arrive at a conclusion as to how much of the whole rent is fairly attributable to this particular portion is to deal with it as a matter of proportion only; that is, such a sum ought to be deducted from the whole rent as would bear to that whole rent the same proportion as the annual value of the portion of the land which has disappeared bears to the annual value of the land originally leased. This course does not seem to have been pursued in this case, and we are quite unable to judge whether the course actually pursued has led to any materially different result or not, as compared with that which this would produce. But we believe we are relieved from this difficulty by what fell from Baboo Tarucknath Sein, the pleader for the special appellant, in the course of his argument in this appeal; for we understand him to admit that no dispute had been raised as to the amount of the actual abatement; that all the questions that were raised in special appeal had reference to the jurisdiction of the Court, and to the inadmissibility of the ikrar. This being so, it is not for us, of course, to say whether the mode of assessing the abatement has produced a result materially different from that which in strictness ought to have been arrived at. The party most concerned does not seem to be aggrieved. And therefore.

in our opinion, the appeal ought to be dismissed with costs.

The 8th July 1868.

Present:

The Hon'ble L. S. Jackson and Dwarkanath Mitter, *Judges.*

Joint Hindoo family—Self-acquired property—Education from joint estate—Source of funds.

Case No. 3462 of 1867.

Special Appeal from a decision passed by the Additional Judge of Tirhoot, dated the 23rd September 1867, reversing a decision passed by the Sudder Ameen of that District, dated the 22nd June 1865.

Dhunookdharee Lall (Plaintiff), *Appellant,*

versus

Gunput Lall and others (Defendants), *Respondents.*

Baboo Debendro Narain Bose for Appellant.

Mr. R. E. Twidale for Respondents.

Where one member of a Hindoo family claimed to participate in the property possessed by certain other members, alleging that it had been acquired from the proceeds of their joint-estate, and it was found that the family-property was not sufficiently large, after supporting the members, to leave surplus funds for the acquisition, and that the defendants were at the time pursuing lucrative employments, the plaintiff being a minor, it was held that there was no ground for the usual presumption as to joint-family estate, and the *onus* lay on the plaintiff to prove his allegation.

HELD that the fact of defendant having received his education from the joint-estate did not entitle plaintiff to participate in every property acquired by defendant by the aid of such education.

It is not incumbent on a Hindoo in every case in which he pleads self-acquisition to show the source from which the money came.

Jackson, J.—IT is satisfactory to find that, in this case, our order of remand has produced from the Additional Judge a judgment infinitely more satisfactory and convincing than the judgment which came before the Court when the case was last heard.

It now appears that he has found as a fact—and it is not alleged that the evidence is not sufficient to warrant that finding—that the joint-family property to which the plaintiff and defendant were entitled was not sufficiently large, after supporting the members of the family, to leave any surplus funds from which the property in suit could have been acquired; and it appears that the two brothers, Gunput and Onpooch, were at that time pursuing lucrative employments, the plaintiff himself being a minor.

In this state of facts, affording no ground for the usual presumption as to joint-family estate, the plaintiff could not succeed. I entertain no doubt, speaking for myself, that our judgment remanding the case was perfectly just and right, and I have the satisfaction of seeing that it has borne fruit in the shape of a judgment which we are able to affirm.

The special appeal, therefore, will be dismissed with costs.

Mitter, J.—I am of the same opinion. It is admitted that the property in dispute was purchased by the defendant (respondent). The plaintiff's case, however, was that the purchase was made with joint-funds belonging to himself and the respondent.

It is true that, in a case of this nature, where the defendant pleads self-acquisition, the *onus* of proving such acquisition lies on the defendant. But all that the Hindoo law requires the defendant to prove in such a case is that the property which he claims as his own was acquired "without detriment to the paternal estate;" or, in other words, without using the paternal estate or the proceeds thereof. The defendant having shown that, in acquiring the property in suit, he did not use any property which belonged to the joint-family, the presumption of joint-ownership is at once rebutted, and it is for the plaintiff to show that the property was acquired in the manner alleged by him.

His case in the Court below was that the defendant received his education from the joint-estate, and that he is consequently entitled to participate in every property that has been acquired by the defendant by the aid of such education. But this contention is nowhere sanctioned by the Hindoo law, and I see nothing in justice to recommend it.

It is a mistake to say that, in every case in which a Hindoo pleads separate acquisition, it is incumbent on him to show the source from which the money came. No doubt, as remarked by their Lordships of the Privy Council in the case of Dhurm Doss Pandey,* the source from which the money comes is the "chief criterion" for determining as to whether a particular property is joint or separate; but their Lordships never said that it is the only criterion, so as

* *See* 6 W. R., Pri. Coun., p. 43.

to render it obligatory on the party who pleads self-acquisition to give evidence of the particular source from which the money was derived.

The appeal ought, therefore, to be dismissed with costs.

The 8th July 1868.

Present :

The Hon'ble F. B. Kemp and E. Jackson, *Judges.*

Enhancement of rent—Ryot not having rights of occupancy—Sections 6 and 17, Act X., 1859.

Case No. 3363 of 1867 under Act X. of 1859.

Special Appeal from a decision passed by the Officiating Judge of Dacca, dated the 17th September 1867, reversing a decision passed by the Deputy Collector of Manickgunge, dated the 24th September 1866.

Pitambur Kurmokar (Defendant), *Appellant,*

versus

Ram Tunoo Roy, on the part of Huro Lall Geeree Roy (Plaintiff), *Respondent.*

Baboo Anund Chunder Ghossal for Appellant.

Baboos Kalee Mohun Doss and *Nuleet Chunder Sein* for Respondent.

In a suit for enhancement of rent, it was held that the provisions of Section 6, Act X., 1859, do not apply to the case of a ryot not having a right of occupancy; and in fixing a fair and equitable rate for such a ryot, Courts are not restricted to the grounds laid down in Section 17.

Kemp, J.—THIS suit was remanded on the 9th of July 1867. In our decision, we observed that the defendant (special appellant) was a ryot not holding under a right of occupancy. The notice of enhancement, which was not disputed, contained seven grounds of enhancement, one of which only was a ground coming within the purview of Section 17 of Act X. of 1859, namely, the 6th ground. We observed in that decision of remand that the Judge had not given an intelligible judgment, and therefore directed him to find whether the tenure was liable to enhancement on all or any of the grounds stated in the notice. The Judge, on remand, has found that the tenure is liable on the 2nd and 3rd grounds, namely, the fact of the land being situated on the banks of a river, and that a Government road had been opened in the neighbourhood. The rate fixed by the Judge was 3 rupees a pakee, the former rate being Rupees 1-14 a pakee.

In special appeal, it is contended, *first,* that the suit was not cognizable under Act X. of 1859; and, *second,* that the opening out of a new road, or the vicinity of a river by gradual encroachment, are not grounds for enhancement under Section 17 of Act X. of 1859. The rates are also objected to in the argument of the pleader.

On the first point, we have been referred to a decision, dated the 24th of July 1867, in Volume VII., Weekly Reporter, page 261. We may observe, in the first place, that this objection is taken for the first time in the oral argument of the pleader. The decision he refers to has reference to the provisions of Section 6 of Act X. of 1859. Now, in this case, the defendant (special appellant) is not a ryot having a right of occupancy, and therefore the provisions of Section 6 will not apply to this case. Again, no pottah has been filed in this case, as was in the case alluded to. We are, therefore, unable to say whether the land was taken simply for building purposes, or whether the land may also be considered as used for agricultural or horticultural purposes. The plaint states that there is a garden with fruit-trees of various descriptions. However, be that as it may, the case not falling within Section 6, and no pottah being produced, and this objection being wholly a new one, we refuse to admit it.

On the second point, it is very clear that this Court made no mistake in its remand-order in treating the defendant as a ryot without a right of occupancy, for, had he been a ryot with a right of occupancy, this Court would not have remanded the case for the Judge to find whether there were any grounds for enhancement other than those contained in Section 17. The defendant, therefore, being a ryot without a right of occupancy, is entitled to hold at fair and equitable rates. In fixing those rates, the Judge was, in our opinion, right in taking into consideration that the lands are situated on the banks of a navigable river, and that a Government road had been opened in the neighbourhood.

The pleader for the appellant has not been able to show us any decision of this Court, ruling that, in cases where Courts fix what is a fair and equitable rate for a ryot without a right of occupancy to pay, they are restricted to the grounds laid down in Section 17 in

arriving at a determination on such a question. The question of rates is not taken in special appeal, and we certainly do not think that the rate is too high a one for land of such valuable description.

This special appeal is dismissed with costs.

The 8th July 1868.

Present:

The Hon'ble L. S. Jackson and Dwarkanath Mitter, *Judges.*

Objection first taken in special appeal—Admissibility of evidence—Duties of Bench and Bar.

Case No. 3148 of 1867.

Special Appeal from a decision passed by the Officiating Judge of Shahabad, dated the 19th August 1867, reversing a decision passed by the Moonsiff of that District, dated the 24th April 1867.

Munrakhun Roy and others (Defendants), *Appellants,*

versus

Juggut Doss and another (Plaintiffs), *Respondents.*

Baboo Oomesh Chunder Banerjee for Appellants.

Baboo Anund Gopal Paleet for Respondents.

It being objected in special appeal that the decision of the Lower Appellate Court was based on documents which were neither admissible as legal evidence, nor had any bearing on the point to be decided—

HELD that, though the objection to the admissibility of the evidence ought to have been taken in the Court in which the evidence was tendered, yet, coming in such a shape as it did, it could not be got over.

HELD, also (Mitter, J., *dissentiente*), that, as defendant has succeeded in special appeal on an objection which he should have taken before, he ought to pay his own costs in this appeal, even should he succeed ultimately (the case being remanded); and that it is not the exclusive duty of a Court, but that of pleaders also, to see whether evidence tendered is legally admissible.

Jackson, J.—THE ground relied on in special appeal in this case is, that the Judge has taken into his consideration, and has made the basis of his decision, certain documentary evidence which ought not to have been received, namely, a proceeding of the Principal Sudder Ameen's Court of the year 1841, and certain *shushmahee* papers deposited in the Collector's office by the putwaree. From these two documents, the Judge finds that "the hereditary "nature of the property, and the fact of "the division having taken place among "the four brothers, is satisfactorily proved."

Now, unfortunately, neither of these documents can be regarded as evidence on these points.

The decision of the Principal Sudder Ameen referred to is one made in an execution-proceeding; and there is nothing, either in the names of the parties at the head of the proceeding, or in the subject-matter, to show that the defendant in this case or any one through whom he claims was a party to that proceeding.

As to the papers of the putwaree, if admissible at all, they cannot be said to afford any evidence as to the hereditary nature of this property, or of a partition having been effected.

The decision of the Court below must be set aside, and the case must go back, in order that the Judge, after excluding from his consideration those documents which are not evidence, should come to a decision on the evidence that remains.

The objection to the admissibility of the evidence is one which ought to have been taken in the Court where it was tendered; but no such objection was taken there. The plaintiff, when he appealed to the Judge, complained specifically that the evidence put in by him had not been adverted to by the Moonsiff. In consequence, no doubt, of his objection, that evidence was again tendered and read; the defendant had a second opportunity of challenging it, and that opportunity was again pretermitted, and it is not till the third hearing of the case on special appeal that his objection is offered. The objection comes in such a shape that it cannot be got over, and we are bound to say that the documents in question were improperly admitted in evidence. But, looking to the conduct of the defendant, and to the fact that he has succeeded on special appeal upon an objection that he should have taken before, I think that, if he succeeds ultimately, the plaintiff ought not to be made to pay the defendant's costs of this appeal.

The case is remanded accordingly.

Mitter, J.—I agree with my learned colleague in remanding this case. The two documents relied upon by the Judge are not admissible as legal evidence. But, even if they were admissible as evidence, it is quite clear from their context that they have no bearing

d.

whatever on the point, which the Judge had to decide.

I regret very much that I cannot concur with my learned colleague in the matter of costs.

I cannot altogether overlook the fact that the practice of admitting documents on the record, as followed in some of the Mofussil Courts, is extremely irregular.

In the present case, the two documents above alluded to were filed in the Moonsiff's Court; and although the Moonsiff allowed them to be placed on the record, there is nothing in his judgment from which any one can infer that he was even aware of their existence at the time when the case was disposed of by him. This fact clearly shows that, when these two documents were permitted by the Moonsiff to be placed upon the record, he did not take the trouble to see, as he ought to have done under Section 129 of the Civil Procedure Code, whether they were legally admissible as exhibits in the cause or not.

Whether the special appellant took any objection to the reception of these documents is a fact which I am not in a position to ascertain precisely. It seems to me, however, that, if we were to make him lose his costs on the ground of some supposed negligence on the part of his pleaders in the Court below, injustice might be done to him. He was a respondent before the Lower Appellate Court, and the notes of his pleader's arguments before that Court are not on the record.

It may be that the pleader who conducted this case on his behalf in the Court below did not object to the reception of these documents; but I do not think that it would be always fair and equitable in this country to impose penalties upon parties merely on the ground of negligence on the part of their pleaders, when such negligence is to a certain extent countenanced, if not actually encouraged, by the Courts themselves. Now, if it were to be held that the special appellant was guilty of negligence in not taking this objection in the Lower Appellate Court, the plaintiff was at least equally guilty of negligence in not bringing the documents in question to the notice of the Moonsiff when he decided the case, and the Judge ought not to have set aside the decision of the Moonsiff on the basis of documents which, although they were filed as exhibits in the cause, do not appear to have been read or made use of, in any manner whatsoever, at the time of the original trial. Be this as it may, it is abundantly clear that the objection upon which the Judge's decision has been reversed by us is not one which merely affects the admissibility of those documents, but it goes to show that those documents, even if they were admissible as legal evidence, do not in the slightest degree help the party who filed them to prove his case. If the plaintiff chose to rely upon such documents, the fault was entirely with him; and if the Judge has erroneously given a decree to the plaintiff on the basis of such documents, the special appellant ought not to suffer even when that decree is set aside. An error of the Court ought to prejudice no one, but if this error has been induced by the conduct of the parties, the party who supported that error, and who was, therefore, principally concerned in inducing the Court to commit it, ought to suffer, and not his adversary, who might or might not have succeeded in preventing the commission of that error by doing his utmost to expose it.

I think, therefore, that, under such circumstances, when the documents appear to be of such a character that the plaintiff ought not to have filed them at all, the fault lay primarily with the plaintiff himself, whatever might have been the negligence of the defendant's pleader, and, I am, therefore of opinion that the costs of this special appeal ought to abide the ultimate result of this case.

Jackson, J.—I desire to record my emphatic dissent from any observations which tend to throw exclusively upon the Court a duty which ought to be discharged by the pleaders who represent suitors.

The labor of deciding cases upon their merits is abundantly severe, far too much so to make it, in my opinion, desirable to throw on the Judge the additional labour of taking objections which ought to come from the parties themselves.

It is right to add, with advertence to what has fallen from my brother Dwarkanath Mitter, that I am far from wishing to saddle the plaintiff with the costs of the defendant. I only say that, if he has improperly tendered evidence that was inadmissible, and if the inadvertent act of the Court in admitting that evidence, no objection being offered, has caused a special appeal to this Court, he will be sufficiently visited by paying his own costs of this appeal; and if, on the other hand, the defendant has been obliged to come up,

in consequence of his own neglect, in special appeal, he will pay the appropriate penalty of that neglect by being in like manner made to pay his own costs.

The 9th July 1868.

Present:

The Hon'ble L. S. Jackson and F. A. Glover, *Judges.*

Mortgage—Right of suit.

Case No. 2264 of 1867.

Special Appeal from a decision passed by the Principal Sudder Ameen of Bhaugulpore, dated the 24th July 1867, reversing a decision passed by the Moonsiff of that District, dated the 19th March 1867.

Budreenath Jha (Plaintiff), *Appellant,*

versus

Imrit Sahoo and others (Defendants), *Respondents.*

Mr. R. E. Twidale for Appellant.

Baboo Luckhee Churn Bose for Respondents.

R having executed two mortgages of the same share, his mortgagees obtained against him separate decrees, in each of which the property was declared liable to sale in satisfaction of the debt. Plaintiff first purchased under the decree obtained on the earlier mortgage, and defendant (who was the second mortgagee) himself purchased the same right, title, and interest at the second sale. The suit was brought for confirmation of plaintiff's possession of the estate, on the ground that his title was affected by the subsequent purchase of the defendant.

HELD that plaintiff had no cause of action, as his rights had not been disturbed by any act of the defendant.

Jackson, J.—THE plaintiff in this case purchased the right, title, and interest of one Rughoonath in Mouzah Rampore Khera. It seems that Rughoonath had executed two mortgages of the same share, one on the 15th of June 1864, and the other in August of the same year. The two mortgagees obtained separate decrees against Rughoonath, in each of which the property was declared liable to sale in satisfaction of the debt; but the plaintiff purchased under the decree obtained on the earlier mortgage, and his purchase was dated the 13th of July 1865.

The defendant was the second mortgagee, and himself purchased the same right, title, and interest at the second sale, on the 30th of December 1865; and the plaintiff sues on the ground that his title is affected by the subsequent purchase of the defendant.

The Moonsiff held that the plaintiff had a preferable right, and gave him a decree confirming him in his possession of the estate.

The Principal Sudder Ameen, on appeal, reversed that judgment, citing a passage from Macpherson's work on Mortgages, page 113, Chapter VII. (also to be found in page 106 of the 2nd Edition). The passage is as follows: "If a first mortgagee obtains "a decree against mortgagor, and the lands "are sold in execution of that decree, but "do not realize more than enough to pay "off the first mortgage, the auction-pur-"chaser has a title to the lands free from "all incumbrances subsequent in date to the "first mortgage."

The Principal Sudder Ameen then goes on to say: "It is a fact which cannot be denied "by the plaintiffs, that the proceeds of the "sales of all the villages pledged in the "hand of Kedarnauth Chuckerbutty were "far more than due to him; and therefore "the plaintiffs, the first auction-purchasers "of Rampore Khera, one of the mortgaged "villages, cannot take advantage of this "ruling, and they must be considered (as "standing by their purchase in the place of "Rughoonath Narain) liable to the incum-"brance put on by the second pledge, the "decree of which had been passed in favor "of Imrit Sahoo previous to their (plaintiffs') "purchase; and to secure the purchased "property from the second sale, it was in-"cumbent upon them to pay off the second "decree-money of Imrit Sahoo, which was "comparatively too small; and then, why "did they not do so?"

The plaintiff appeals specially to this Court; and the respondent admits that he cannot support the judgment of the Principal Sudder Ameen upon the reasons given. But he contends, and it seems to us with good reason, that the plaintiff in this suit had really no cause of action.

The defendant had apparently in good faith taken a mortgage from the owner, probably unaware of the first mortgage, and in furtherance of his mortgage he got a decree, and caused the right and interest of his debtor to be sold, and purchased them himself. In doing this, he committed no act to the injury of the plaintiff, and the plaintiff was not entitled to sue him, unless his rights were disturbed.

This is a matter of which the Court itself ought to have taken notice under Section 32

of the Civil Procedure Code. The plaint ought to have been rejected, and the suit ought, on the objection of the defendant, to have been dismissed.

The question as to the respective rights of the two mortgagees need not be considered now.

The special appeal must be dismissed with costs.

The 9th July 1868.

Present :

The Hon'ble J. B. Phear and C. Hobhouse, *Judges.*

Proceedings to keep alive a decree—Section 20, Act XIV., 1859.

Case No. 219 of 1868.

Miscellaneous Appeal from an order passed by the Judge of Nuddea, dated the 26th March 1868, affirming an order passed by the Moonsiff of that District, dated the 11th February 1867.

Brojo Lall Puramanick (Judgment-Debtor), *Appellant,*

versus

Ram Tarun Gossain (Decree-holder), *Respondent.*

Baboo Ashootosh Chatterjee for Appellant.
No one for Respondent.

Steps taken towards placing the assignee of a decree in the position of the original decree-holder, do not constitute proceedings to enforce or to keep in force the decree within the meaning of Section 20, Act XIV. of 1859.

Phear, J.—ALL the steps taken by the respondent in this case were directed merely to placing the assignee of the decree in the position of the original decree-holder, and we think that these alone do not constitute proceedings to enforce the decree or to keep the same in force within the meaning of the words used in Section 20, Act XIV. of 1859. Nothing that the assignee did solely for the purpose of putting himself in the place of the original decree-holder, can have the effect of putting him in a *better* position than the decree-holder himself would have occupied had he never assigned the decree.

The appeal, therefore, is decreed. All process of execution is barred by Section 20, Act XIV. of 1859, and therefore further proceedings in execution must be stayed absolutely. The appellant must have his costs in all the Courts.

The 9th July 1868.

Present :

The Hon'ble H. V. Bayley and A. G. Macpherson, *Judges.*

Plaint in the name of a deceased person—Aurungs and Pergunnahs.

Case No. 3309 of 1867.

Special Appeal from a decision passed by the Judge of Tirhoot, dated the 14th September 1867, affirming a decision passed by the Sudder Ameen of Soodharam, dated the 22nd February 1867.

Goluck Chunder Dutt and others (some of the Defendants), *Appellants,*

versus

The Court of Wards, representing the deceased Rajah Pertab Chunder Singh and another (Plaintiffs), and others (Defendants), *Respondents.*

Baboo Romesh Chunder Mitter for Appellants.

Baboos Kishen Kishore Ghose, Juggodanund Mookerjee, and *Nursingh Chunder Mitter* for Respondents.

Where a plaint was filed in the name of a deceased party, of whose death the person filing the plaint was ignorant, but the heir and representative of the deceased was at once put upon the record as plaintiff in his room, the irregularity (if any), was held, in special appeal, to be immaterial.

An Aurung (or salt-tract) is a definition appertaining to the Salt Department, and not necessarily connected with the land revenue definition of a Pergunnah.

Bayley, J.—THE plaintiff in this case sued for the lands in dispute as abolished salt lands lying within the 5½ annas share of his property, and as being part of Pergunnah Ameerabad.

The principal defendant's case was that these lands were in the 7 annas share, and appertained to him as Pergunnah Gopee Bullubpore; and he pleaded that the lands mentioned in the schedule of salt lands, dated 1833, were in Pergunnah Gopee Bullubpore.

The first Court gave the plaintiff a decree.

On appeal, the Lower Appellate Court affirmed the decision of the first Court.

This special appeal is by the defendants, and upon the following grounds :—

1st.—That this suit being instituted in the name of the late Pertab Chunder Singh, on the 17th Srabun 1273, and the said Pertab Chunder Singh having died on

the 4th Srabun of that year, the suit, as instituted in the name of a deceased party, could not go on.

2ndly.—The Lower Appellate Court relied upon the schedule of salt lands of 1833, but the lands were mentioned therein to be in Pergunnah Bhullooa Gopalpore, whereas the plaintiff claims the lands in dispute as situate in Pergunnah Ameerabad.

* * * * * * *
* * * * * * *

In my opinion, all these pleas are untenable It is nowhere shown to us that there was any such information before the Lower Appellate Court of the death of Pertab Chunder at the time when the objection was raised as was capable of judicial cognizance.

The *second* plea is incorrect, inasmuch as *Aurung* (or salt-tract) Bhullooa Gopalpore, which is the definition in the list of 1833, is a definition entirely appertaining to the offices of the Salt Department, and in no way necessarily connected with the land revenue definition of a Pergunnah.

* * * * * * *
* * * * * * *

Lastly, I would observe that the whole judgment of the Lower Appellate Court is based on a conclusion of fact found on evidence, *viz.*, that the lands in dispute really were within the $5\frac{1}{2}$ annas share which the plaintiff alleges they were; and although there is some obscurity in the words "$1\frac{1}{8}$ annas share belonging to 7 annas share" in the judgment of the Lower Appellate Court, still there is no doubt that the Lower Appellate Court has found it as a fact that the lands in suit lie in plaintiff's share, as stated in the allegation of his plaint.

I would, therefore, dismiss the appeal with costs. Separate costs to be allowed to the Court of Wards, representing Rajah Pertab Chunder Singh, and to Sabeh Khan who has been made a respondent.

Macpherson, J.—I concur in the proposed order. As it was not known at the time of filing the plaint that Rajah Pertab Chunder was dead, and as his heir and representative was at once put upon the record as plaintiff in his room, and as the suit has, in fact, been throughout conducted by the heir and representative, and no possible injury has accrued to the defendant from the fact of the plaint having been filed after Pertab Chunder's death, I think the irregularity, if any, is immaterial.

The 9th July 1868.

Present:

The Hon'ble J. B. Phear and C. Hobhouse, *Judges.*

Contract between parties in fiduciary relation—Presumption—Onus probandi.

Case No. 168 of 1868.

Special Appeal from a decision passed by the Judge of the 24-Pergunnahs, dated the 4th January 1868, affirming a decision passed by the Principal Sudder Ameen of that District, dated the 26th June 1867.

Mr. R. A. Poushong (Defendant), *Appellant,*

versus

Mussamut Moonia Halwain (Plaintiff), *Respondent.*

Messrs. R. T. Allan and *S. Verlannes* and *Baboo Anund Gopal Paleet* for Appellant.

Baboo Oopendur Chunder Bose for Respondent.

Where a mooktear, in consequence of proceedings taken by him as the agent of his client, got possession of property on her behalf, and sought to retain possession adversely to her on the ground of an alleged contract entered into with her when he undertook to be her legal adviser or manager, the case was held to fall under the operation of the *rule of equity*, that—

A contract of sale or conveyance entered into by any one with another who stands to him in a relation of confidence or trust (especially if the contract is between attorney or skilled legal adviser and client in respect to property, the subject of advice), is liable to be called in question by the vendor, and to be set aside at his instance if it be found that the other party made an unfair use of his advantages. In such cases undue influence is presumed until the contrary is proved, and it is incumbent on the purchaser to prove that all the terms of the contract are fair, adequate, and reasonable.

Phear, J.—No more unconscionable case than this certainly has it been my lot to meet with since I have sat upon the Bench of this Court. There can be no doubt that the Lower Appellate Court is entirely right in its conclusions, but it might very well have founded its decision upon higher ground than that upon which it has felt it sufficient to place it.

The defendant is resisting a claim to possession of a certain house which is made by a lady who was admittedly his client in the matter of certain proceedings in the Lower Courts, wherein he had undertaken to do his best as a mooktear and person skilled in the practice of Courts, to recover for her the property of which this forms a portion. It seems that the proceedings which he took as her agent were suc-

cessful. and that he got possession on her behalf: but he now seeks to keep that possession adversely to her, and to retain the house for himself. He justifies this conduct on his part by saying that he is entitled to hold the property as his own under a contract which he entered into with the plaintiff preliminary to his undertaking the conduct of her affairs. But he has met with one insuperable difficulty in making out this case, namely, that if the contract gave him, as he says it did, the right to possession which he sets up, then the document which he tenders as the written evidence of the contract, is not admissible under the stamp which it bears. Consequently, there is nothing before the Court which can be looked at as evidence of his alleged right, and this of itself is sufficient to defeat the claim which he puts forward.

Assuming, however, that the contract was proved, we learn from the defendant's own admission that it was entered into with the lady at a time when he undertook to be her legal adviser or manager. It lay at the very initiation of a fiduciary relationship between himself and her. Now, it is always held in Courts of equity that a contract of sale or conveyance entered into by any one with a person who stands relatively to him in a position of confidence or trust is liable to be called in question by the vendor, and to be set aside at his instance if it be found that the other party made an unfair use of his advantages. So also, when the seller labors under such disabilities, or is so situated as to be peculiarly liable to be imposed upon; and bargains with widowed or single purdah women fall within this class. (*See* Roopnarain Singh and others *versus* Gungadhur Pershad Narain and others, 9 Weekly Reporter, 299.) But especially in a case where any person acting as attorney or as a skilled legal adviser, enters into a contract of purchase with his client in respect of the subject of litigation or advice, is the contract liable to be questioned by the other side at any time; and when it is questioned, every presumption is made against its being just. Undue influence is presumed to have been exerted until the contrary is proved, and it is incumbent upon the purchaser, if he relies upon the contract, to show that all its terms and conditions are fair, adequate, and reasonable. Failing that, his claim under the contract and his rights under it must go.

Upon the facts of this case, although in strictness, perhaps, the defendant was not actually the attorney or adviser of the plaintiff at the very moment when he made the bargain with her, still it is clear that he was so situated relative to her as to possess all the influence and advantages which belong to that relationship, and which are the foundation of the plaintiff's equity. And even if the transaction in question does not fall exactly under the last special head which I have mentioned, it is clear that it is within the operation of the general rule. But, moreover, looking at the conditions of the contract which the defendant in this case thought it consistent with his duty as a mooktear of a Civil Court and as legal adviser of the plaintiff to enter into with her, I do not hesitate to say that they are such as, upon the face of them, exhibit the operation of undue influence and pressure. Such terms would clearly never have been come to, if the contracting parties had stood upon equal ground. In truth, if the description given by the Judge of the nature of this contract be correct, the transaction goes as near an act of fraud as anything can, without subjecting the perpetrator to the risk of being tried at the bar of a Criminal Court. It seems to me that the defendant's conduct falls but little short of an attempt at stealing the property of the plaintiff, and I feel it impossible to say that a contract of this kind can be for a moment maintained when the party on the other side questions it.

We think, as I have already said, that the decision of the Lower Appellate Court is entirely right for the reason given by the Judge, and we have also felt ourselves bound to express our opinion that it might well have been placed upon other and higher grounds than those upon which the Judge has placed it, namely, on the grounds which I have just alluded to. We therefore dismiss this appeal with costs.

But I wish further to add that, inasmuch as we learn from the judgment of the Judge, that the defendant in this case has been in the habit of practising as a mooktear of a Court, over which we have jurisdiction, we think it is our duty to direct that Court to hold an enquiry into the circumstances under which this contract was made and entered into, with the view to its forming a judgment as to the propriety of allowing this gentleman to practise as a mooktear and pleader before it for the future; as it seems to us, if any confidence can be placed in the representations of the

Judge of the Lower Appellate Court, the defendant is not a person to whose hands the interests of suitors ought to be entrusted.

The 9th July 1868.

Present:

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble Dwarkanath Mitter, *Judge*.

Evidence legally inadmissible—Error not affecting merits—Grounds for reversal or remand.

Case No. 3360 of 1867 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of Midnapore, dated the 6th September 1867, modifying a decision passed by the Deputy Collector of that District, dated the 30th July 1867.

Kenaram Shamunt (Plaintiff), *Appellant*,

versus

Gopeenath Geeree (Defendant), *Respondent*.

Baboo Anund Chunder Ghossal for Appellant.

Baboo Kedarnath Chatterjee for Respondent.

The objection that papers were admitted as evidence which were not legally admissible, is not ground sufficient under Section 350, Code of Civil Procedure, to warrant a decree being reversed or modified, or a case being remanded, when it is admitted that there was other evidence to support the Lower Court's finding, and the insufficiency of such other evidence is not alleged in the grounds of appeal.

Peacock, C. J.—THIS decision must be affirmed. The point was not taken in the Lower Court that the papers objected to were not admissible evidence against the plaintiff, and therefore we must hold the plaintiff, appellant, strictly to his grounds of appeal. The simple ground of appeal is that the Lower Appellate Court admitted these papers as legal evidence. It is admitted that there was other evidence in the cause in support of the Judge's finding, and the appeal does not say that that other evidence was not such as ought, independently, of the inadmissible evidence, to have induced the Judge to arrive at the conclusion at which he came.

Section 350 of the Code of Civil Procedure says, that no decree shall be reversed or modified, nor shall any case be remanded to the Lower Court on account of any error, &c., not affecting the merits of the case or the jurisdiction of the Court.

This would be an error not affecting t merits of the case, if the other evidence the cause was sufficient to induce the Jud to come to the conclusion at which he a rived. It has not been pointed out, n even contended before us, that the oth evidence was not sufficient, nor is it so leged in the grounds of appeal.

The appellant must pay the costs of th appeal.

The 9th July 1868.

Present:

The Hon'ble Sir Barnes Peacock, *Kt.*, *Ch Justice*, and the Hon'ble Dwarkana Mitter, *Judge*.

Jurisdiction—Suit for specific performance o alternative damages.

Case No. 3389 of 1867.

Special Appeal from a decision passed by Principal Sudder Ameen of Dacca, da the 16th September 1867, reversing a de sion passed by the Moonsiff of that Distri dated the 22nd December 1866.

Nund Coomar Banerjee and others (Plaintiff *Appellants*,

versus

Ishan Chunder Banerjee and others (Defen ants), *Respondents*.

Baboo Hem Chunder Banerjee for Appellants.

Baboo Sreenath Banerjee for Respondents

Where a plaint asked either that defendant might ordered to fill up an excavation at his expense, or t plaintiff might have 25 rupees as damages, and the lat was what he was entitled to, the suit was held to one for damages cognizable by a Small Cause Co which cannot be ousted of jurisdiction merely beca plaintiff asked for an alternative relief to which he not entitled.

Peacock, C. J.—THE plaint asks for one of two things, either that the defendant may be ordered to fill up the excavation at his expense, or that the plaintiff may have 25 rupees as damages. The latter alternative is one entirely within the jurisdiction of the Small Cause Court. The plaintiff is not, we think, entitled to a decree for performance of the specific act, but only to the alternative relief sought for by him. It is, therefore, a suit for damages, and the Small Cause Court cannot be ousted of its jurisdiction merely by asking for an alternative relief to which the plaintiff is not entitled. In this view, the Principal Sudder Ameen was correct in saying that the suit is one which is cognizable by the Small Cause Court.

The decision of the Lower Appellate Court is affirmed with costs.

The 9th July 1868.

Present :

The Hon'ble H. V. Bayley and F. A. Glover, *Judges.*

Decree for possession—Mesne-profits in execution.

Cases Nos. 151 and 152 of 1868.

Application for review of judgment passed by the Hon'ble Justices H. V. Bayley and F. A. Glover, on the 24th March 1868, in Regular Appeal No. 54 of 1867.

Chowdhry Sib Narain Pohraj Mandhata, Plaintiff (Respondent), *Petitioner,*

versus

Chowdhry Kishore Narain Pohraj Mandhata and another, Defendants (Appellants), *Opposite Party.*

Baboos Onookool Chunder Mookerjee and *Kalee Prosunno Dutt* for Petitioner.

Baboos Chunder Madhub Ghose and *Obhoy Churn Bose* for Opposite Party.

Following a Full Bench decision (9 W. R., p. 407), it was held that a decree of the High Court technically for possession only, which reinstates a party in the position he was in when ousted, also gives a right to *wassilat*, on ascertainment in execution, under Section 11, Act XXIII. of 1861.

Bayley, J.—DEFENDANTS in this case originally sued for possession, and got a decree for possession against the plaintiff, and took possession in execution on 30th April 1861.

On appeal, this decree was reversed by the High Court on the 30th April 1864, and plaintiff was restored to possession on the 11th November 1864.

Plaintiff next sued separately for mesne-profits for the interval of 3 years 9 months and 19 days.

Defendants objected that plaintiff had collected rents for a portion of 1270 and the whole of 1271, and put in other pleas against plaintiff's claim.

The Principal Sudder Ameen gave a decree for a modified amount of wassilat to plaintiff.

Defendant and plaintiff both preferred regular appeals to this Court, and we (Glover and Bayley, JJ.) hold that a regular suit would not lie, but that the question of mesne-profits must be decided in execution under Section 11, Act XXIII. of 1861.

An application for review is now made, and in it it is contended that Section 11, Act XXIII. of 1861 does not apply to defendant, who, it was stated by the pleader for the applicant, merely "got the decision of the first Court against him reversed by the superior Court," and that, the decree being for *possession only*, nothing but a decree in a separate suit could award mesne-profits.

The question now is, whether the decree of this Court, which technically is for *possession only*, which, however, reinstated the party in the position he was when ousted, also gives a right to wassilat on ascertainment in execution. To put the question in another way—will the decree, which is, in fact, for restitution to possession, enable the Zillah Court in execution, under Section 11, Act XXIII. of 1861, to include in restitution of possession restitution of mesne-profits which would have reached the ousted party had he not been ousted?

The cases noted in the margin are cited by the respective parties.

By the applicant for review.
1 Weekly Reporter, page 5.
5 Weekly Reporter, page 125.
6 Weekly Reporter, page 109.
7 Weekly Reporter, page 45.
Contra
2 Weekly Reporter, page 275.
6 Weekly Reporter, page 111, Misc.
7 Weekly Reporter, page 521.
9 Weekly Reporter, page 407.

The case in Volume I., page 5, may be said to be overruled by the case in Volume IX., page 407. The case in Volume V., page 125, refers only to the execution of the decree of Her Majesty's Privy Council. The case in Volume VI., page 109, refers to interest. The case in Volume VII., page 45, is not in a suit for possession.

Of the cases cited by the pleader on the other side, the case in 2 Weekly Reporter, page 275, referred to the restoration of money taken from the Collectorate in execution on the reversal of the decree of a Lower Court, where, though the money was not actually decreed, its restoration in *execution* was held to be proper. The case in 6 Weekly Reporter, page 111, rather supports the pleas of the opposite party who uses it. The case in 7 Weekly Reporter, page 521, refers to restitution of a sum of money according to the terms of a modified decree. The case in 9 Weekly Reporter, page 407, has the following passage:—

"But for the decision of the Division "Bench of the 6th September 1864, and "which is reported in the 1st Weekly Re-"porter, Miscellaneous cases, page 5, I "should have thought it clear that, as a "matter of law, when the decree under

"which the plaintiff was turned out of "possession, was reversed by the Sudder "Court, and it was ordered that the pro- "perty should remain with the plaintiff, she "had a right to be restored to the possession "which she had lost, *not only of the land,* "*but also of the rents or profits which* "*have been received by the defendants,* "whilst he was in possession of the land by "force of the erroneous decree which was "reversed. When a decree orders a sum of "money to be paid to a plaintiff he is en- "titled to have that decree executed, al- "though the decree is silent upon the "subject of execution. It is the legal effect "of a decree of reversal that the party "against whom the decree was given is "to have *restitution of all that he has been* "*deprived of under it.* A Court of appeal "does not necessarily enter into the ques- "tion whether a decree, which it is about "to reverse, has been executed or not.

"The decree of reversal necessarily car- "ries with it the right to restitution of all "that has been taken under the erroneous "decree, in the same manner as an ordinary "decree carries with it a right to have it "executed; and I should have considered "that a decree of reversal necessarily "authorized the Lower Court to cause "restitution to be made of all that the "party against whom the erroneous "decree had been enforced had been de- "prived by reason of its having been en- "forced."

Reviewing all the cases cited, and referring to the particular facts of this case, which is one of an order for restitution of possession by this Court as it was before the decree of the Lower Court held otherwise, I think the case in 9 Weekly Reporter, page 407, governs this case; and that, accordingly, our order was correct. It is urged that the passage cited from page 407 is an *obiter* of the learned Chief Justice, and not a legal precedent. But I see no *dissentient* judgment upon that point (though there is on other points in that Full Bench decision). And I think the passage forms part of the judgment, as it contains directly the reasoning by which the conclusion was come to by the Chief Justice in that case.

Under this view of the case, I would reject the application for review with costs.

Glover, J.—I also think that the application should be rejected. No new argument has been advanced, nor anything shown to us, which induces me to think the original order wrong. That order turned on a point of law solely, which was fully argued and considered at the first hearing.

The 9th July 1868.

Present:

The Hon'ble H. V. Bayley and A. G. Macpherson, *Judges.*

Bond suit—Plea of non-payment of consideration—Onus probandi.

Case No. 2691 of 1867.

Special Appeal from a decision passed by the Principal Sudder Ameen of East Burdwan, dated the 13th June 1867, reversing a decision passed by the Officiating Sudder Ameen of that District, dated the 30th July 1866.

Manick Lall Baboo (Plaintiff), *Appellant,*

versus

Ram Doss Mozoomdar and others (Defendants), *Respondents.*

Baboo Roop Nath Banerjee for Appellant.

Baboo Bycunt Nath Paul for Respondents.

Plaintiff sued defendant upon a bond which recited the fact of due consideration having been paid at the time of execution. Defendant admitted the execution of the bond, but pleaded that consideration had not been paid.

HELD that it was upon the defendant to prove that the facts stated by him in the bond were really different from what they were stated to be.

Bayley, J.—THIS special appeal must be decreed with costs.

The plaintiff sued the defendant upon a bond, and alleged that due consideration had passed. The bond recited the fact of the consideration having passed when the bond was executed.

The defendant admitted the execution of the bond, but at the same time pleaded that the consideration, as recited in the bond, had not been paid; that, on the contrary, as the plaintiff did not agree to give the money until the bond was registered, he (the defendant) raised money by pledge of jewels.

The first Court gave the plaintiff a decree.

The Lower Appellate Court has dismissed the plaintiff's suit, on the ground that the plaintiff failed to prove that the consideration had passed.

The plaintiff appeals specially, and urges that, as the defendant admitted the execution of the bond in which the payment of

the consideration was recited, the burden of proving that consideration had *not* been paid was on the defendant.

On the other hand, the special respondent urges that an admission made in a written statement must be taken as a whole, that is to say, it cannot be accepted as an admission of his execution of the bond if the plea is rejected that there was no consideration at all: and it is urged that in this view the burden of proof would still be on the plaintiff.

We are of opinion that when the defendant in his bond stated that the money had been received by him, and when he, in his written statement, admitted that the bond was executed by him, it was upon him to prove that the facts stated by him in the bond were really different from what they were recited and stated to be. This is an ordinary rule of law, and according to it we think that the decision of the Lower Appellate Court, which threw the entire burden of proof on the plaintiff when it ought to have been on the defendant, ought to be reversed.

We accordingly reverse it, decree this special appeal with costs, and affirm the judgment of the first Court.

The 9th July 1868.

Present:

The Hon'ble H. V. Bayley and A. G. Macpherson, *Judges.*

Reversioner—Relief—Special Appeal.

Case No. 2726 of 1867.

Special Appeal from a decision passed by the Judge of East Burdwan, dated the 8th August 1867, reversing a decision passed by the Additional Principal Sudder Ameen of that District, dated the 23rd April 1867.

Bama Soonduree Dossee (Defendant), *Appellant.*

versus

Bama Soonduree Dossee (Plaintiff), *Respondent.*

Baboo Bykuntnath Paul for Appellant.

Baboo Lukhee Churn Bose for Respondent.

A reversioner sued to set aside alienations made by the heiress in possession, but framed her plaint wrongly, seeking immediate possession to which she was not entitled. The Principal Sudder Ameen, finding that plaintiff had substantially a good case, declared the alienations good for the life of the alienor, and gave a decree for only such relief as the plaintiff was legally entitled to. The course adopted by the Principal Sudder Ameen was not made a ground of appeal to the Judge, and the High Court refused in special appeal to set aside the decree.

Macpherson, J.—In this case, the plaintiff, as mother and guardian of her minor son, sued to set aside certain alienations made by her mother, the plaintiff's son being the reversioner or next heir after the plaintiff's mother. The Courts below have given the plaintiff a decree as regards most of the alienations in question, declaring them to be good only for the lifetime of the mother.

In special appeal, it is contended that the suit is altogether wrongly framed, and that, therefore, it ought to have been, and ought now to be, dismissed.

There is no doubt that the plaint is bad in itself, for the only relief it prays is a relief to which the plaintiff is clearly not entitled. The plaintiff's claim is stated in the plaint to be "to recover possession of paternal "estate wasted and sold by plaintiff's mother, "*by setting aside the sale and removing* "*the estate from her hands*, subject to pay-"ment to her of the profits." And the prayer at the end of the plaint is "*to re-*"*move the property* aforesaid and also the "remaining property in plaintiff's mother's "possession *from her hands, and to obtain* "*possession of an 8-annas share of the* "*property left by her father*, subject to "payment by her of the profits to her mo-"ther." Such a plaint is bad, as it has been repeatedly decided that a reversioner, in the position of the plaintiff, can sue only for a declaration that the alienation is made without such necessity as justifies it and that the alienation will not bind the heir after the death of the widow. The reversioner has no right to sue for immediate possession, or to remove the property from the hands of the widow. (Weekly Reporter, Special Number, page 166; 2 Hay, page 608; 9 Weekly Reporter, page 108; 7 Weekly Reporter, pp. 119, 303: VI. Weekly Reporter, page 222, &c.)

Nevertheless, we do not think that we ought, at this stage of the suit, to dismiss it, because of its having been wrongly framed. For, on the merits, the Lower Courts have found that the plaintiff has a substantially good case, but the decree which has been made, is not in accordance with the prayer of the plaint, but is strictly such as the plaintiff was legally entitled to and as she ought to have asked for. The Additional Principal Sudder Ameen who tried the case as the Court of original jurisdiction, perceiving the defect in the plaint, declared distinctly

"which the plaintiff was turned out of "possession, was reversed by the Sudder "Court, and it was ordered that the pro- "perty should remain with the plaintiff, she "had a right to be restored to the possession "which she had lost, *not only of the land,* "*but also of the rents or profits which* "*have been received by the defendants,* "whilst he was in possession of the land by "force of the erroneous decree which was "reversed. When a decree orders a sum of "money to be paid to a plaintiff he is en- "titled to have that decree executed, al- "though the decree is silent upon the "subject of execution. It is the legal effect "of a decree of reversal that the party "against whom the decree was given is "to have *restitution of all that he has been* "*deprived of under it.* A Court of appeal "does not necessarily enter into the ques- "tion whether a decree, which it is about "to reverse, has been executed or not.

"The decree of reversal necessarily car- "ries with it the right to restitution of all "that has been taken under the erroneous "decree, in the same manner as an ordinary "decree carries with it a right to have it "executed; and I should have considered "that a decree of reversal necessarily "authorized the Lower Court to cause "restitution to be made of all that the "party against whom the erroneous "decree had been enforced had been de- "prived by reason of its having been en- "forced."

Reviewing all the cases cited, and referring to the particular facts of this case, which is one of an order for restitution of possession by this Court as it was before the decree of the Lower Court held otherwise, I think the case in 9 Weekly Reporter, page 407, governs this case; and that, accordingly, our order was correct. It is urged that the passage cited from page 407 is an *obiter* of the learned Chief Justice, and not a legal precedent. But I see no *dissentient* judgment upon that point (though there is on other points in that Full Bench decision). And I think the passage forms part of the judgment, as it contains directly the reasoning by which the conclusion was come to by the Chief Justice in that case.

Under this view of the case, I would reject the application for review with costs.

Glover, J.—I also think that the application should be rejected. No new argument has been advanced, nor anything shown to us, which induces me to think the original order wrong. That order turned on a point of law solely, which was fully argued and considered at the first hearing.

The 9th July 1868.

Present:

The Hon'ble H. V. Bayley and A. G. Macpherson, *Judges.*

Bond suit—Plea of non-payment of consideration—Onus probandi.

Case No. 2691 of 1867.

Special Appeal from a decision passed by the Principal Sudder Ameen of East Burdwan, dated the 13th June 1867, reversing a decision passed by the Officiating Sudder Ameen of that District, dated the 30th July 1866.

Manick Lall Baboo (Plaintiff), *Appellant,*

versus

Ram Doss Mozoomdar and others (Defendants), *Respondents.*

Baboo Roop Nath Banerjee for Appellant.

Baboo Bycunt Nath Paul for Respondents.

Plaintiff sued defendant upon a bond which recited the fact of due consideration having been paid at the time of execution. Defendant admitted the execution of the bond, but pleaded that consideration had not been paid.

HELD that it was upon the defendant to prove that the facts stated by him in the bond were really different from what they were stated to be.

Bayley, J.—THIS special appeal must be decreed with costs.

The plaintiff sued the defendant upon a bond, and alleged that due consideration had passed. The bond recited the fact of the consideration having passed when the bond was executed.

The defendant admitted the execution of the bond, but at the same time pleaded that the consideration, as recited in the bond, had not been paid; that, on the contrary, as the plaintiff did not agree to give the money until the bond was registered, he (the defendant) raised money by pledge of jewels.

The first Court gave the plaintiff a decree.

The Lower Appellate Court has dismissed the plaintiff's suit, on the ground that the plaintiff failed to prove that the consideration had passed.

The plaintiff appeals specially, and urges that, as the defendant admitted the execution of the bond in which the payment of

the consideration was recited, the burden of proving that consideration had *not* been paid was on the defendant.

On the other hand, the special respondent urges that an admission made in a written statement must be taken as a whole, that is to say, it cannot be accepted as an admission of his execution of the bond if the plea is rejected that there was no consideration at all; and it is urged that in this view the burden of proof would still be on the plaintiff.

We are of opinion that when the defendant in his bond stated that the money had been received by him, and when he. in his written statement, admitted that the bond was executed by him, it was upon him to prove that the facts stated by him in the bond were really different from what they were recited and stated to be. This is an ordinary rule of law. and according to it we think that the decision of the Lower Appellate Court, which threw the entire burden of proof on the plaintiff when it ought to have been on the defendant, ought to be reversed.

We accordingly reverse it, decree this special appeal with costs, and affirm the judgment of the first Court.

The 9th July 1868.

Present:

The Hon'ble H. V. Bayley and A. G. Macpherson, *Judges.*

Reversioner—Relief—Special Appeal.

Case No. 2726 of 1867.

Special Appeal from a decision passed by the Judge of East Burdwan, dated the 8th August 1867, reversing a decision passed by the Additional Principal Sudder Ameen of that District, dated the 23rd April 1867.

Bama Soonduree Dossee (Defendant), *Appellant.*

versus

Bama Soonduree Dossee (Plaintiff), *Respondent.*

Baboo Bykuntnath Paul for Appellant.

Baboo Lukhee Churn Bose for Respondent.

A reversioner sued to set aside alienations made by the heiress in possession, but framed her plaint wrongly, seeking immediate possession to which she was not entitled. The Principal Sudder Ameen, finding that plaintiff had substantially a good case, declared the alienations good for the life of the alienor, and gave a decree for only such relief as the plaintiff was legally entitled to. The course adopted by the Principal Sudder Ameen was not made a ground of appeal to the Judge, and the High Court refused in special appeal to set aside the decree.

Macpherson, J.—In this case, the plaintiff, as mother and guardian of her minor son, sued to set aside certain alienations made by her mother, the plaintiff's son being the reversioner or next heir after the plaintiff's mother. The Courts below have given the plaintiff a decree as regards most of the alienations in question, declaring them to be good only for the lifetime of the mother.

In special appeal, it is contended that the suit is altogether wrongly framed, and that, therefore, it ought to have been, and ought now to be, dismissed.

There is no doubt that the plaint is bad in itself, for the only relief it prays is a relief to which the plaintiff is clearly not entitled. The plaintiff's claim is stated in the plaint to be "to recover possession of paternal "estate wasted and sold by plaintiff's mother, "*by setting aside the sale and removing* "*the estate from her hands*, subject to pay-"ment to her of the profits." And the prayer at the end of the plaint is "*to re-*"*move the property* aforesaid and also the "remaining property in plaintiff's mother's "possession *from her hands, and to obtain* "*possession of an 8-annas share of the* "*property left by her father*, subject to "payment by her of the profits to her mo-"ther." Such a plaint is bad, as it has been repeatedly decided that a reversioner, in the position of the plaintiff, can sue only for a declaration that the alienation is made without such necessity as justifies it and that the alienation will not bind the heir after the death of the widow. The reversioner has no right to sue for immediate possession, or to remove the property from the hands of the widow. (Weekly Reporter, Special Number, page 166; 2 Hay, page 608; 9 Weekly Reporter, page 108; 7 Weekly Reporter, pp. 119, 303; VI. Weekly Reporter, page 222, &c.)

Nevertheless, we do not think that we ought, at this stage of the suit, to dismiss it, because of its having been wrongly framed. For, on the merits, the Lower Courts have found that the plaintiff has a substantially good case, but the decree which has been made, is not in accordance with the prayer of the plaint, but is strictly such as the plaintiff was legally entitled to and as she ought to have asked for. The Additional Principal Sudder Ameen who tried the case as the Court of original jurisdiction, perceiving the defect in the plaint, declared distinctly

"Dooars, and hopes to carry it against the Raj "Bansi cultivators and the English Courts. "The price of the pottah might almost "have been used to help the war against the "British Government. The transaction was "a speculation. The Soobah got his money, "and the Bengalee, who could not emigrate "to Bhootan, took his chances of being "made zemindar.

"In my opinion, the question is one for "the Executive Government, not for the "Courts of justice. The plaintiff is about "the last man of the last class who deserves, "or has any kind of pretension, to be re-"cognized as a zemindar. If he had got "an ordinary jote-pottah from the Soobah, "and possession with it, he would have "been maintained in possession like any "other jotedar. It would seem to me utterly "unreasonable to allow his purchase of new "zemindaree-rights from the Bhooteah "Soobah to stand good to the injury of the "cultivators' rights. Even granting that all "the kubooleuts and hissabs filed are genu-"ine, the jotedars have no power to set up "a zemindar over their head.

"On the issues framed, I find all the "plaintiff's documents genuine, but at the "same time invalid."

Further on, the Deputy Commissioner says: "It might be urged that, even if the "Soobah had no power to grant a lease at "fixed rates for ever, still he had power to "grant ordinary jote leases, and that the "plaintiff's filed pottah should be taken as "an ordinary jote-pottah, scratching the "word 'mokurruree.' The answer is that "the pottah interferes with the rights of "existing jotedars. The Soobah might have "farmed any number of jotes to any one "person; that is, he might have farmed his "own rights; but the farm could not last "longer than the Soobah who granted it. "The plaintiff does not urge this plea, though "it seems to me to be his strongest.

"Considering, therefore, that this Court "is not bound to recognize the Soobah's "authority in the matter in hand, namely, "the establishment of a land-holder under "Government above the jotedars, and con-"siders that it would be unjust and inexpe-"dient to confirm the Soobah's act in the "matter, I direct that the case be dismiss-"ed with costs."

I have said that I see no reason to interfere with the Deputy Commissioner's finding of the facts in this case. But upon the facts as found, I think the plaintiff is entitled to our judgment.

No considerations of expediency can weigh with us, or can legally be entertained by us. We must treat the question as if it arose in one of the long-settled districts. Were the matter otherwise, we might possibly concur in the view taken by the Deputy Commissioner. It might have been well if the plaintiff's case had, in the first instance, been differently treated by the Executive. But, so far as this suit is concerned, it appears to me that the plaintiff proves his case. He did, in fact, get this mourosee jotedaree-pottah from the Soobah; the British Government's officers recognized him, and received rent from him; and the defendants have granted him kubooleuts and attorned to him. Surely, then, as against these defendants, he is entitled to have their names removed from the registry, and to have his own placed upon it instead. Whether a pottah of this sort, granted by the Soobah on the eve of flight, is one which really by itself gave the plaintiff a title to the position he claims is, as it seems to me, most doubtful. But that is not the question which we have to decide. The only question before us is whether, as regards these defendants who have acknowledged the title which the plaintiff sets up, he is entitled to a declaration that his title is good, and that his name, and not theirs, ought to appear on the register as jotedar.

It appears to me that the decree of the Deputy Commissioner ought to be reversed, and that a decree ought to be passed in the plaintiff's favor, declaring him to be mourosee jotedar (under his pottah) of the eleven parcels of land in suit, and declaring that he is entitled to have his name put in the register as such jotedar.

Under the peculiar circumstances of the case, we shall make no order as to the costs of this appeal.

Bayley, J.—I am of opinion that the British authorities did formally recognize the Soobah's pottah, and having done so, and rent-payments having been made under it, the subsequent action as to registration of the jotedars would not set aside such recognition of the Soobah's pottah. It was quite open to the British authorities to deny recognition, or to admit the pottah only *ad interim*; but this was not done.

I concur in the order proposed by Mr. Justice Macpherson.

h.

The 10th July 1868.

Present:

The Hon'ble F. B. Kemp and E. Jackson, *Judges.*

Execution in another district — Certificate under Section 284, Act VIII., 1859.

Case No. 154 of 1868.

*Application for review of judgment passed by the Hon'ble Justices F. B. Kemp and E. Jackson, on the 26th March 1868, in Regular Appeal No. 182 of 1867.**

Mooktakeshee Debia, Plaintiff (Respondent), *Petitioner,*

versus

Luchmeeput Sing Doogur and another Defendants (Appellants), *Opposite Party.*

The Advocate-General and *Baboos Ashootosh Chatterjee* and *Doorga Doss Dutt* for Petitioner.

Mr. R. T. Allan and *Baboo Onookool Chunder Mookerjee* for Opposite Party.

Where a case is decreed in one district, and property is attached and sold in execution in another district, without application made by the decree-holder to the Court of the latter district, and without the certificate and other papers being obtained from the former district, as laid down in Sections 284 and 285, Act VIII., 1859, the proceedings must be held to be without jurisdiction.

But (HELD by Jackson, J.), where the certificate alluded to in Section 284 was sent, whether asked for or not, the execution-proceedings are legal, even though the process of attachment was issued by the Court executing at the request of the other Court, instead of (as it should have been) on the direct application of the decree-holder.

HELD (by Jackson, J.) that no particular form being prescribed in law for a certificate under Section 284, if it contains all the information which it should contain, it is a good certificate, even though wanting in precision.

Jackson, J.—THE question at issue in this case was whether the plaintiff or the defendant had a superior title to certain landed estate. Both had purchased it in execution of decree, and the plaintiff's purchase was prior to the purchase of the defendants; but it was alleged that the proceedings in execution of the decree, under which the plaintiff purchased, were without jurisdiction, and that, consequently, the plaintiff obtained no valid title by her purchase in the course of those proceedings. On the former hearing of this case, I concurred with Mr. Justice Kemp in dismissing the plaintiff's suit, more specially on the ground that the plaintiff, being himself the decree-holder, had carried on in the Dinagepore Judge's Court proceedings in execution of the decree which was passed in the Burdwan Court, without having previously obtained from the Burdwan Court the certificate and other necessary papers to enable him legally to make application for execution to the Dinagepore Court. I thought I had carefully examined the papers on the record at the former hearing, and had satisfied myself that the usual certificate under Sections 284 and 285 had not been sent to the Dinagepore Court. The pleaders for the plaintiff certainly did not, at the former hearing, point out to the Court the certificate in question. It appears, however, that that document, or the paper which it is alleged is the certificate in question, is with the record, and it is clear that that certificate was sent to the Dinagepore Court, with the view that that Court should allow the plaintiff to take out execution of his decree in the Dinagepore district. The papers on the record show that the plaintiff had taken out execution of his decree in the Burdwan district, and desired to take out further execution in the Moorshedabad, Hooghly, and Dinagepore districts. As it was doubtful whether he could carry on execution-proceedings by the sale of the judgment-debtor's property in all the three districts at the same time, he petitioned the Burdwan Court to furnish him with certificates, &c., to enable him to attach and sell the debtor's property first in the Moorshedabad district; but he also asked that immediate steps might be taken, under Section 235, Act VIII. of 1859, to attach the debtor's property in the Hooghly and Dinagepore districts also. The plaintiff's request was complied with, and a general certificate was drawn up, stating the facts connected with the decree, and a copy was sent to each of the three districts in which the plaintiff wished to carry out execution. On receipt of these papers in the Dinagepore Court, the Judge appears, without further application from the plaintiff, to have attached the property now in dispute, under Section 235 of the Act, and subsequently, on the receipt of further papers from the Burdwan Court, to have sold that property, when the plaintiff became purchaser. Afterwards, the present defendant also obtained a decree against the same judgment-debtor, and attached and sold this same estate a second time, and purchased it, and was placed in possession of it.

The question now, then, is not between either decree-holder and the judgment-debtor, but between the two purchasers. It is

* *See* 9 W. R. 388.

true that, in this case, the purchasers are the decree-holders, but the question would have been the same had the purchasers been other than the decree-holders. I am of opinion that no mere irregularity in the attachment and sale would invalidate the plaintiff's title under his prior purchase; but if the attachment or sale were made without application to the Dinagepore Court, and without first obtaining from the Burdwan Court the certificate and other papers, as laid down in Sections 284 and 285 of the Act, I still think, as was laid down in our former judgment, that the proceedings in the Dinagepore Court would have been without jurisdiction. But I entertain no doubt now that the proceedings before the Burdwan and Dinagepore Courts were strictly legal, except as to one point, and that, on that one point, though there was an informality, still that informality would not vitiate the sale, and render the whole of the proceedings illegal.

The first portion of the argument on this application was directed to the question whether the certificate alluded to in Section 284, Act VIII. of 1859, was sent to the Dinagepore Court, and it was said that no such certificate was asked for, and no such certificate was sent. We have not before us the original application of the decree-holder, so that I am unable to satisfy myself by direct evidence as to whether the certificate was asked for. But I infer it was asked for, because I am satisfied that it was sent; and, as it was sent, it seems to me immaterial whether it was asked for or not. If the sending of the certificate was all which was necessary to make the proceedings before the Dinagepore Court legal, I am satisfied that they were legal so far as the certificate was concerned. It is said that the certificate is headed as a certificate under Section 235, Act VIII. of 1859. No particular form is prescribed in the law for the certificate, and though there are portions of it which might have been written more precisely, more especially the heading alluded to, I would not, on any matter of form or irregularity, hold the execution-proceedings invalid. If the certificate contained all the information which it was necessary it should contain, I would hold that certificate a good certificate under Section 284 of the law. It is not alleged that it did not contain that information, and it appears to have been regularly sent to the Dinagepore Court. So far the proceedings were correct, and the Dinagepore Court had jurisdiction to carry on the execution.

A question was raised during the argument as to whether a copy of the decree was sent. It is not specially alluded to in the proceeding sending the certificate. But that proceeding states that the certificate, &c., were sent. I would presume that the Court acted rightly, until the contrary is shown.

In sending the certificate and copy of the decree to the Dinagepore Court to enable the plaintiff to execute his decree there, though the execution was at that time to be confined to the attachment of the judgment-debtor's property, the Burdwan Court requested the Dinagepore Court to issue process of attachment under Section 235. Accordingly, the Dinagepore Court attached the estate now in dispute, and, subsequently, on the receipt of further proceedings from Zillah Burdwan, sold it. It is said that this attachment was not a legal attachment; that no application for the attachment was made direct to the Dinagepore Court; and that that Court should not have acted without direct application being made to it. I think the plaintiff should have made a direct application for attachment to the Dinagepore Court, and that that Court should not have attached without such direct application. But I would not declare the sale invalid and vitiated by this informality. There was an application for attachment made by the decree-holder through the Burdwan Court to the Dinagepore Court. However informally it was made, still it was made, and the Court overlooking the informality made the attachment. That attachment was, in my opinion, a legal attachment. I doubt if even the judgment-debtor could have succeeded in getting the sale set aside on account of this irregularity, and I certainly would not declare that it rendered all subsequent proceedings in the case null and void, and without jurisdiction. If the attachment was good and legal, it follows that the sale is a valid sale, and the plaintiff's title under that sale is a good title.

Holding this view on the evidence which has now been brought to the notice of the Court, but which was omitted from notice at the last hearing, I think a good case has been made out for the admission of the review, and I would accordingly admit it, and, reversing our former orders, would decree the suit for the plaintiff.

Kemp, J.—I see no good ground for altering or amending the judgment of this Bench passed on the 20th March 1868, which is in accordance with a decision published in the Weekly Reporter, Volume VIII., page 310.

b

The same arguments, which were urged when the appeal was heard by us, have been urged on this occasion, perhaps more ably, as the applicant has had the benefit of being represented by the learned Advocate-General.

I have no doubt whatever that the sale under which the applicant purchased was made without jurisdiction, and was wholly illegal. I have given my reasons in detail for this opinion in my former decision, to which I adhere in every respect. The application is rejected with costs.

The 11th July 1868.

Present:

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble Dwarkanath Mitter, *Judge*.

Sowdaick stridhun.

Case No. 3454 of 1867.

Special Appeal from a decision passed by the Principal Sudder Ameen of Dacca, dated the 23rd September 1867, affirming a decision passed by the Moonsiff of Bohur, dated the 26th June 1866.

Kashee Chunder Roy Chowdhry and another (two of the Plaintiffs), *Appellants*,

versus

Gour Kishore Gooho and others (Defendants), *Respondents*.

Baboo Kally Mohun Dass for Appellants.

Baboo Sreenath Banerjee for Respondents.

Sowdaick stridhun created by the husband descends, not to his heirs, but to the heirs of the wife.

Peacock, C. J.—THE decision of the Lower Appellate Court in this case must be affirmed with costs. The ground of appeal is that the Court has committed an error in finding that *sowdaick stridhun* created by the husband is alienable by the wife. The plaintiffs claim as heirs of the husband. It is, therefore, unnecessary to determine whether the wife could alienate her *sowdaick stridhun* or not. If she could alienate, the property passed to the purchaser. If she could not alienate, it descended to her heirs, and not to the heirs of her husband. In neither case could the plaintiffs, as heirs of the husband, be entitled to recover.

The 11th July 1868.

Present:

The Hon'ble J. B. Phear and C. Hobhouse, *Judges*.

Evidence received by consent—Special appeal.

Case No. 1667 of 1867 under Act X. of 1859.

Special Appeal from a decision passed by the Additional Judge of Nuddea, dated the 19th April 1867, affirming a decision passed by the Deputy Collector of that District, dated the 20th June 1866.

Anar Mollah (Defendant), *Appellant*,

versus

Mr. James Hills (Plaintiff), *Respondent*.

Baboo Anund Gopal Paleet for Appellant.

Mr. J. S. Rochfort and *Baboo Bhowanee Churn Dutt* for Respondent.

Where both parties to a suit adduce calculations made in neighbouring villages as evidence to establish their respective cases, they impliedly consent that the calculations, although not strictly legal, shall constitute the materials upon which the Court is to act, and they are not entitled afterwards to object to them in special appeal.

Phear, J.—LOOKING at the judgments of the Deputy Collector and the Judge in order to see how the parties have dealt with this case, we have come to the conclusion that both sides adduced calculations made in neighbouring villages as evidence upon which they relied in order to establish the respective cases which they were desirous of making before the Court. We think that, although, no doubt, these calculations were not, if objected to, strictly legal evidence between the parties, both sides have, in the way in which we have pointed out, impliedly consented that they should constitute the materials upon which the Court was to act.

Under these circumstances, we think that the grounds of special appeal are not made out, and we, therefore, dismiss the appeal with costs.

The 11th July 1868.

Present:

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice*, and the Hon'ble Dwarkanath Mitter, *Judge*.

Contract out of ill-feeling—Public policy.

Reference to the High Court, by the Judge of the Small Cause Court at Kooshtea, dated the 10th June 1868.

Bamun Dass Banerjee, Pleader, *Plaintiff*,

versus

Huro Lall Shaha, *Defendant*.

A contract, the effect of which is to assist another in carrying on the litigation against a third party, made with the express declaration that it was out of spite and ill-feeling against such third party, is a contract against public policy, and a suit cannot lie upon it.

Case.—PLAINTIFF, who practises in this Court as a pleader, brought this action to recover from defendant the amount mentioned above (50 rupees) as averred in his plaint, which runs thus:—

"One Ram Gopal Shaha got a decree "in case No. 966 of 1867 in this Court "against another Ram Gopal Shaha. De- "fendant, Huro Lall Shaha, who professed "himself to be a friend of the judgment- "debtor, Ram Gopal Shaha, made in "Ughran last a verbal contract with "plaintiff, to the effect that inasmuch as "he wanted to benefit the judgment-debtor, "and to thwart the judgment-creditor, for "his grudge against, and party-feelings "towards, the judgment-creditor, he (defend- "ant) would pay plaintiff Rupees 50 from "his own pocket, if plaintiff could manage "to have the case No. 966 of 1867, which "was decreed, to be dismissed, struck off, "or anyhow rejected from the file of the "Court. A *vakalutnama* signed by judg- "ment-debtor was accordingly given to "plaintiff, who filed an application for a new "trial, and urged the Court to refer the "case for the opinion of the High Court. "The decision of the High Court, dated "18th January last, ruled that the case "was not cognizable by this Court; and "on the 3rd February last, this Court "carried the orders of the High Court into "effect. Defendant had quarrels with "judgment-creditor, on account of the party- "spirit subsisting between them, and he "wanted to serve his purpose by befriending "judgment-debtor in the way of his gaining "the case. So defendant entered into the "contract with plaintiff, who undertook the "task, agreeing to the terms proposed. "Defendant's efforts to secure his own in- "terest, and to do a piece of good turn to "the judgment-debtor, are the two consi- "derations in this contract. Defendant is, "consequently, liable to pay the amount "contracted for. After the case was dis- "posed of by the High Court, defendant "acknowledged his liability before a great "many respectable persons. Plaintiff is, "therefore, entitled to get from defendant "the sum claimed."

Defendant's pleader urged the following pleas:—

1. Defendant had no interest in the suit conducted by plaintiff: hence this case is not sustainable.

2. There was a co-pleader with plaintiff, but, as he has not been made a party to the case, the cognizance of this case is barred.

3. Defendant agreed that he would cause Rupees 50 to be paid to the plaintiff by Ram Gopal Shaha, defendant in the case, should the case be finally dismissed by this Court.

Now, first of all, it is to be considered, in the disposal of this case, whether the contract was a valid one, and any action could lie on it.

From the very tenor of the plaintiff's own statement, and the nature of the defence made, it appeared that defendant was nowise interested in the issue of the case, excepting that he wanted to harass and annoy judgment-creditor, and that he made agreement with plaintiff to pay him money for trying in his capacity of a pleader to have the decreed case dismissed, struck off, or otherwise thrown out of Court. A contract of this kind is contrary to the public policy of laws, and the Courts will not lend their assistance for the enforcement of the contract. (See Addison on Contracts, Fourth Edition, page 92.)

The reason set forth by plaintiff for binding defendant to the contract was that defendant's spite and party-feeling towards judgment-creditor, induced him to come to the assistance of judgment-debtor, and to offer money for the re-opening of a

d.

suit set at rest, for the purpose of serving his interest of avenging himself on judgment-creditor. Plaintiff deemed these considerations as valid for making defendant liable, and that the moving of these considerations was good ground for a valid contract. But agreements to furnish money to aid and assist in the prosecution of law-suits, in which the party making the agreement is in no wise interested, and in which he has no just or reasonable ground for interference, are void, as tending to keep alive strife and contention. (*Vide* page 94 of the work mentioned above.) Friendly leanings, party-feelings, and private quarrels are, I think, no just and reasonable grounds for interference.

Another principle in the law of contract in contravention of which this contract was made is that the agreement upon which this suit was laid partakes of the nature of wagering in law. A pleader who contracts for a decree which was passed by a competent Court, and which could not be reversed or modified but by Courts having jurisdiction over the matter, undertakes an impossibility beyond his power to accomplish, and incompatible with his profession of a pleader.

It might have further been seen that the statement contained in the plaint was conclusive evidence of the nullity of the contract, and could not form the basis of an action at law.

As the contract was against the public policy of laws, and entered into with a person no wise interested in the issue of the case, and as plaintiff attempted wagering in law, I have dismissed the case; but at the request of the plaintiff, who prays that the case may be referred to the High Court, I have made the order of dismissal contingent upon the decision of the Hon'ble Judges of the High Court, on the point whether the contract was a valid contract, and could any action lie on it.

The judgment of the High Court was delivered as follows:—

Peacock, C. J.—We are of opinion that a contract, the effect of which is to assist another in carrying on litigation against a third party, made with the express declaration that it was out of spite and ill-feeling against such third party, is a contract against public policy. We are, consequently, of opinion that the suit in this case cannot be maintained, and that the Judge of the Small Cause Court was right in dismissing it.

The 11th July 1868.

Present:

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice*, and the Hon'ble Dwarkanath Mitter, *Judge*.

Jurisdiction—Suit to establish judgment-debtor's right to property released under Section 246, Act VIII., 1859.

Reference to the High Court by the Officiating Judge of the Small Cause Court at Kishnaghur, dated the 19th June 1868.

Ram Dhun Biswas, *Plaintiff*,

versus

Kefal Biswas and others, *Defendants*.

A decree-holder cannot sue in a Court of Small Causes to establish his judgment-debtor's right to property seized in execution, but subsequently released to a claimant under Section 246, Act VIII., 1859.

Case.—THIS is an application by plaintiff for a new trial. Whether it shall be granted or not depends on the decision of the High Court on the question hereinafter submitted for its opinion.

The object of the suit, as stated in the plaint, is to establish the title of the *pro-formâ* defendants to certain personal property, which plaintiff had attached in execution of a decree against them, but which had been released on the claim of the first defendants under Section 246 of Act VIII. of 1859, and to bring it to sale in execution of that decree; *or* to recover the value of the property from first defendant. Plaintiff subsequently amended his plaint by withdrawing the prayer for bringing the property to sale, and stating his claim to be, to establish the title of the *pro-formâ* de-

fendants to the property, and to recover the value of it from defendant 1. The question which I submit for the decision of the High Court is, whether a decree-holder can sue in a Small Cause Court to establish his judgment-debtor's title to property seized in execution, which has subsequently been released to a claimant under Section 246 of Act VIII. of 1859, and to recover the value of that property from the successful claimant.

It seems to me that such a suit is not one of those contemplated by Section 6 of Act XI. of 1865. Plaintiff would not be entitled to a decree for the property in question or its value, for it never was his. All that he could get would be a declaration that he was entitled to bring the property to sale in execution of his decree, which, in fact, constituted the first prayer in the plaint. The suit would be, therefore, declaratory in its nature, and a declaratory suit does not come within the scope of this Court's jurisdiction. The ruling, Womesh Chunder Bose *versus* Muddun Mohun Sirkar, II. W. R. 44, has been referred to by plaintiff's pleader, but it has no bearing on this case, as it refers to cases where the unsuccessful claimant under Section 246, and not the decree-holder, is plaintiff. Had plaintiff simply brought an action for damages against defendant 1, the case might have been different. In that case, his suit would probably lie in this Court; he would have to prove his debtor's title to the property, and the loss which he had suffered in being prevented from bringing it to sale. The present suit, however, is not an action for damages, and for the foregoing reasons is not, in my opinion, triable in a Small Cause Court.

The judgment of the High Court was delivered as follows:—

Peacock, C. J.—The suit which, by Section 246 of Act VIII. of 1859, is given to a party against whom an order under that Section is made, is "a suit to establish his right." We think that such a suit is not maintainable in a Small Cause Court, and that the Judge of the Small Cause Court is right in holding that a decree-holder cannot sue in a Small Cause Court to establish his judgment-debtor's title to property seized in execution, and which has been subsequently released to a claimant under Section 246, Act VIII. of 1859.

The 11th July 1868.

Present:

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice*, and the Hon'ble Dwarkanath Mitter, *Judge*.

Jurisdiction—Suit against Governor-General's Agent—Section 9, Act XI. of 1865.

Reference to the High Court by the Judge of the Small Cause Court at Moorshedabad, dated the 2nd June 1868.

Roopun Tewaree, *Plaintiff*,

versus

Mr. W. B. Buckle, Agent to the Governor-General at Moorshedabad, on the part of Government, *Defendant*.

A suit against an Agent to the Governor-General on the part of Government is substantially a suit against Government, and ought, under Section 9, Act XI., 1865, to be brought in a Court having jurisdiction at the seat of Government.

Case—The plaintiff alleges that he was in the Government employ, and was holding the office of a Sotaburdar under Mr. W. B. Buckle, Agent to the Governor-General of India at Moorshedabad. He sues the Government for the recovery of his salary due for the period specified in the plaint.

Mr. W. B. Buckle, Agent to the Governor-General, on the part of Government, by the Government pleader, Baboo Dinno Nauth Gangooly, raises a preliminary objection to this suit, that it is not cognizable by this Court, as under the provisions of Section 9 of Act XI. of 1865 suits against the Local Government or against the Government of India are to be brought in the Court having jurisdiction at the place which is the seat of such Government, and that, as Moorshedabad is not the seat of Government, therefore, the plaintiff's suit, which is brought against Government, cannot be tried by the Small Cause Court of Moorshedabad.

It is admitted by plaintiff's pleader that Moorshedabad is not, as contended by defendant, the seat of Government, but he urges that the law quoted by defendant does

not apply to the suit brought by plaintiff. The pleader for plaintiff contends that Section 9 of Act XI. of 1865 refers only to suits to be brought against the Government for claims affected by an act of the head of Government, and does not refer to suits brought against Government for claims affected by acts of a local officer of Government, and that, as plaintiff's claim is affected by an act of Mr. Buckle, who unjustly withheld payment of plaintiff's salary, and who is a resident of Moorshedabad, plaintiff's suit can, therefore, be tried by the Small Cause Court of Moorshedabad under the spirit of the law quoted by defendant.

The point to be tried in this case is whether the plaintiff's suit, which is brought against Government under Act XI. of 1865, is cognizable by this Court.

This case is brought against Government under Act XI. of 1865. Under the provisions of Section 9 of the Act, all suits against Government ought to be brought in the Court having jurisdiction at the place which is the seat of Government. That Moorshedabad is not the seat of Government is a fact admitted by both parties; therefore the plaintiff's suit is not cognizable by this Court. Whether the plaintiff's claim be affected by an act of a local officer of Government, or by an act of the head of Government, has nothing to do as to the jurisdiction of Courts over suits of this nature. The law, Section 9 of Act XI., is clear, and under it all suits against Government should be brought in the Court having jurisdiction at the place which is the seat of Government. The plaintiff's suit is instituted in this Court in contravention of the law quoted by the defendant. I, therefore, dismiss the plaintiff's suit for want of jurisdiction. Plaintiff is to pay the defendant's cost with interest from this day to the date of realization thereof. At the special request of the plaintiff's pleader, I pass this judgment subject to the opinion of the High Court on the point of law under which this suit is thrown out.

Judgment of the High Court.

Peacock, C. J.—We are of opinion that the Judge of the Small Cause Court is correct in this case, and that the suit is substantially a suit against the Government. The suit is against Mr. Buckle, Agent to the Governor-General on the part of Government, and not against Mr. Buckle individually.

The 11th July 1868.

Present:

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice*, and the Hon'ble Dwarkanath Mitter, *Judge*.

Review—Error in law.

Reference to the High Court by the Recorder of Rangoon, dated the 9th June 1868.

Koh Poh, *Petitioner*,

versus

Moung Tay and others, *Opposite Party*.

An error on a point of law is a ground for a review of judgment.

Case.—In this case, the plaintiff Koh Poh sued (in Civil Regular 72 of 1868) the four defendants, (1) Moung Tay, (2) Moung Bah Pho, (3) Mah Kho Oo, (4) Mah Shoay Boo, for Rupees 1,054, the balance due on a promissory note.

The promissory note was written on a one-anna stamp, and was translated by the Court Interpreter as follows:—

Rangoon.

"In the year 1229, 7th day of the waning "moon of Tagoo, the undersigned promise "to pay on demand to Koh Poh the sum of "Rupees (1,534) one thousand five hundred "and thirty-four, for the purchase of jag-"gery; that the above said amount will be "paid on demand either to Koh Poh or "order; that the aforesaid amount is to be "paid jointly and severally by the under-"signed."

(Signed) "Moung Tay.
"Moung Bah Pho.
"Mah Kho Oo.
"Mah Shoay Boo."

The 7th day of the waning moon of Tagoo 1229 appears, on reference to the almanac, to have been the 25th of April 1867.

At the trial, the plaintiff was represented by his Counsel, Mr. Lowe; and the 1st and 3rd defendants were also represented by their Advocate, Mr. Christopher. The 2nd and 4th defendants were present in person, and confessed judgment.

Evidence was taken, and it appeared from the evidence of the plaintiff Koh Poh that the two first defendants signed the note on the day it was written, and promised to pay

in 15 days. When the 15 days had expired, the two women, the 3rd and 4th defendants, signed as security; and Mr. Christopher, Advocate for the 1st and 3rd defendants, contended that, as there had been a material alteration in the note, the plaintiff could not recover upon it. He made a further objection that the 3rd defendant could not be sued, as she was the wife of the 1st defendant.

In my judgment, I stated that it appeared to me that the instrument was void under the Stamp Act. X. of 1862; that it became a new note when the fresh signatures were affixed, and therefore required a fresh stamp, and the stamp could not, in the case of a bill or a note, be affixed with a penalty (*see* Section 22); that the note, being unstamped, was inadmissible as evidence. I, therefore, dismissed the suit as against 1st and 3rd defendants, and gave judgment against the other two who had confessed their liability.

Mr. Agabeg, who is now retained for plaintiff, applies for a review of judgment, on the ground that the addition of the names of the 3rd and 4th defendants to the promissory note does not make it a fresh note; nor was it necessary to have a fresh stamp; the Section 22 of Act X. of 1862 does not apply to the present case.

The question is, whether this is a ground of review under Section 376 of Act VIII. of 1859.

The grounds laid down in that Section are as follow:—

"The discovery of new matter or evidence, which was not within his knowledge, or could not be adduced by him at the time when such decree was passed, or any other good and sufficient reason."

It seems to me that the ground set forth by Mr. Agabeg is a ground for an appeal instead of a ground for review, and I find that the Chief Justice, in the case of Nusserooddeen Khan *versus* Indernarain Chowdhry,* reported in Wyman's Reports, page 127, held that the fact of the Court below having decided against the weight of evidence is a ground for appeal, and not for review; and his Lordship goes on to say (*see* page 130) that the attempt has frequently been made for the purpose of having the case re-argued by fresh Counsel when parties have been dissatisfied with the first decision.

* *See* 5 W. R., Civil Rulings, p. 93.

I conclude from this that, where the object is to get the same case re-heard upon exact the same materials, with no discovery of fr evidence, and nothing in the nature of ne matter arising in the case after the origin decision, it would be improper to admit review merely for the sake of having the ca re-argued by fresh Counsel.

The ground urged by Mr. Agab would, it seems to me, be a ground f special appeal, and not for review; but th case is one in which the amount sued f is under 3,000 rupees, and consequently n appeal lies to the High Court or to the Priv Council.

I would, therefore, request the opinion o their Lordships whether an error in a poi of law is ground for review of judgment.

Judgment of the High Court.

We are of opinion that an error on a point of law is a ground for a review of judgment.

The 11th July 1868.

Present:

The Hon'ble G. Loch and F. A. Glover, *Judges.*

Execution—Endorsement—Transfer of decree—Allegations of fraud.

Case No. 172 of 1868.

Miscellaneous Appeal from an order passed by the Judicial Commissioner of Chota Nagpore, dated the 16th January 1868, reversing an order passed by the Principal Sudder Ameen of Purulea, dated the 21st September 1868.

Ramdhun Rukhit (Judgment-debtor), *Appellant,*

versus

Punchanun Chuckerbutty (Decree-holder), *Respondent.*

Baboo Poorno Chunder Shome for Appellant.

Baboo Rash Beharee Ghose for Respondent.

In taking out execution, a decree-holder is not bound to produce his original decree, or even a copy thereof.

A privately executed endorsement on a decree, unregistered and unproved, is no evidence of the transfer of the decree.

Where a decree-holder, in taking out execution, is opposed by the judgment-debtor, and imputes fraud to the latter, the Court executing is bound to examine into the allegations.

Glover, J.—In this case, the decree-holder, on taking out execution, was opposed by

judgment-debtor on the ground that he decree-holder) had sold his decree to a party from whom it had passed to the gment-debtor's son. The Court of first nce admitted the judgment-debtor's ob-tion, and referred the decree-holder to a lar suit. The Judicial Commissioner, ever, on appeal, held that an endorse-nt on the back of a decree was not a valid veyance, and that, moreover, this endorse-nt was neither registered nor proved. He nsidered it a fraudulent attempt on the t of the judgment-debtor to evade payment the decree-holder's claim.

It is urged in special appeal (1) that, as original decree was not produced by the cree-holder, no execution could issue; and 2) that the endorsement was sufficient evi-ence as to the transfer of the decree.

Neither of these objections are of any ight. A decree-holder is not bound to oduce the original decree. Indeed, it would ever, under any circumstances, come into s hands, it being retained in the record of e suit in the Civil Court. Nor is he ound to produce even a copy of the decree. ection 212 of Act VIII. of 1859 and Sec-ion 15, Act XXIII. of 1861, lay down the ocedure necessary, and make it quite suffi-ient for a decree-holder to submit an appli-ation containing the number of the suit, mes of parties, date of decree, &c., and e Court, after comparing the application ith the original decree, and finding it to orrespond, passes under Section 215 of the Act the necessary order for execution.

With regard to the second objection, it is quite clear that a mere privately executed endorsement, unregistered and unproved, would be no evidence at all in favor of the transfer, and it was for the judgment-debtor, who alleged the fact, to give evidence in support of it. As a matter of fact, no evidence was given. The judgment-debtor relied simply and solely on the endorsement as it stood.

With reference to the argument that this was not a question coming under Section 11, Act XXIII. of 1861, and that the decree-holder was properly referred by the Principal Sudder Ameen to a regular suit, we think that, as the parties to the alleged sale are the parties now litigating, it was incumbent on the Civil Court executing the decree to examine into the allegations of fraud propounded by the decree-holder, and that the Judicial Commissioner was quite right in going into them.

We see no reason for interference in the present case, and dismiss this appeal with costs.

The 11th July 1868.

Present :

The Hon'ble G. Loch and F. A. Glover, *Judges.*

Benamee mortgage—Foreclosure—Benamee-dars as trustees—Non-verification of plaint.

Case No. 309 of 1867.

Regular Appeal from a decision passed by the Principal Sudder Ameen of Gya, dated the 10th August 1867.

Roy Mohun Lall Mitter and another (Defendants), *Appellants,*

versus

Buhoo Soonduree Debia and others (Plaintiffs), *Respondents.*

Baboo Sreenath Doss for Appellants.

Mr. J. W. B. Money and *Baboo Otool Chunder Mookerjee* for Respondents.

A suit for possession after notice of foreclosure having been decreed in favor of the parties who appeared as mortgagees in the mortgage-deed, though it was contested that the ostensible plaintiffs were not really interested, an action was brought to recover the mesne-profits of the land decreed in the above suit. While the case was under trial, *L*, whose guardian had brought the action, filed a petition, stating that he had nothing to do with the property, and that the real owner was *C*, who was in possession. A petition to the same purport was filed by *C*, and the Court directed that his name should be entered as a joint-plaintiff to the suit.

HELD that as the defendants were in no wise prejudiced by the disclosure made by *L* and *C*, and had not been ignorant of the real party with whom they had been dealing; and as the money claimed was justly due by them to the party who had foreclosed the mortgage and taken possession, and it was not denied that that person was *C*, the parties in whose name the suit was brought might be considered in the light of trustees for the person beneficially interested.

HELD, too, that the suit could not be dismissed and justice denied, on the technical ground that *C* had failed to verify his plaint as required by law.

Loch, J.—THIS is a suit to recover mesne-profits. It appears that the property in question was mortgaged by the defendants in the name of Mohesh Chunder and Gopeenath to the father of Bisto Chunder Chatterjee.

A suit for possession after notice of foreclosure was brought against the defendants in the name of the parties who appeared as mortgagees in the mortgage-deed, and a decree for possession was given in their favor. In that suit, it was hotly contended that the ostensible plaintiffs were not really interested, and that the real mortgagee was the father of Bisto Chunder. This was denied by the plaintiffs, and the Court rejected the objection to the hearing of the suit.

The present action is brought to recover the mesne-profits of the land decreed in the suit referred to above. The Principal Sudder Ameen gave a decree for the plaintiffs, but on appeal the case was remanded, that the Lower Court might take more reliable evidence than was then on the record. In the order of remand, dated 30th January 1866, this Court remarked that "the jumabundee papers on which alone the Lower Court has proceeded in ascertaining the amount are very incomplete and unsatisfactory, and wholly insufficient to enable the Court to say with any degree of certainty or accuracy for what sum the decree ought to be given. Such papers are not sufficient to justify the decree, although they might be possibly something of a guide in making a local investigation. We remand the case that an Ameen may be deputed to ascertain the amount of wassilat in the usual manner."

An Ameen was accordingly deputed to the spot, and the result of his enquiry was not satisfactory, as the ryots did not produce their receipts on the plea that they had been burnt when the village was burnt, and they professed themselves quite unable to state what they had paid, giving the invariable answer that the money paid by them was all entered in the putwaree's accounts. The defendants do not appear to have done anything to assist the Ameen, leaving him to flounder through his enquiry as he best could, though the burden was upon them to show what were the real assets of, and collections from, the estate. The Ameen, therefore, was unable to submit to the Court any satisfactory data on which a calculation of the real produce of the estate could be based. The Principal Sudder Ameen, therefore, considered that no other course was left to him but to fall back on the jummabundee papers, which he observes had been put into the Collector's office by the putwaree.

While the case was before the Principal Sudder Ameen under the order of remand, Beharee Lall, whose guardian Soondureee Debia had brought this action, filed a petition in Court on 29th April 1867, stating that he had nothing to do with the property, that the real owner was Bisto Chunder Chatterjee; that he was the party beneficially interested; that the former litigation had been carried on at his expense and for his benefit; that he was in possession; and that he, the petitioner, now that he had come of age, had given an ikrarnamah to that effect to Bisto Chunder. A petition to the same purport was filed by Bisto Chunder, who filed the ikrarnamah, and on 4th May 1867, the Principal Sudder Ameen directed that his name should be entered as a joint-plaintiff with the original plaintiffs to the suit. Two petitions of objection on the part of the defendants, dated respectively the 7th May and 10th July, were presented, but the Principal Sudder Ameen appears to have passed no orders upon them.

The appeal before us may be divided into two heads—*first*, as regards the admission of Bisto Chunder as a co-plaintiff; and, *second*, as to the mode of determining the amount of *mesne-profits*. These two heads embrace every thing that was argued before us.

We think both the grounds taken by the appellants must be given against them. The mortgage, for some reason best known to the parties, was drawn up in the names of Mohesh Chunder and Gopeenath, for whom the defendants had professed to take the loan. It was necessary, therefore, that both the action for possession after foreclosure and the present suit should be brought in the names of the persons in whom the legal title was vested. For some reason best known to the parties, it appeared advisable in the course of this suit to drop the *nom de guerre*, and to disclose the real mortgagee and plaintiff; and accordingly petitions by Beharee Lall and Bisto Chunder were presented, acknowledging that the former was only ostensibly the mortgagee, he representing his father Mohesh Chunder, and that the latter was the person beneficially interested. It is urged that, on such a disclosure being made, the suit should have been dismissed, for Bisto Chunder had not verified the plaint, which by law he was required to do, and the present statement was directly at variance with the statement made in the former case, in which the plaintiffs, who then represented Beharee Lall, had successfully contended that Mohesh and Gopeenath were the real mortgagees.

No doubt, the party beneficially interested has put himself into difficulty by the contrary statements made by him in the two suits. As the mortgage-bond was in the name of Mohesh Chunder and Gopeenath, the suits were, as is customary, brought in their names, and it would have been prudent for Bisto Chunder to have kept quiet and abstained from declaring himself till the present suit was determined, and we have now to consider whether, in consequence of his having made his disclosure, the suit should be dismissed. It is clear that the defendants are in no wise prejudiced by the disclosure. They cannot pretend that they were ignorant of the real party with whom they were dealing. The money claimed in this suit is really due by them to the party who has foreclosed the mortgage and taken possession of the property, and it is not denied that this person is Bisto Chunder. It is true that he has not complied with the requisition of the law which requires the party instituting a suit to verify the plaint, but there is no allegation that the claim is false or unfounded, and it would be a denial of justice were the suit to be dismissed on the technical ground now taken by the pleaders for the appellants. The parties in whose names the suit was brought, may be considered in the light of trustees for the person beneficially interested. There is, no doubt, an evasion of the law by the party really interested in the suit, for he has failed to verify the plaint as required by the law, and it is open to question whether suits brought in such a form should not be dismissed as defeating the object of the law, which is to enable a Court to have before it, and to deal with the parties actually concerned in the matter brought before it for trial. In the present case, however, there can be no doubt that the defendants, appellants, have not been injured by the course taken by the respondents, and that they knew with whom they were dealing, and therefore I reject this ground of appeal.

On the *second* objection taken to the judgment of the Lower Court, it appears to me that the estimate of mesne-profits has been formed on the best evidence before the Court; and though in the remand-order the High Court was not satisfied with the mode in which the accounts had been prepared, under the impression that other and better evidence could be procured, yet, as it is clear that nothing better has been brought forward by the appellants who could have proved the real assets of the estate, and there is on the record sufficient, though meagre, data upon which the Court can come to a conclusion, and upon which it has based its decree, we think there are no grounds for disturbing that judgment, and I dismiss the appeal with costs.

Glover, J.—I think, on the whole, that this appeal should be decided on its merits. I admit fully that the policy of the law is against secret trusts, and that parties, beneficially interested, should be made to disclose themselves. But in the present case no one has been deceived, nor has any injury been done to the defendant. Mesne-profits have been adjudged to be due from him; and, so far as he is concerned, it matters nothing whether or not the name of the beneficial owner is joined to that of the legal owner as co plaintiff.

There would be undoubtedly a want of verification in the plaint as amended, the new co-plaintiff not having been called upon to verify; and in ordinary cases this would, I conceive, be a fatal objection to the alteration; but here there is really no second verification required, for the facts are undisputed, and the only question for decision was the amount of mesne-profits collected. That mesne-profits were collected by the defendant, and that those mesne-profits were rightly payable to the party beneficially interested in the foreclosure-decree, there is no doubt. In this country, where transactions are so commonly "benamee," it would, I think, be hard measure to visit a case like the present, where there is no suspicion of fraud, with dismissal. The defendant knew of the "benamee" from the first; indeed, he tried to prove it in the foreclosure-suit, but failed, and cannot, therefore, say that he was or is in any way damaged by the fact that the ostensible mortgagees were not the real plaintiffs. In fact, he does not say so, but seeks to escape the consequences of a claim, just in itself, on a technical objection, which has nothing to do with the merits of the case.

This being so, I do not think that this defect in the judgment of the Principal Sudder Ameen, that is to say, his not adjudicating on the effect of the disclosure of the beneficial owner, is one which affects the merits of the case, and, therefore, under Section 350, Act VIII. of 1859, the appeal on this point should be disallowed.

As to the amount of mesne-profits, it appears to me that the Lower Court's order proceeded on sufficient evidence, and that no ground is shown for our interference.

I would dismiss the appeal with costs.

The 19th July 1868.

Present:

The Hon'ble F. B. Kemp and E. Jackson, *Judges.*

Application for certificate under Act XXVII., 1860—Evidence of members of the family—Account-books—Separation in estate—Presumption.

Case No. 147 of 1868.

Miscellaneous Appeal from an order passed by the Judge of Tirhoot, dated the 28th February 1868.

Jagun Kooer and others, *Appellants,*

versus

Rughoonundun Lall Sahoo and another, *Respondents.*

Baboo Romesh Chunder Mitter for Appellants.

Mr. R. T. Allan and *Baboos Unnoda Pershad Banerjee, Kalee Mohun Dass,* and *Mohesh Chunder Chowdhry* for Respondents.

In a case in which an application was made by the widow and mother of deceased (other relatives opposing) for a certificate under Act XXVII. of 1860, on the allegation that he had been separate in food and in estate from the other members of the family, and the application contained allegations which required to be very clearly accounted for, it was held that the applicants should have been allowed an opportunity of adducing evidence.

The evidence of members of the family would be the best evidence as to whether the parties were joint or separate; the account books would be simply corroborative.

Separation in dwelling and food would give rise in Hindoo law to a presumption of separation in estate.

Kemp, J.—This was an application for a certificate of administration under the provisions of Act XXVII. of 1860, to the estate of Baboo Lall. The applicants were the widow and the mother of the said Baboo Lall. The application was opposed by the heirs of Beharee Lall, the uterine brother of Keshoo Lall, the father of Baboo Lall. The application was made on the allegation that Baboo Lall died in 1268; that he was separate in food and in estate from the other members of the family; that the profits of the zemindary and of the muhajunee karbar were credited in certain banking firms in Durbangah and Mozuffurpore in the following proportions, namely, four annas in the name of Baboo Lall, four annas in the name of the objectors, and eight annas in the name of Lalljee and others; and that each party drew out sums as occasions required in proportion to the shares above stated. It is admitted that the share of Lalljee is separate.

The question raised in this case was whether Baboo Lall was separate in estate or joint.

The Judge, without enforcing all the processes for the attendance of the witnesses authorized by the law, appears to have tried the case on the suggestion of the objector that it might be probably disposed of without taking evidence. The Judge, after hearing the argument of the pleaders, has held that the applicants are not entitled to obtain a certificate, inasmuch as he was not satisfied that Baboo Lall was separate as alleged. In special appeal, it is contended that the Judge is wrong in disposing of the case without taking any evidence at all, and that the inference and presumptions of law drawn by the Judge are wrong.

We are of opinion that this case must be remanded. There are certain allegations in the petition applying for a certificate which, in our opinion, would require to be very clearly accounted for before the certificate ought to be granted.

In the first place, it is alleged that Baboo Lall separated in estate in 1264, when he was admittedly a minor. There is nothing to show that his natural guardian, his mother, obtained a separation on his behalf. There is also admission that Baboo Lall arrived at majority in 1268, and that he died very shortly after. There is also the fact that no application for a certificate was made until seven years had expired after the death of Baboo Lall, and it has not been shown who was in possession of Baboo Lall's estate during those seven years; and the two applicants for a certificate, who represent the interest of Baboo Lall's estate, inform the Court that they were away on a pilgrimage during that period. All these are points which require to be cleared up. It may be that the applicants for a certificate, if they were permitted to adduce evidence, would be able to do so, and the case must be remanded to give them an opportunity of doing so.

The Judge must enforce the attendance of the witnesses, and exhaust every process of law to ensure their attendance.

There are certain presumptions of law in the Judge's decision which require remark. In the first place, the Judge says that the account-books of the firm would be the very best evidence to prove the separation, and that the evidence of co-partners in the firm would be but secondary evidence. We would observe that the account-books of the firm would be simply corroborative evidence, and the evidence of the members of the family as to whether the parties were joint or separate would be the best evidence.

The Judge is also wrong in saying that no presumption whatever arises of a separation from the fact of an admitted separation in dwelling and food. We would observe that such separation, though not conclusive evidence of a separation in estate, would give rise in Hindoo law to a presumption of separation in estate.

The case is remanded for re-trial with reference to the above remarks.

The 11th July 1868.

Present:

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble Dwarkanath Mitter, *Judge*.

Attachments under Section 236, Act VIII., 1859—Money payable to sirdars as wages of coolies.

Reference to the High Court by the Deputy Commissioner, exercising the powers of a Judge of the Small Cause Court, of Darjeeling, dated the 26th June 1868.

Sujjeewan, *Plaintiff*,

versus

Gopal and another, *Defendants*.

Money payable to sirdars as the wages of coolies over whom they are sirdars does not constitute a debt to the sirdars, but debts to the coolies themselves, even where a sirdar is entitled by custom or contract to have the wages of coolies paid to him, in order that he may deduct the amounts due to him by the coolies for food supplied. Money payable as above is, therefore, not attachable under Section 236, Act VIII. of 1859, in execution of a decree against the sirdar.

Case.—FINDING upon a question of fact called for in the orders of the High Court, dated the 18th April 1868, on a reference made by this Court in this case.

The order of the High Court is contained in the following words:—

"If, by virtue of contract or of a custom "upon the basis of which the coolies were "hired, the sirdar is entitled to have the "wages of the coolies paid to him, so that "he may deduct the amounts due to him "from the respective coolies for food, &c., "supplied by him to them, and the coolies "are not entitled to receive the money "direct from the Government officers, the "money so payable would be money pay-"able to the sirdars, and the Government "officers would not be justified in paying "it direct to the coolies. This is a ques-"tion of fact, and, before we can give any "definite opinion upon the law, we must "have a definite finding upon the fact."

On receipt of a copy of the proceedings of the Court containing the above order, Major Perkins, R.E., the Government officer, who held certain moneys alleged to be due to the sirdars (debtors), and who, for reasons which formed the basis of the reference to the High Court, declined to pay these moneys into Court, was called upon to declare the custom which obtained in his department in reference to the payment of moneys due to coolies.

* * * * * * *

As Major Perkins' reply might not be held conclusive, he was requested to furnish a nominal roll of coolies serving under Gopaul sirdar on or just previous to the order of this Court attaching money due to the said Gopaul, with a view of their being examined.

Major Perkins, on the 5th June (instant), stated that an endeavour was being made to get the names of the coolies concerned, adding: "The practice explained in para. 4 "of this office-letter No. 149, dated 20th May "1868, has not been universal throughout "the division, and had not been adopted "with reference to the coolies working on "the bazaar section of the Hill Cart "Road."

Nine of the coolies of Buddul Singh, one of the debtors of Sujjeewan, plaintiff, were, on this Court's orders, produced, and their statements were recorded. They—one and all—admitted that the claim of Sujjeewan was a fair one, and that the Court was at liberty to satisfy the said claim from the sum to be realized on their account from Major Perkins. One of their number, who was examined at length, deposed as follows:—

Indroban: "I am the coolie of Buddul "Singh. I have been four months his coolie. "I take my pay from the sirdar. We do "not get our food from the moodee direct. "The sirdar gets it from the moodee, "and deducts it from our pay. This is "the custom. The sirdar used to get our "food from Sujjeewan moodee. This is "Sujjeewan moodee. There were 26 or 25 "coolies with Buddul Singh. We have left "Major Perkins' service. It is three months "since we left. We are now with Mr. "Mann. Our pay was decreed. We have "not got our pay. We have, therefore, left "Major Perkins' service."

Major Perkins has left the district, and the nominal roll called for has not been submitted.

Finding.

I find that, by virtue of custom, a sirdar of coolies in this district is entitled to have the wages of coolies paid to him, so that he may deduct the amounts due to him from the respective coolies for food, &c., supplied by him to them. I have arrived at this conclusion from the statements of nine of the coolies of one of the debtors (Buddul Singh), in the case of Sujjeewan, plaintiff, *versus* Gopal and Buddul Singh, and the letter on the subject received from the objector, Major Perkins. The coolies, who, in the present instance, are parties principally concerned, freely admitted this custom.

Major Perkins contended that, in his department at least, this custom did not prevail. The following admission on his part, however, goes far, in my opinion, to prove that he is mistaken:—

"I acknowledge no agreement, either ex-"pressed or implied, that the actual wages of "the coolie shall be paid into the sirdar's "hands. But I admit that the custom is "so to pay, and that the coolies appear to "have some private understanding with "the sirdars which disinclines them to re-"ceive direct payments."

The question is not what Major Perkins acknowledges as binding on himself, but what the custom of the district is.

Major Perkins, in a further portion of his letter, states: "Native employés of my "own are kept on, who prepare, also daily, "a nominal roll of each gang. At the end "of the month, this nominal roll shows the "number of days worked by each man, and "is available for reference. On pay-days "(twice a month) the whole gangs are "mustered at the pay-office with their sir-"dars at the heads of their gangs. The "due of each gang in presence of the gang "is handed to the sirdar."

I believe that the nominal rolls, when kept at all, are kept as a check on the sirdars, quite as much in regard to the Government accounts as with a view of ensuring the payment of his due to each coolie. Further, the fact that the money is paid through the sirdar shows that there are other accounts to settle besides the claim of the coolies on Government. It is reasonable to suppose that these other accounts consist of the claims of the sirdars on the coolies.

The circumstance that the sirdar is expected to settle with the men before each gang breaks off does not in the least affect the point in issue. This supposition is more than confirmed by the belief which Major Perkins himself expresses that the reason of the coolie declining a direct payment is that he arrives from Nepal without credit and with but little, if any, knowledge of Hindoostani, and that he is then glad of the assistance of a sirdar who probably puts him under advances. The mere fact that this custom, for custom it assuredly is, is not recognized by the employer, appears irrelevant.

The judgment of the High Court was delivered as follows:—

Peacock, C. J.—We are of opinion that the attachment cannot be maintained. It is "of "all moneys which are or may become payable "to the debtors, whether on their own person-"al account or on account of coolies over whom "they are sirdars." Moneys payable to the sirdars on account of the coolies could not be attached. Nothing more could be attached than the money payable to the sirdars on their own personal account. The finding is that, by virtue of custom, a sirdar of coolies is entitled to have the wages of coolies paid to him, so that he may deduct the amounts due to him by the respective coolies for food supplied by him to them. There is no finding that Major Perkins hired the coolies upon the basis of that custom; but, putting that fact out of the question, it is clear that, according to the custom, the contract is not made with a sirdar to pay him so much a month or fortnight, as the case may be, for providing so many coolies, but that the contract is for wages to the coolies themselves, which are

payable to the sirdar in order that he may deduct what is due by the coolies to him. Even if the contract had been entered into upon the basis of the custom found, the wages of the coolies did not constitute a debt to the sirdars, but debts to the coolies themselves, which for a certain purpose might be paid into the hands of the sirdar.

From the statement of Major Perkins, to which reference is made by the Judge of the Small Cause Court, it appears that the wages are not paid into the hands of the sirdars in the absence of the coolies, but that the gangs are mustered with their sirdars at their heads, and that the amount due in respect of each gang is handed over to the sirdar, the object, no doubt, being that the sirdar, after retaining what might be due to him from each of the coolies, should pay over the remainder of the wages to each coolie.

Looking at the custom as found, and rejecting the statement of Major Perkins, which is not legally in evidence, we are of opinion that, under the circumstances, Major Perkins was not indebted to the sirdars, and, therefore, that the wages were not attachable under Section 236. The money was, however, attached under Section 237. The finding does not bring the case within that Section. We can only answer questions of law which are referred to us upon facts distinctly found, and there is no finding that Major Perkins had any moneys in his hands. Even if the fact had been found that Major Perkins had been supplied by the Government with money for the purpose of paying the expenses of public works entrusted to his charge, such money would not, in our opinion, fall within the word "deposit" within the meaning of Section 237.

If it could be shown that any one or more of the coolies was or were indebted to the sirdars for supplies furnished to them by the sirdars, the amount due from each coolie to the sirdar, and for which he had a lien on such coolie's wages, might be attached. But the amounts so due from all the coolies constituting the gang could not be attached in the general way attempted by the attachment actually issued. It would be very mischievous, and would probably stop the supply of labor for public works, if the whole of the wages of the coolies could be attached in the manner proposed in satisfaction of a decree against their sirdar. This is borne out by the statement of the cooly Indroban, which is forwarded with the finding. He says: "We have left Major "Perkins' service. It is three months since. "We are now with Mr. Mann. Our pay "was decreed. We have not got our pay. "We have, therefore, left Major Perkins' "service." By the words "our pay was decreed," we understand him to refer to the attachment of the coolies' pay under the decree against Buddul Singh.

In cases like the present, distinct questions of law should be propounded.

The 13th July 1868.

Present:

The Hon'ble F. B. Kemp and E. Jackson, *Judges.*

Sale of mortgaged property in execution—Right of purchase.

Case No. 327 of 1868

Special Appeal from a decision passed by the Judge of Rungpore, dated the 2nd December 1867, affirming a decision passed by the Officiating Principal Sudder Ameen of that District, dated 3rd June 1867.

Brojo Kishoree Dossia (Defendant), *Appellant,*

versus

Mahomed Suleem (Plaintiff), *Respondent.*

Baboo Issur Chunder Chuckerbutty for Appellant.

Baboos Romesh Chunder Mitter and *Kishen Dyal Roy* for Respondent.

Where the rights and interests of a mortgagor were sold in execution of a decree declaring the mortgaged property liable for the mortgaged debt, it was held that a putneedar, who had obtained a pottah from the mortgagor subsequent to the mortgage and in violation of its conditions, had no right or title to hold possession against the purchaser.

The purchaser in such a case buys the rights and interests of the judgment-debtor as they stood at the time of the hypothecation, and not as they stood at the time of the sale.

Jackson, J.—This was a suit brought by a purchaser of the rights and interests of a mortgagor at a sale in execution of a decree, which declared the mortgaged property liable for the mortgage-debt, and to oust the defendant, a putneedar, who had obtained a putnee-pottah from the mortgagor subsequent to the mortgage, and in violation of the conditions contained in the mortgage-deed forbidding alienation of any sort.

The Lower Appellate Court has decreed the claim. I am of opinion that that Court was right in law. The purchaser did not,

Baboo Issur Chunder Chuckerbutty for Respondent.

The proceeding of a Court Ameen in a sub-division where he has no jurisdiction cannot be a legal proceeding or legal evidence.

Bayley, J.—We dismiss this special appeal with costs. The Lower Appellate Court has held that the *jummabundee* made by a Court Ameen of Zillah Pubna in a suit under Section 10, Act VI. of 1862, B. C., is not legal evidence in this suit, inasmuch as the lands were in Serajgunge, and the Ameen had no jurisdiction out of Pubna.

The pleader for the special appellant urges that the case in Volume VII., Weekly Reporter, page 170, relied upon by the Lower Appellate Court, does not apply to this case, and that *that* case referred only to suits under Section 20; whereas this case should properly come under the provisions of Section 19, under which the Deputy Collector would have authority to proceed with the suit.

I am, however, of opinion that, as it is clear that the Court Ameen of Pubna would have no jurisdiction in another sub-division, *viz.*, that of Serajgunge (he being simply Court Ameen of the one locality, and not of the other), his proceeding cannot be considered as made with jurisdiction, and cannot, therefore, be a legal proceeding or legal evidence in a suit.

In this view, I would dismiss this special appeal with costs.

Macpherson, J.—I concur.

The 8th June 1868.

Present:

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble Dwarkanath Mitter, *Judge*.

Sale in execution—Setting aside of decree on review—Writ of elegit—Writ of fieri facias.

Case No. 3302 of 1867.

Special Appeal from a decision passed by the Additional Judge of Chittagong, dated the 14th September 1867, affirming a decision passed by the Moonsiff of that District, dated the 2nd March 1867.

Jan Ali (Defendant), *Appellant.*

versus

Jan Ali Chowdhry (Plaintiff), *Respondent.*

Mr. C. Gregory and *Baboo Rajendronath Bose* for Appellant.

Mr. R. E. Twidale for Respondent.

A *bonâ-fide* sale under a decree is binding, notwithstanding the decree may be set aside upon review.

Of the two kinds of execution in England, *viz.*, a writ of *elegit* and a writ of *fieri facias*, when property is delivered under the former to an executor, in order that he may satisfy his judgment by collecting the rents of the estate, the reversal of the judgment puts an end to the plaintiff's title; but in case of a *fieri facia.* the sale by the Sheriff to a *bonâ-fide* purchaser under a decree is not affected by the reversal of the decree.

Peacock, C. J.—The decision of the Revenue Court has been set aside by the Revenue Court itself. It is contended on the part of the plaintiff that, as that decree has been set aside, there is no foundation for the sale to the auction-purchaser, and consequently that he, the plaintiff, against whom the decree was originally passed, is entitled to recover the lands sold under that decree.

It has been held* that a sale under a decree to a *bonâ-fide* purchaser is valid, notwithstanding that decree may be reversed upon appeal, and it seems to follow that a *bonâ-fide* sale under a decree set aside upon review, is equally binding. The authorities cited by Mr. Justice Norman fully bear out the opinion which he expressed in that case.

* *See* VII. Weekly Reporter, Civil Rulings, page 312.

There were two kinds of execution in England: one, a writ of *elegit*, under which property was delivered to the executor in order that he might satisfy his judgment by collecting the rents of the estate; and the other, a writ of *fieri facias*, under which the Sheriff was directed to levy the amount by seizure and sale of the defendant's goods and chattels. In the case of a sale under a writ of *fieri facias*, it was held by the Court of Common Pleas, and affirmed in error by the Court of King's Bench after several arguments, that the sale to a *bonâ-fide* purchaser under a decree was not affected by a subsequent reversal of the decree. But the delivery to the judgment-creditor under an *elegit* is different, and it was held that the reversal of the judgment put an end to the plaintiff's title under the *elegit*. There is good ground for the distinction, and as it is important to advert to the distinction, we think it right to refer to the reasons which were given by the Courts in each of the two cases.

One of these cases is Matthew Manning's case, 4 Coke's Reports, page 96. It was resolved in that case that the sale by the Sheriff by force of the *fieri facias* should stand, although the judgment was afterwards

reversed, and that the plaintiff in the writ of error should be merely restored to the value, for the Sheriff who made the sale had lawful authority to sell, and by the sale the vendee had an absolute property in the chattel purchased; and although the judgment, which was the warrant of the *fieri facias*, was afterwards reversed, yet the sale, which was a collateral act done by the Sheriff by force of the *fieri facias*, should not be avoided; for the judgment was that the plaintiff should recover his debt, and the *fieri facias* was to levy it of the defendant's goods and chattels, by force of which the Sheriff sold the chattel, as he well might, and the vendee paid money to the value of it.

It was remarked that, if the sale of the chattel should be avoided, the vendee would lose his chattel, and his money too, and thereupon great inconvenience would follow; that none would buy of the Sheriff goods or chattels in such cases, and so execution of judgments (which is the life of the law in such case) would not be done.

The other case to which reference is made by Mr. Justice Norman is that of Goodyere *versus* Ince, Coke's Reports of the times of James 1st, page 246. The Court there held that "there was a difference between "the sale and delivery upon an *elegit* to the "party himself and a sale to a stranger "upon a *fieri facias*; for the *fieri facias* "gives authority to the Sheriff to sell and "to bring the money into Court; wherefore, "when he sells a term to a stranger, "although the execution be reversed, yet "he shall not, by virtue thereof, be re-"stored to the term, but to the moneys, "because he comes duly thereto by act in "law. But the sale and delivery of the "lease to the party himself upon an *elegit* "is no sale by force of the writ, which "being reversed, the party shall be restored "to the term itself."

We think that the distinction is founded upon reason and good sense, and that our decision must be in accordance with these authorities.

It is, therefore, necessary to decide whether the purchaser under the execution was a *bonâ-fide* purchaser, or whether, as alleged in the plaint, he was in collusion with the ijaradar, the plaintiff, in the revenue-suit.

The Court of first instance considered that, as the decree had been set aside, the plaintiff was entitled to succeed in this suit, whether there was fraud between the ijaradar and the purchaser under the decree or not, and he did not raise or try any issue as to whether there was any collusion or fraud. The Judge did try that question, but he tried it upon the evidence as it stood in the Lower Court, and neither of the parties, therefore, had an opportunity of calling witnesses upon that issue.

The main points upon which the Judge has found that there was fraud between the ijaradar and the auction-purchaser are, *first*, that enmity existed between the purchaser and the plaintiff; *secondly*, that Bhyrub Chunder, the naib of the ijaradar, was present at the sale; *thirdly*, the inadequacy of the price realized; and, *fourthly*, the ignorance in which the plaintiff was kept of the intended sale. I by no means intend to say that the Judge arrived at an erroneous conclusion of fact, but I think there was not in strictness any legal evidence to warrant it.

The case ought to be remanded, in order that the question of fraud and collusion between the auction-purchaser and the plaintiff in the decree may be tried. The case should go to the Judge in order that he may send it to the Moonsiff under Section 354 of Act VIII. of 1859, to try whether such fraud or collusion existed, and to return his finding, together with the evidence, to the Judge for final decision. Either party should be at liberty to adduce any evidence he may think fit upon the trial of that issue, and we think that the Moonsiff ought to be directed to summon all the parties to this suit, that is to say, the ijaradar, his naib, and the auction-purchaser; and, as it is suggested that there was collusion between the plaintiff and the ijaradar, we think the plaintiff should also be examined.

It does not appear what was done with the purchase-money paid by the auction-purchaser; whether any, and, if any, what portion of it, was paid out to the plaintiff in the rent-suit, or to the plaintiff, the defendant in that suit, and whether the auction-purchaser has ever obtained possession of what he purchased or taken any, and what, steps for that purchase, or whether the plaintiff in this suit, or the ijaradar, or the auction-purchaser has been in possession since the auction-purchase. We think these points must be enquired into by the Moonsiff, when the case goes back to him on remand from the Judge, as they have a material bearing upon the question of fraud.

The costs of this appeal will abide the result of the ultimate decision in the case.

The 23rd June 1868.

Present:

The Hon'ble F. B. Kemp and E. Jackson, *Judges.*

Ejectment—Section 23, Clause 5, and Section 78, Act X., 1859—Ex-parte decree by Collector—Revival of suit by successor—Section 58, Act X., 1859.

Case No. 232 of 1867 under Act X. of 1859.

Regular Appeal from a decision passed by the Deputy Collector of Howrah, dated the 20th May 1867.

Rughoo Mohinee Dossee (one of the Defendants), *Appellant,*

versus

Kasheenath Roy Chowdhry and others (Plaintiffs), *Respondents.*

Baboos Onookool Chunder Mookerjee and *Bhowanee Churn Dutt* for Appellant.

Mr. R. T. Allan for Respondents.

Case No. 340 of 1867 under Act X. of 1859.

Regular Appeal from a decision passed by the Collector of Howrah, dated the 26th August 1867.

Kasheenath Roy Chowdhry and others (Plaintiffs), *Appellants.*

versus

Shabitree Soonduree Dossee and others (Defendants), *Respondents.*

Mr. R. T. Allan for Appellants.

Baboos Onookool Chunder Mookerjee and *Bhowanee Churn Dutt* for Respondents.

Plaintiff sued defendant under Clause 5, Section 23, Act X. of 1859, for direct or *khas* possession of a farm (for which the latter had paid a *bonus*), stating that the contract between them was that, on default in payment of the farming rent as per *kistobundee*, a suit was to be instituted for the arrears, and in execution of the decree the lease was to be forfeited, and the plaintiff, the lessor, entitled to enter upon *khas* possession, unless the amount were paid within fifteen days. It was further urged that defendants, the lessees, had defaulted; that plaintiff had obtained decrees; and that defendants, having failed to pay within fifteen days, had violated the lease, and were liable to be ejected. HELD that the terms of the contract were in strict accordance with the provisions of Section 78, Act X., and that plaintiff ought to have brought his suit under that Section, and obtained a decree for ejectment. From the date of such decree specifying the amount of arrear, the lessors would have 15 days for payment.

Where defendants, against whom an *ex-parte* decree has been passed by a Collector, apply to his successor under Section 58, Act X., for a revival of the suit showing good and sufficient cause for their non-appearance, and that there has been a failure of justice, the successor is competent to alter or rescind his predecessor's decree according to the justice of the case.

Kemp, J.—THESE two appeals were heard together, and one decision will govern both appeals. In No. 232, one of the defendants below is appellant; in No. 340, the plaintiff is appellant.

The history of the case is as follows:—

The plaintiff sued the defendants for direct or *khas* possession of the farm for which the defendants had paid a *bonus* of 12,000 rupees, under Clause 5, Section XXIII., Act X. of 1859.

In the plaint it is stated that the contract between the lessor and lessees was that, on default in payment of the farming rent as per *kistobundee*, a suit was to be instituted, and a decree obtained for the arrears, in execution of which decree the lease was to be forfeited, and the plaintiff, the lessor, entitled to enter upon *khas* possession of the leased properties, unless the amount due were paid within fifteen days. It is further alleged that the defendants, the lessees, defaulted on various occasions; that the plaintiff sued and obtained decrees for the rent due; that, as the defendants have failed to pay in the rent due within fifteen days from date of the execution of the decree, they have violated the terms of their lease, and are liable to be ejected.

The suit in the first instance was dismissed on default under Section 64, Act X. of 1859, the plaintiff having failed to appear in person on the day appointed by the Collector.

The plaintiffs then applied, under Section 58, Act X. of 1859, for a revival of their suit, which application was successful.

The Deputy Collector of Howrah, Mr. Whinfield, on the 28th May 1867, gave the plaintiff a decree against the defendant Rughoo Mohinee, appellant in No. 232, who had appeared, as also *ex parte* against the defendants who had not appeared. By this decree, the plaintiff was declared entitled to eject the defendants, the lessees, and to take direct possession of the properties comprised in the lease.

Subsequently, the defendants, against whom an *ex parte* decree had been passed, applied under the provisions of Section 58 of Act X. of 1859, for a revival of the suit, on the ground that no summons had been

served on them, and that there had been a failure of justice, owing to a misconstruction of the counterpart of the lease under which the defendants held the farm.

The Collector of Howrah, Mr. Tottenham, revived the suit, and in his decision, dated the 26th August 1867, he dismissed the plaintiff's suit.

There are, therefore, two appeals to this Court, one by the plaintiff against the decision of Mr. Tottenham, dismissing his claim, and one by the defendant Rughoo Mohinee, against the decision of Mr. Whinfield.

Mr. Allan, pleader for the plaintiff, appellant in No. 340, contends in the first place that Mr. Tottenham had no jurisdiction to review the decision of his predecessor, Mr. Whinfield. We think there is no force in this contention. The defendants, against whom an *ex-parte* judgment had been passed by Mr. Whinfield, applied, under the provisions of Section 58, for a revival of the suit, and having shown good and sufficient cause for their non-appearance, *viz.*, that no summons had been served upon them, and Mr. Tottenham having found this fact to be proved, and further that there had been a failure of justice, he was competent, under the Section quoted above, to revive the suit, and to alter or rescind the decree passed by Mr. Whinfield according to the justice of the case. We now proceed to try the appeals on the merits.

It is clear that, under the provisions of Section 78, Act X. of 1859, the plaintiff was competent to sue for the ejectment of the defendants, and to cancel their lease, as well as for the recovery of any rent due, in the same action. The plaintiff in the present suit does not sue for any arrear of rent as due, nor has he adduced any unexecuted decree for arrears of rent as evidence of the existence of an arrear. It is, moreover, doubtful, taking into consideration the statement of the plaintiff's agent Debnath Bose, whether any arrear is really due. The plaintiff's suit is shaped according to the provisions of Clause 5, Section 23, Act X. of 1859. Whether the plaintiff is entitled to eject the defendants, and to assume direct or *khas* possession of the property leased to the defendants, depends entirely upon the construction to be put upon the terms of the contract or lease. Mr. Allan contends that parties are at liberty to contract themselves out of the letter of the law; and, without passing any opinion upon this point, it being unnecessary in this case to do so, we find that the terms of the kubooleut, which is admitted by both parties, are framed so as to bring the contract strictly within the purview of Section 78, Act X. of 1859.

We have carefully considered this document. It is right and proper that we should put a liberal construction on the terms of the contract, for Courts of Equity do not favor claims for the forfeiture of a lease, particularly of a lease for which a large *bonus* has been paid, so long as we do not depart from the intentions of the contracting parties to be gathered from the document itself, which is the evidence of such intentions.

The terms, in as far as they affect the decision of this case, are to this effect: "If "we, the lessees, default in payment of any "instalment of rent, you (the lessors), after "bringing a suit for direct possession of the "mourosee mokurruree ijarah for the pur-"pose of realizing the rents with interest at "the rate of one per cent. per mensem, and "after having obtained such a decree and "put it into execution, then if we, the les-"sees, within fifteen days after your obtain-"ing such a decree and putting it into force, "do not pay the amount due, the farm will "revert to the *khas* possession of you, the "lessors."

These terms are, we think, in strict accordance with the provisions of Section 78, Act X. of 1859. The plaintiff ought to have brought his suit under that Section. Under that Section, it is necessary for the Court to specify the amount of the arrear in its decree, for if such amount, together with interest and costs of suit, be paid into Court within 15 days from the date of the decree, the lessee or tenant cannot be ejected.

The plaintiff does not sue for any arrear of rent, nor does he, as already observed, adduce any unexecuted decree for arrears of rent as evidence of the existence of any arrear. If he seek to cancel the lease of the defendants, he must prove that they have broken the terms of their contract. He must show an arrear, and must obtain a decree under Section 78 for the ejectment of his lessees, and the lessees from the date of the decree, specifying the amount of arrear, if any due, will have fifteen days from the date of such decree within which to pay in the amount found to be due, and which must be

specified in the decree, and on their making such payment, they will protect themselves from ejectment.

The suit of the plaintiff in its present form has been properly dismissed by Mr. Tottenham, and improperly decreed by Mr. Whinfield.

The result is, that the appeal of the plaintiff to this Court is dismissed with costs payable by the plaintiff, appellant, and the appeal of the defendant Rughoo Mohinee is decreed with costs payable by the plaintiff, respondent.

The 13th July 1868.

Present:

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice*, and the Hon'ble Dwarkanath Mitter, *Judge*.

Contribution—Excess payment of Government revenue—Evidence of defendants—Section 170, Act VIII., 1859.

Case No. 2616 of 1867.

Special Appeal from a decision passed by the Officiating Judge of Midnapore, dated the 18th July 1867, affirming a decision passed by the Principal Sudder Ameen of that District, dated the 29th June 1866.

Hemanginee Dossee (Plaintiff), *Appellant*,

versus

Ram Nidhee Koondoo and another (Defendants), *Respondents*.

Mr. R. T. Allan and *Baboo Bhowanee Churn Dutt* for Appellant.

Baboos Ashootosh Chatterjee and *Roopnath Banerjee* for Respondents.

In a suit by one shareholder against his co-shareholders for contribution in respect of Government revenue paid for the estate, it is not necessary for plaintiff to prove that he paid the whole amount of the revenue; it is sufficient for him to prove that he has paid more than his share, and that his co-sharers have paid less than theirs.

When a plaintiff cites defendants as witnesses, and is unable to prove his case without them, his suit ought not to be dismissed without proof; but the procedure laid down in Section 170, Act VIII. of 1859, should be followed.

Peacock, C.J.—It appears to us that this case ought to go back to the Judge to be tried upon the merits. The Principal Sudder Ameen found that, although the plaintiff had not proved her title-deed, yet she had proved that she was in actual possession of the share which she claimed. We think the possession of that share was *primâ-facie* proof of her title to it. The suit tried by Mr. Hobhouse did not relate to this land. The Principal Sudder Ameen says: "The "plaintiff cannot produce any accounts of "credit and debit, or proof to show that she "herself paid the whole amount." But it is not necessary in a suit by one co-shareholder against his co-shareholders for contribution in respect of his having paid Government revenue for his estate to prove that he paid the whole amount of the revenue. It is sufficient for him to prove that he has paid more than his share, and that his co-sharers have paid less than theirs. That would entitle him to contribution upon proof of the amount paid.

The Judge says: "In a suit for contri- "butions of this nature, I think it is in- "cumbent on the plaintiff to prove that "the money she claims has really been "paid on account of the shares of those "persons whom she sues." To that extent he is right. But he goes on to say: "But "this she has not done in the present in- "stance, for she has not shown what the "defendants' (respondents') shares are, nor "does she sue all the co-sharers, and thus "make them all jointly liable for the "amount of her deposit."

Now, so far from her not showing what the defendants' shares were, it appears to us that that was scarcely disputed, and that there was proof of the respective shares of the defendants; and even if there was no legal proof, the defendants, if they had appeared as witnesses, might have been compelled to prove what their shares were. If the plaintiff had sued all the other sharers jointly, she could not have made them jointly liable for contribution, inasmuch as they were not jointly interested, but each was separately interested in his own share. As regards one of the shareholders whom the plaintiff does not sue, she says in substance that, having regard to the amount which he paid towards the Government revenue, and the amount which she was compelled to pay to make good the total amount, his share amounted to a certain sum which he had promised to pay. If he had paid the amount instead of promising merely to pay it, it is clear that he need not have been made a party to the suit. If the amount of his contribution is correctly stated and proved, the defendants will not be injured by the plaintiff's giving him credit upon his promise for the amount for which he is liable, inasmuch as it cannot affect the interests of the defendants, nor increase the shares for which they are respect-

rely liable to contribute. The Judge does not say that the plaintiff has not proved that she has paid more that her own share, and that each of the defendants has paid less than his, but he says that she has not shown what the respondents' shares are. The Judge has not examined the account produced from the Collector's office for the purpose of ascertaining the amounts paid by the respective shareholders. The document, if evidence and correct, would in all probability show what each of the shareholders paid. Admitting that it was not legal evidence without calling some one from the Collector's office to prove the fact of the payments therein credited, the plaintiff's suit ought not to have been dismissed. She called her own man of business to show the amount that she had paid. If she proved that the shareholder who was not sued had not paid his full share, and also what she paid, and what each of the two defendants paid, that would have enabled the Judge to decide what each of the defendants should contribute towards the excess which she paid; and this, as regards the defendants themselves, could not have been proved by more satisfactory evidence than their own depositions. They were actually summoned by the plaintiff as witnesses for the purpose of giving their evidence, but they failed to attend.

The Principal Sudder Ameen says: "On "remand by the Appellate Court, the plaintiff "has cited the defendants as witnesses, but "they have not made their appearance. As "the plaintiff's case has not been established, "she is not entitled to a decree simply by "reason of the defendants' failure to enter "appearance."

When the plaintiff cited the defendants as witnesses, and was unable to prove her case without them, her suit, at any rate, ought not to have been dismissed for want of proof. Section 170 of Act VIII. of 1859 points out the consequence of the non attendance or refusal of a party to the suit to give evidence.

It appears to us that it is not proper in a case when a party summoned to attend as a witness refuses to attend and give evidence, and the party who requires the evidence is unable to make out his case without it, that his suit should be dismissed for want of proof, when the points on which he fails depends upon matters of fact which may reasonably be presumed to be peculiarly in the knowledge of the defaulting parties; such for instance as in the present case, the extent of their own shares and the amounts which they had paid on account of revenue.

An appeal was preferred to the Judge, upon the ground that the suit had been dismissed when the defendants failed to attend and give evidence, and upon this part of the case the Judge appears to have fallen into an error. He thought that the Principal Sudder Ameen had refused to summon them, not considering it important that they should attend, whereas he summoned them, and they refused to attend. He says: "The "plaintiff (appellant) objects that the defend-"ants in the case should have been summoned "at her request. I do not find that the ap-"pellant showed any good grounds for her re-"quest. She did not satisfy the Lower Court "that the issue of the summons was necessary, "and that Court *refused the request on "grounds which seem to me to be good*, and "at any rate the appellant could not, with any "show of reason, expect the defendants to "prove her title, and without such proof "she could not succeed." What the grounds were which the Judge considered good grounds for refusing the plaintiff's request to summon the defendants we know not, inasmuch as there was no such refusal, and no grounds were or could be given for it.

The plaintiff's ground of appeal to the Judge from the Principal Sudder Ameen was, not that the Principal Sudder Ameen had refused to summon the defendants, but that they, having been summoned, neglected to attend. It is as follows: "In order to "prove my claim, I summoned the defend-"ants as my witnesses and agreed to rely "on their evidence, but the defendants "did not appear; under these circumstances, "the Lower Court ought to have decided "the case under Section 170, Act VIII. "of 1859." The Judge, therefore, appears to have misunderstood the case.

Further, he says "that the plaintiff could "not with any show of reason expect the "defendants to prove her title."

The appellant might have expected, with very good reason, that the defendants would prove her case if they spoke the truth, and she knew that they were liable to be punished if they should wilfully give false evidence. She had got her own man of business to prove what she had paid; she had got a copy of the Collector's accounts; and she might, therefore, very reasonably cite the defendants for the purpose of prov-

ing that, so far as they were concerned, the Collector's accounts were correct. It was not unreasonable to compel the attendance of the defendants to prove what their shares were, and what amounts they had paid on account of revenue.

The case must, therefore, go back to the Judge to be tried upon the merits, and that he may give a decision with reference to the ground of appeal to which we have referred, and in respect of which he has fallen into a mistake. The Judge must endeavour to arrive at the amount which each of the defendants is bound to contribute towards any excess of payment which the plaintiff may prove that she has made on account of the Government revenue beyond the amount of the proportion due in respect of the share of which she was in possession; but he cannot give a decree against the two defendants jointly. The amounts which the defendants will respectively have to contribute must be determined with reference to the excess, if any, which the plaintiff may prove that she has paid, having regard to the extent of the respective shares of the defendants and of the amounts which they have respectively paid.

Considering that this appeal might, and in all probability would, not have been necessary if the defendants had attended as witnesses in pursuance of the citation, they must pay the costs of this appeal.

The 15th July 1868.

Present:

The Hon'ble J. B. Phear and C. Hobhouse, *Judges.*

Non-payment of expense of notice—Sections 5, 6, and 7, Act XXIII., 1861—Construction of the words "cases of appeal and powers" in Section 37.

Case No. 238 of 1868.

Miscellaneous Special Appeal from an order passed by the Judge of the 24-Pergunnahs, dated the 12th March 1868, affirming an order passed by the Moonsiff of Baraset, dated the 18th December 1867.

Kalee Kisto Chunder and another (two of the Defendants), *Appellants,*

versus

Hureehur Chuckerbutty (Plaintiff), *Respondent.*

Baboo Mohendro Lall Shome for Appellants.

Baboo Kalee Kishen Sein for Respondent.

In a case in which a memorandum of appeal has been filed, but owing to the expenses of service not having been deposited, no notice had been served on the respondent, and he did not appear; the Judge, under Sections 6 and 7, Act XXIII., 1861, dismissed the appeal. About a month after this, the appellant presented a petition, explaining the reasons of his default, and praying that on payment of the *tullubanna* his appeal should be restored, but the Judge rejected the prayer.

HELD, that the application to have the appeal re-heard was essentially one for a review of judgment, and the decision of the Judge rejecting it was final.

HELD, further, that Section 37, Act XXIII., 1861, does not make Section 7 applicable to cases in which the Appellate Court has dismissed the appeal under Section 6, as the words "cases of appeal" apply solely when the actual subject of appeal is before the Court.

The word "powers" in Section 37 is not synonymous with "jurisdiction." Especially with reference to the use of that word in other parts of the Act, and in Act VIII., 1859, it does not comprehend jurisdiction.

Phear, J.—IN this case it seems that the memorandum of regular appeal was duly filed in the Judge's Court on the 15th of January 1868. It was apparently preferred by the defendant against the decree of the Court of first instance. The 7th of February 1868 was fixed for the hearing of the appeal, and proper orders seem to have been given for the service of notice thereof upon the respondent within the provisions of Section 345, Act VIII. of 1859. The appellant, however, failed to deposit the requisite money for the expenses of the service of notice according to the rules of Court in this respect, and consequently no notice ever was served. This was discovered to be the case when the appeal came on for hearing, as it did in due course, after the time fixed in the notice for that purpose, namely, the 17th of February 1868. Thereupon the Judge, as the respondent did not appear, exercising the power in that behalf given to him by Sections 5 and 6 of Act XXIII. of 1861, as he says, "struck off the appeal," but more correctly in the terms of the Act, "dismissed the appeal." About a month after this occurrence, the appellant presented a petition to the Judge, explaining the reasons of his default, and praying that upon payment of the necessary *tullubanna*, and so on, his appeal should be restored to its place and proceeded with. But the Judge, without taking any notice of, or considering the matter of, the excuse in the petition, refused to grant the prayer, solely on the ground that the petition came too late. Against this decision of the Judge, that is, against the decision rejecting this petition, not against

the decision by which he dismissed the appeal under Section 6, Act XXIII. of 1861. an appeal is now brought before this Court. And the first question which arises is whether an appeal lies or not.

The vakeel for the appellant has argued that an appeal does lie on the following grounds: first, he says that the application to the Judge for the restoration of the appeal was regular, because it was made in conformity with the provisions of Section 7, Act XXIII. of 1861, and because this Section was, by the operation of Section 37 of the same Act, made applicable to "cases of appeal," within which category it is clear that the Judge's order dismissing the appeal falls. Then, he says, it has been decided that an appeal lies against an order passed under the provisions of Section 7 and Section 5 of Act XXIII. of 1861, in the same manner that it does against an order refusing re-admission of an appeal made under Section 347 of Act VIII. of 1859, and, in support of this, he refers to the case which is reported in the 3rd Volume of the Weekly Reporter, page 23, Miscellaneous: therefore, by parity of reasoning, it must lie against an order of rejection passed under Sections 7, 6, and 5 of the Act. And, thirdly, as an authority for maintaining that an appeal lies against a decision refusing re-admission of an appeal under Section 347 of Act VIII. of 1859, he cites the case reported in Volume II. of the Weekly Reporter, page 23, Miscellaneous Rulings, acquiesced in by the Judges in another case which is reported in the same Volume, page 253 of the Civil Rulings. In this way, he very logically makes out that an appeal does lie to this Court in this case.

I am of opinion, however, that each one of the 3 links in the chain of his reasoning is faulty. In the first place, I do not think that Section 7 is made applicable to cases in which the Appeal Court has dismissed the appeal under the provisions of Section 6, Act XXIII. of 1861. The words of Section 37 are: "Unless otherwise provided, the Appellate Court shall have the same powers in "cases of appeals which are vested in the "Courts of original jurisdiction in respect "of original suits." I have some difficulty in satisfying myself as to what the Legislature precisely meant, when they used the word "powers" in this Section, but be the meaning of that word what it may, assuming only, as I believe I am justified in doing, that it is not synonymous with "jurisdiction," I think that the following words "in cases of appeal" do not comprehend that stage of proceedings which succeeds upon an order being made under Sections 6 and 5. It appears to me that those words apply solely to cases where the actual subject of appeal is before the Court and being dealt with. Now, in the present case, the appeal itself was entirely at an end. The Judge had dismissed it. He had passed a final order between the parties under the extraordinary powers given him by Section 6 and Section 5 of Act XXIII. of 1861. I say extraordinary powers, because, strictly speaking, at the time that he passed the order under those Sections, there was no appeal before him. There was only a memorandum of appeal filed. No respondent had been brought before the Court, and had it not been for the express words of the Sections to which I am now alluding, the utmost that the Court could have done would have been to dismiss the memorandum or petition of appeal. It could not have passed an order which would be of final effect between the parties. However, the words of the Section empower the Court, as it seems to me, actually to pass a final order between the parties as if an appeal were regularly before the Court, and there were both an appellant and a respondent who could be affected by the order of the Court. The Section empowers him to dismiss the appeal, and, accordingly, the appeal was dismissed. The subsequent application for the re-admission or re-hearing of the appeal, whatever be the foundation of the jurisdiction of the Judge to entertain it, was not an application in the original appeal. It was an application subsequent to it. It was an application of the nature of an application for review, and we have already had a decision of a Full Bench of this Court, pronouncing a decision of a Court which rejects an application for review to be no judgment in appeal. I am of opinion, then, that the petition of the appellant to have his appeal re-admitted, although it had been finally disposed of, and the decision of the Judge refusing to grant his application, constitute matter *dehors* the appeal, although it may well be that it was matter disposed of by the Court in the exercise of its appeal-jurisdiction.

Turning now, with these views, to the words of Section 37, I consider that the giving the Appellate Court the same powers *in cases of appeal* as are vested in Courts

of original jurisdiction *in respect of original suits* does not apply to cases where the subject, which is being dealt with by the Court, is not the actual appeal itself, and cannot, therefore, be rightly treated as standing in an analogous position to that of the original suit itself.

Also I am further disposed to think, on like grounds, that the power given by Section 11 of Act XXIII. to Courts of original jurisdiction, upon the contingency in the Section mentioned "to order a fresh summons to issue upon the plaint already filed" does not strictly come under the designation given in Section 37, namely, a "power "vested in a Court of original jurisdiction in "respect of original suits."

Having arrived at the foregoing conclusions, I am of opinion that Section 37 does not have the effect of making Section 7 of the same Act applicable to cases where the Appellate Court has passed an order under Section 5 and Section 6 dismissing the appeal.

It would seem, therefore, that the application to the Judge seeking to have the appeal re-heard, against which the appeal to us is now made, was essentially an application for a review of judgment: and, as such, the decision of the Judge rejecting it was final.

If this view be correct, I think it entirely disposes of this case. At any rate, it renders it unnecessary for me to go into the further argument of the appellant which was directed to demonstrating that an appeal lay against an order made under Section 7, Act XXIII. of 1861. But if it had been necessary to have gone further, I should have felt myself at liberty to disregard, in this case, the decision to which the appellant referred us, and which is reported in 3 Weekly Reporter, Miscellaneous, page 23, because the judgment there given, couched as it is in very concise terms, does not necessarily appear to have been pronounced upon a case similar to the present. So far as the learned Judges who decided that case judicially interpreted any of the Sections of Act XXIII. of 1861 and Act VIII. of 1859, they seem, from the words used by them, to have confined their attention to Sections 5 and 6 of Act XXIII. of 1861, and orders made under them. They appear not to have had in contemplation a further and subsequent order supposed to be passed under Section 7. No doubt, this limitation of their decision to these two Sections only makes the reference to Section 347 of Act VIII. somewhat obscure, and is in some degree inconsistent with what appears in the latter part of their judgment, where the Judges give their opinion upon the merits of the case. But I think it probable that the attention of those learned Judges was, in fact, directed more to the merits of the case which, in truth, was made the foundation for their dismissing the appeal, than to the legal question which is apparently so lightly passed over by them; and this is my chief reason for thinking that we ought not to feel ourselves bound to treat this decision as a binding authority with regard to the law-point upon which it may seem to bear. But apart from any possible inference which may be drawn from this decision, I see no sort of reason why orders rejecting an application for re-hearing in the cases contemplated by Sections 5, 6, and 7 of Act XXIII. should, in the absence of express legislation on the point, be considered necessarily to be in the same position relative to appeal as like orders under Section 347 of Act VIII. In the one set of cases there is no respondent before the Court, and in the other there is. And this distinction alone is sufficient to destroy the supposed analogy, or, at any rate, to prevent it being strong enough to give any appeal where the Legislature has not said that there shall be an appeal.

And I may add that whether or not there is an appeal against orders passed under Section 347 is a matter which at present rests solely on the second authority quoted by the special appellant, namely, the decision of a Bench of this Court which is given in 2 Weekly Reporter, Miscellaneous, page 23, and which lays down that an appeal lies from a decision given under the provisions of Section 347 of Act VIII. of 1859; and this has, in effect, been overruled by the decision of the Full Bench, which I have already quoted. For that Full Bench in express terms decided that an order made, as an order under Section 347 must necessarily be made *after* the appeal has been disposed of, is not an order made in appeal: and it was on the basis of an order under Section 347 being an order made in regular appeal that the Judges who decided the case in Volume II., Weekly Reporter, page 23, Miscellaneous Rulings, placed their judgment.

I desire further to say that, had I not taken the view which I have taken of the meaning of the words "in cases of appeal," which appear in Section 37 of Act XXIII.

of 1861. I should still have had very great difficulty in coming to the conclusion that Section 37 had the effect of applying Section 7 to cases within the appellate jurisdiction of a Court in addition to cases of original jurisdiction, to which it seems to be limited by its own words. For it is observable that Section 6, which comes between Section 5 and Section 7, expressly makes the provisions of Section 5 applicable to *appeals*. The inference from this Section, taking into consideration its relative position to the preceding and succeeding Sections, in my mind, is this, that the Legislature, when framing this Section, did distinguish between "appeals" and "appellate jurisdiction," and did purposely abstain from enacting that Section 7 should be applicable to *appeals*, which, in my view, would have involved an absurdity. If, however, they had intended to use "appeals" in the sense of "appellate jurisdiction," and also to apply Section 7 to cases of the latter, I should have expected that the words of Section 6, instead of coming where they do, would have followed Section 7, instead of the applicability of Section 7 being left to depend upon the operation of the later Section 37, while that of Section 5 was cared for by Section 6. And, moreover, it is obvious that, if Section 37 operates to apply the provisions of Section 7 in the way contended for, it must also apply Section 5 to appeals: and consequently there was no need of having Section 6 at all, because all that is done by Section 6 is done equally well by Section 37. I cannot, therefore, think that the Legislature really intended Section 7 to have the effect which is attributed to it, and I should further be rather disposed if it was necessary, to say that the powers vested in Courts of original jurisdiction spoken of in Section 37 mean powers vested otherwise than by the words of the Act. No doubt, even with this limitation, an opening is afforded to the special appellant in this case for argument leading to a result which would apparently be favorable to him, namely, that even supposing Section 37 of Act XXIII. of 1861 does not render Section 7 applicable, it still will, by the interpretation which I have just mentioned, make Section 119, Act VIII. of 1859, applicable, and that latter Section, after giving the opportunity to the plaintiff against whom a decree by default has passed to apply to the Court within 30 days from the date of the judgment for an order to set it aside, says that, "in all appealable cases in which the Court shall reject his application, an appeal should lie from the order of rejection to the tribunal to which the final decision in the suit would be appealable." And the appellant in this case might say that, as he has the benefit by virtue of the interpretation of Section 37 which I have just mentioned, he thereby gets the benefit of Section 119 of Act VIII. of 1859 in its entirety; and consequently, if the Judge, upon his application made under this Section, rejects it, he has a right, under the same Section, to appeal to this Court.

However, it seems to me that the use of the word "powers" in Section 37 has the effect of rendering this argument nugatory. The utmost that Section 37, by the use of that word, can mean is to give powers of action to the Appeal Court, such as the Court of original jurisdiction enjoys under the first portion of Section 119 of Act VIII. of 1859; for it seems to me that it can have no applicability to the latter portion of that Section. The latter portion of Section 119 does not give powers to the Court of first instance trying and dealing with original suit. It gives powers, if it all, to an Appellate Court; and Section 37 only purports to give powers to an Appellate Court such as are vested in a Court of first instance. It does not give powers to an Appellate Court in one class of cases, which are vested in an Appellate Court in another class of cases. And so, even giving the appellant the advantage of the interpretation of Section 37, which I have last mentioned, and which I by no means think is the proper interpretation of the Section, he does not, in my opinion, obtain thereby the right to say that the latter part of Section 119 of Act VIII. of 1859 is applicable to his case.

On the whole, then, it seems to me, for every reason, that the decision of the Judge in this case is one which we cannot touch upon appeal. I think that no appeal from it lies to this Court. It is not necessary for me now to say whether the Judge had any jurisdiction to entertain the appellant's application, or, if he had, whether he has properly entertained it, and exercised due judicial discretion with regard to it. I think that this appeal should be dismissed with costs, on the ground that we have no jurisdiction to entertain it.

Hobhouse, J.—I agree in the judgment delivered by Mr. Justice Phear in this case. It seems to me that the first question is to see whether the Judge, who heard this case

in appeal, had jurisdiction to hear it; because, if he had jurisdiction, so have we: and if he had not jurisdiction, so have not we jurisdiction—jurisdiction, of course, I mean, within the provisions of Section 7, Act XXIII. of 1861. The case before him was simply this. He dismissed an appeal under Section 6, Act XXIII. of 1861, for default of the appellant to pay any money for service of process. Having done this, the appellant appeared before him within 30 days after the order of dismissal, and under Section 7 of that Act asked him to entertain the question whether he was satisfied that there was some sufficient cause for not having made the deposit required within the proper time. The Judge did so, and held that the appellant had not shown sufficient cause for his failure, and therefore he dismissed the application; and it is with reference to this order that the special appeal is made before us.

It seems to me that, reading Section 7 and Section 37 of Act XXIII. together, there was no jurisdiction in the Lower Court under these Sections; neither is there jurisdiction in this Court to entertain the appeal. The question seems to me to turn entirely upon the use of the word "power" in Section 37. If the word "power" comprehended the word "jurisdiction," then I think we should be in a position to entertain the special appeal. But it seems to me that the word "power," especially with reference to the use of that word in other parts of the Act and in Act VIII. of 1859, does not comprehend jurisdiction. The word "powers," as used in Section 358, Act VIII. of 1859, is used in regard to powers for granting time, for adjournment of hearing, for examination of parties and pleaders, for awarding costs, &c., but the word is not used in the sense of jurisdiction. For instance, it seems to me, and that has been ruled by a decision of this Court, that the word "powers" in Section 37 would comprehend the power to grant an appellant the liberty to bring a fresh suit; but it does not, in my judgment, comprehend jurisdiction. I hold, then, upon the reading of Section 7 and Section 37, Act XXIII. of 1861, together, that we have no jurisdiction to entertain this appeal, and I agree in dismissing it with costs.

The 15th July 1868.

Present:

The Hon'ble G. Loch and F. A. Glover. *Judges.*

Damages—False charge—Special appeal.

Special Appeals from a decision passed by the Judicial Commissioner of Chota Nagpore, dated the 1st September 1867, modifying a decision passed by the Deputy Commissioner of Lohardugga, dated the 15th April 1867.

Case No. 3329 of 1867.

Banee Madhub Chatterjee (Defendant), *Appellant,*

versus

Bholanath Banerjee (Plaintiff), *Respondent.*

Baboo Sham Lall Mitter for Appellant.

No one for Respondent.

Case No. 3254 of 1867.

Heera Chand Banerjee (Plaintiff), *Appellant,*

versus

Banee Madhub Chatterjee (Defendant). *Respondent.*

Baboo Greeja Sunkur Mojoomdar for Appellant.

Baboo Sham Lall Mitter for Respondent.

In a suit for damages on account of a false charge and consequent arrest, in which the Court of first instance found that there were probable and reasonable grounds for bringing the charge, and the Lower Appellate Court took a different view of the evidence, it was HELD that the difference of view was not a subject for special appeal.

The amount of damages to be awarded is a question for a Jury to decide, and one with which the High Court cannot interfere in special appeal.

Loch, J.—THE plaintiff is special appellant in case No. 3254. He sued for damages, on the ground that the defendant had brought a false criminal charge of breach of trust against him, and had caused him to be

arrested, and had thereby injured his reputation. The Lower Appellate Court awarded Rupees 200 as the measure of damages, and costs in proportion.

In special appeal, the plaintiff urges that the amount of damages awarded is insufficient to compensate him for the injury he has suffered in purse and pocket, and he urges that the award of proportionate costs is ruinous to him, as the case has been backward and forward in appeal more than once, and he prays that the Court will make the defendant pay his own costs.

In case No. 3329, the defendant is special appellant. He urges that the criminal charge was not maliciously brought; that the first Court found that there were probable and reasonableg rounds for bringing that charge; that the Lower Appellate Court, while reversing the finding of the first Court on this point, had not in any way met the arguments of the first Court.

This case came up in special appeal to the High Court on a former occasion, and it was remanded to give the defendant an opportunity to rebut the evidence or presumption of malice, by showing that he had reasonable and probable cause for making his accusation. The first Court held that a reasonable and probable cause was established by the evidence then given. The Lower Appellate Court took a different view of the evidence, and considered that the defendant had failed to show that he had reasonable and probable cause for charging the plaintiff criminally with breach of trust. He, therefore, gave plaintiff a decree for Rupees 200 as damages.

We find no reason for admitting the special appeal on any of the grounds stated in appeal No. 3329, the whole point of the appeal resting upon the view taken of the evidence by the Judge in the Lower Appellate Court, which differs from that of the Judge of the first Court; and this is not a subject for a special appeal. Appeal No. 3329 is consequently dismissed with costs.

In appeal No. 3254, a passage from Sedgwick on Damages is quoted to show that the measure of damages is a question of law to be disposed of by the Court, and therefore there is good ground for a special appeal. We think that the amount of damages to be awarded is a question for a Jury to decide, and here the Lower Court, sitting as a Jury, has fixed the sum which it considers to be a sufficient compensation to the plaintiff. With that order we do not think we can interfere in special appeal. The appeal is dismissed with costs.

The 15th July 1868.

Present:

The Hon'ble G. Loch and Dwarkanath Mitter, *Judges.*

Act I., 1841, and Section 14, Act XXIII., 1861—Presumption—Auction-sale in execution.

Case No. 2317 of 1867.

Special Appeal from a decision passed by the Judge of Sylhet, dated the 12th June 1867, affirming a decision passed by the Officiating Principal Sudder Ameen of that District, dated the 18th February 1867.

Abdool Juleel (Plaintiff), *Appellant,*

versus

Khellat Chunder Ghose (one of the Defendants), *Respondent.*

Mr. R. T. Allan and *Baboo Onookool Chunder Mookerjee* for Appellant.

Mr. C. Gregory and *Baboos Unnoda Pershad Banerjee* and *Debendro Narain Bose* for Respondent.

Act I. of 1841 and Section 14, Act XXIII. of 1861, are not applicable to permanently-settled estates in Sylhet or (unless extended) to the estates in any district in Bengal.

The law of pre-emption cannot apply to an execution-sale by public auction where the neighbour or partner has an opportunity to bid.

Loch, J.—We think that Section 14 of Act XXIII. of 1861 and Act I. of 1841 are not applicable to permanently-settled estates in Sylhet, and that, unless these Acts have been extended, they are not applicable to the estates in any district of Bengal.

We think that the Judge was right in rejecting the plea of the special appellant that he had a right of pre-emption under Act I. of 1841 and under Section 14 of Act XXIII. of 1861, as contended for in the first ground.

On the second ground taken by the special appellant, that he is entitled as a co-sharer under the general law of pre-emption to have the property sold to him, we think that, where property is sold by public auction at a sale in execution of a decree, and the neighbour or partner has an opportunity to bid for the property as other parties present in Court, the law of pre-emption cannot apply to such sales. We dismiss the appeal with costs.

The 15th July 1868.

Present:

The Hon'ble F. B. Kemp and E. Jackson, *Judges.*

Enhancement of rent—Ryots with rights of occupancy — Ejectment—Section 21, Act X., 1859.

Case No. 192 of 1868 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of Dinagepore, dated the 18th November 1867, affirming a decision passed by the Deputy Collector of that District, dated the 31st August 1867.

Raj Mohun Neogee and others (Plaintiffs), *Appellants,*

versus

Anund Chunder Chowdhry and others (Defendants), *Respondents.*

Baboo Greeja Sunkur Mojoomdar for Appellants.

Baboos Bhugobutty Churn Ghose and *Kishen Dyal Roy* for Respondents.

While a suit for enhancement of rent is pending, defendant is not liable for interest, inasmuch as his rent is undetermined; but after the rent is determined, he is liable to interest for all arrears from, and for all instalments after, that date.

By Section 21, Act X., 1859, a ryot with a right of occupancy can be ejected in execution of a decree under the rent-law.

Jackson, J.—This was a suit for arrears of rent with interest and also for ejectment of the tenant. Both Courts have decreed the claim for arrears of rent, but have dismissed the claim for interest, and ejectment, and the special appeal to this Court is on the point that the plaintiff is entitled both to interest and to ejectment. It appears, as regards interest, that there was a suit for enhancement of rent pending between the parties; and we are clearly of opinion that, while that suit lasted, the defendant is not liable for any interest, inasmuch as his rent was during that time undetermined; but we see no sufficient reason for rejecting his application for interest after the rent was determined. The defendant was then bound to pay his rent according to the decree, and he is liable to interest for all arrears from that date and for all instalments due after that date.

As respects the question of ejectment, the first Court appears to have treated the defendant as a lease-holder coming under Section 22 of Act X. of 1859. That Court decided that he held under a transferable lease, and that the plaintiff even had admitted the transferable nature of his lease by putting it up for sale in execution of a decree, and upon this view dismissed the claim for ejectment. The Judge on appeal appears to have treated the defendant as a ryot with a right of occupancy, and, following a former decision of this Court, has held that the ryot could not be ejected.

Section 21 of Act X. of 1859 rules that a ryot with a right of occupancy can be ejected in execution of a decree or order under Act X. of 1859. The Judge, therefore, was wrong in the law which he has laid down. Even if the defendant was, as he states, a ryot with a right of occupancy, he would still be liable to be ejected. But we think that the Judge was altogether wrong in law in treating the defendant as a ryot. The defendant had claimed to be a lease-holder, and the first Court found that he was a lease-holder, and a lease-holder with a transferable interest, and that the plaintiff had treated him as such; and it does not appear that there was any appeal to the Judge as regards the *status* of the defendant. The appeal to him was on the ground that, although the plaintiff had treated the defendant's interests as transferable, still they were not transferable. Although, then, the Judge's decision is wrong in law on the question of ejectment, the orders which he has passed dismissing the claim to eject are correct.

But we think that the Judge is wrong in the orders which he has passed about interest, and we hold that the defendant is, under the circumstances of the case, liable for interest from the date of the decree fixing his rent. The decree of the Lower Court will be amended on the point of interest.

Each party will pay his own costs in this appeal.

The 16th July 1868.

Present:

The Hon'ble H. V. Bayley and A. G. Macpherson, *Judges.*

Section 260, Act VIII., 1859—Mortgage—Redemption.

Case No. 199 of 1867.

Regular Appeal from a decision passed by the Principal Sudder Ameen of Gya, dated the 3rd June 1867.

Jokhee Lall and Buhoree Lall (Plaintiffs), *Appellants,*

versus

Mussamut Huns Kooer (Defendant), *Respondent.*

Messrs. R. T. Allan and *R. E. Twidale* and *Baboo Sreenath Dass* for Appellants.

Baboos Kishen Kishore Ghose and *Unnoda Pershad Banerjee* for Respondent.

The purchaser of immoveable property sold in execution of a decree of a Civil Court got a certificate under Section 259 of Act VIII. of 1859, and subsequently sued for possession of that which he had purchased. HELD that the defendant (who was in possession) was by Section 260 debarred from pleading that he himself was the real purchaser, and that the purchase was *benamee* for him in the name of the plaintiff, the "certified purchasers."

The purchaser of an equity of redemption sued to redeem and obtain possession of the land. HELD that he was entitled to possession, if, on taking the accounts, it appeared the mortgage-debt had been liquidated before the plaint was filed—or upon paying into Court within one month the balance remaining due, if, on taking the accounts, it should appear that anything still remained due.

Macpherson, J.—GUNGA PERSHAD TEWAREE, being the holder of a decree against Brijo Lall Oopadhya (which decree had been originally obtained by one Ajoodhya Pershad), in execution of the decree attached and sold a decree for mesne-profits which Brijo Lall Oopadhya held against one Motee Soonduree. At the sale, the appellant, Buhoree Lall, became the purchaser.

Buhoree Lall, being thus the holder of Brijo Lall's decree against Motee Soonduree, took out execution of it, and attached and sold the right, title, and interest of Motee Soonduree in the Talook Doodhur in Pergunnah Siris (which is the subject of the present suit), and at the sale became himself the purchaser of it.

Motee Soonduree's share (8½ annas) of Doodhur had previously, in 1844, been mortgaged by way of zur-i-peshgee lease to Brijo Lall Oopadhya, who was put in possession, and remained in possession, until his death (which occurred before the institution of the present suit). From the time of his death, the respondents, the widow and minor son of Brijo Lall's son Bechun, who died before his father, have been and still are in possession.

The present suit is brought by Buhoree Lall for redemption, and to recover possession of the property mortgaged, and for an account—his allegation in the plaint being that the mortgage-debt has been liquidated from the usufruct. The plaint, however, contains a further prayer that, if any portion of the mortgage-debt is found, on taking the accounts, to be still due, the plaintiff may be decreed to be entitled to possession on bringing into Court the balance due.

In their written statements, the respondents, the widow and son of Bechun, state that throughout the proceedings which have been referred to, as well as other proceedings to which it is unnecessary to refer in detail, both Gunga Pershad Tewaree and Buhoree Lall acted merely benamee for Brijo Lall Oopadhya, and that the purchase of Motee Soonduree's rights, though made in Buhoree Lall's name, was, in fact, made by, and for the benefit of, Brijo Lall. The written statement further alleges that the mortgage-debt has not been satisfied, and pleads that the plaint is inconsistent and bad as regards the prayer for possession on depositing the balance due in the event of its turning out that a balance still is due.

The Lower Court (most improperly, and notwithstanding many decisions of this Court that such a course is wrong, and not warranted by the Code of Civil Procedure) allowed the plaintiffs to put in a written statement by way of reply to that of the defendants. The most important point raised in this reply is that, under Section 260 of Act VIII. of 1859, the defendants cannot plead that Buhoree Lall, who obtained the certificate as auction-purchaser, was not the real purchaser, but bought merely *benamee* for Brijo Lall.

The Principal Sudder Ameen held that Buhoree Lall did purchase merely *benamee* as alleged, and that the defendants were entitled to plead this fact, Section 260 notwithstanding; and he dismissed the plaintiff's suit.

In appeal before us, the appellants contend (amongst other things) that the Lower Court was wrong in law in holding that the defendants could plead that Buhoree Lall bought *benamee* for Brijo Lall, and

wrong also in finding as a fact that he was only a *benameedar*.

As regards the question of fact, we arrive at the same conclusion as the Lower Appellate Court, and substantially for the same reasons. We have no doubt that Buhoree Lall was not the real purchaser, but that the purchase was made by Brijo Lall in the name of Buhoree Lall.

The question of law is one of greater difficulty. Various cases have been referred to in argument, and at one time it appeared to us that there existed a conflict of decisions which would render a reference to a Full Bench necessary; but a consideration of the several judgments showed that there was no conflict. The point turns on the construction to be put upon Section 260 of Act VIII. of 1859. That Section enacts that "the "certificate shall state the name of the "person who, at the time of sale, is declared "to be the actual purchaser, and any suit "brought against the certified purchaser on "the ground that the purchase was made on "behalf of another person not the certified "purchaser, though by agreement the name "of the certified purchaser was used, shall "be dismissed with costs."

It is argued that, although a suit brought *against* the certified purchaser is to be dismissed, there is nothing in this Section which, in the case of a suit brought by a certified purchaser, prevents the defendant from pleading that the purchase was made by him and on his behalf, though by agreement the name of the certified purchaser was used. And it is contended that, although, if the certified purchaser had once succeeded in getting possession, the defendants could not have successfully sued to eject him on the ground that they had themselves made the purchase *benamee* in the name of the certified purchaser, still the defendants being in actual possession, and the certified purchaser coming into Court as plaintiff, the defendants can plead that he bought for them, and that the purchase is, in fact, theirs.

The point now raised has never, so far as I can ascertain, been decided.

In the case of Shurosutty Dossee *vs.* Gopee Soonduree Dossee, where a third party disputed the plaintiff's right to sue on the ground that she was not the certified purchaser, the Chief Justice, in delivering judgment (to the effect that, as it was not the certified purchaser, but a stranger, who sought to take advantage of Section 260, that Section did not form any bar to the plaintiff), said that the object of Section 260 was to prevent disputes between a certified purchaser and a person claiming that the certified purchaser purchased *benamee* for him.

The case reported in 1 Weekly Reporter, page 328, has really no bearing on the question we have now to decide. The same remark may be made of another case relied upon, *viz.*, that reported at page 130 of 3 Weekly Reporter. In that case, the sale to the certified purchaser was declared to be clearly fraudulent as made collusively between him and the judgment-debtor. In the present instance, there is no element of fraud, so far, at any rate, as the certified purchaser and the judgment-debtor are concerned.

An unreported case, decided on the 19th of August 1865 (by Trevor and Glover, JJ.), has also been quoted, but nothing is there decided which has any bearing on this case, although it may be inferred from the judgment that the respondent's Counsel were of opinion that a defence such as that raised by the respondents now before us is good. That was a case under Section 36 of Act XI. of 1859, which is in substance similar to Section 260 of Act VIII.

Section 36 of Act XI. of 1859 provides that "any suit brought to oust the certified "purchaser on the ground that the purchase "was made on behalf of another person not the "certified purchaser shall be dismissed with "costs." A question similar in many respects to the one now before us arose under that Section some time ago before Mr. Justice Seton-Karr and myself. The main difference in the position of the parties is that, in that case, the certified purchaser had, in the first instance, got possession, and was subsequently ousted by the defendants, who pleaded that they were the real purchasers, though the name of the certified purchaser had been used. We decided (so far as this point was concerned) in favor of the certified purchaser, being of opinion that "the fact that the "plaintiff is, by reason of what has occurred, obliged to come into Court to recover "possession, does not, as it seems to us, "alter the position of the parties so as, in "any way, to deprive the plaintiff of any "benefit which he might have had under "Section 36, if this suit had been brought "against him as defendant to oust him, the "certified purchaser, on the ground that the

purchase was made on behalf of another person not the certified purchaser." (Jadub Ram Dutt *versus* Ram Lochun Muduck, 5 Weekly Reporter, page 56.)

The opinion thus expressed by us appears to me still to be right; and, if it is, it is applicable equally to the present case, making every allowance for the difference existing in the circumstances under which the parties respectively appear in Court. It seems to me that the object of the Section 260, which, as has been decided, is to prevent disputes between a certified purchaser and a person claiming that the certified purchaser purchased *benamee* for him, would be very much defeated if the defendant could make use of those facts by way of defence, which he could not make use of in order to prove his case if he came before the Court as plaintiff.

In the view of the law which I take, it is clear that the plaintiffs, as entitled to the equity of redemption which was in Motee Soonduree, have a right to redeem the mar-i-peshgee mortgage, and to recover possession, if it appear, upon taking the accounts, that the whole mortgage-debt has been liquidated. With this declaration, we remand the case to the Lower Court to take the accounts. If, upon taking the accounts, a balance still appear to be due to the defendants (the representatives of the mortgagees), the plaintiffs will be entitled to possession if they deposit the money in Court within one month from the date on which such balance is declared by the Lower Court.

The costs of this appeal, and those incurred in the Lower Court heretofore, will depend upon the result of the remand. The plaintiffs, however, will not in any event recover costs, unless, upon taking the accounts, it appears that the mortgage-debt had been paid off in full before the present suit was instituted.

Bayley, J.— I concur in the order proposed. Looking to all the cases cited, and to the terms of Section 260, I think the provision of the Section applies to a defendant's case in the same way as to a plaintiff's.

The 16th July 1868.

Present:

The Hon'ble L. S. Jackson and F. A. Glover,

Judges.

Issues in rent-suit — Section 65, Act X., 1859.

Case No. 63 of 1868 under Act X. of 1859.

Special Appeal from a decision passed by the Officiating Judge of Midnapore, dated the 8th November 1867, affirming a decision passed by the Deputy Collector of that District, dated the 13th September 1867.

Sreehuree Mundul (one of the Defendants), *Appellant,*

versus

Judoonath Ghose, Surburakar of Sunnyashee Churn Mundul, and others (Plaintiffs), *Respondents.*

Baboos Onookool Chunder Mookerjee and *Rash Beharee Ghose* for Appellant.

Baboos Ashootosh Chatterjee and *Hem Chunder Banerjee* for Respondents.

In a suit for enhancement of rent, during the trial of which plaintiff, being unable to show that notice had been served, fell back on his claim for rent at the rate formerly paid, and an issue, as to what that rate had been, was framed on the date on which Collector gave judgment, and when only two witnesses remained for examination:

HELD that, under Section 65, Act X., 1859, the Collector's duty was not only to frame an issue, but to fix a "convenient day" for the trial of that issue, regard being had to the facilities which the parties may have had for producing their evidence.

Jackson, J.—THIS case, as originally brought in the Collector's Court by the plaintiff, was a suit for the enhancement of the defendant's rent.

The plaintiff alleged that the defendant held a certain quantity of land for which he had to pay rent at the rate of 19 rupees 6 annas yearly, and that, upon certain specified grounds, he had given notice to the defendant to pay rent at an enhanced rate, and in accordance with that notice he now sued to recover rent at the rate specified.

The defendant in his written statement alleged that the quantity of land which he held was less than that stated by the plaint-

iff, and he also alleged that the rent was not 19 rupees and 6 annas, but 10 rupees 15 annas.

It was found, on coming to trial, that the plaintiff was unable to show that notice had been served on the defendant as required by law.

On this discovery, the plaintiff fell back upon his claim for rent at the rate formerly paid.

It seems that there was no express issue framed as to what the former rate of rent had been, until the case had been twice heard, and several of the witnesses and parties on both sides had been examined. But on the date on which the Collector gave judgment, and when only two witnesses remained for examination, a fresh issue on that point was framed, the remaining witnesses were examined, and the Collector gave judgment for the plaintiff at the old rate of rent as alleged by him.

On appeal to the Zillah Judge, the defendant objected that, as the suit was framed by the plaintiff, on his failure to prove his right of enhancement, the suit ought to have been dismissed altogether. He also objected to the mode of trial, and to the finding as to the rent formerly paid. The Judge, however, affirmed the judgment of the Court below.

Two objections have been argued before us. They are—

1st.—That there was no fair trial as to the original rate of rent paid by the defendant, the defendant having, with regard to the trial of that issue, been taken by surprise.

2nd.—That the judgment of the Lower Appellate Court, which is based entirely on the zemindary-papers adduced by the plaintiff, is based on legally insufficient evidence.

On the second of those points, we have but little difficulty, because we observe that there was oral evidence on the part of the plaintiff as to the amount of rent; and although the Judge does not expressly refer to that evidence, we have no doubt that he had it under his consideration, and that his judgment was partly based on it.

The other question is one on which, after some consideration, we think that the appeal ought to prevail.

The directions as to the mode of trial and framing of issues under Act X. are somewhat different from those prescribed by the Civil Procedure Code. Act X. appears to contemplate suits before the Collector of two categories. One in which the question at issue is of an extremely simple kind, capable of being decided upon the evidence adduced in the first instance, and where the Collector can give judgment at once. In such cases, after hearing the evidence, and without the framing of any formal issues, the Collector is able to pass a decree.

But Section 65 provides—

"If, on such examination as aforesaid, it "appear that the parties are at issue on any "question upon which it is necessary to "hear further evidence, the Collector shall "declare and record such issue, and shall "fix a convenient day for the examination "of witnesses and the trial of the suit; and "the trial shall take place on that day, "unless there be sufficient reason for ad-"journing it, which reason shall be recorded "by the Collector."

It seems to me, therefore, that, where the Collector finds that there is a point on which the parties are at issue, and on which further evidence will be required, his duty is not only to frame such issue, but to fix a "convenient day" for the trial of that issue, regard being had to the facilities which the parties may have for producing their evidence.

It would clearly not be fair, and not in accordance with the provisions of that Section, for the Collector, having first framed certain issues, and having examined the parties or their witnesses in connection with those issues, suddenly, upon the day of trial, to frame a new issue of fact demanding proof on either side, of which the parties had no notice, and as to which, consequently, they could not be prepared with their evidence.

It is impossible for us to say, as the matter comes before us in special appeal, whether defendant, who appeals, could have produced further evidence or not.

It is sufficient for the purposes of this appeal to say that possibly he might have been able to do so, and as the plaintiff can be in no wise prejudiced by affording the defendant an opportunity of producing that evidence, and as the defendant might be seriously prejudiced by not being afforded such opportunity, we think it right to set aside the

ecision of the Lower Appellate Court, and remand the case in order that the defendant may have the opportunity of producing idence to show what the rate which was rmerly paid by him may have been, and course the plaintiff will also be at liberty produce any further evidence which he ay think necessary.

The 16th July 1868.

Present:

The Hon'ble L. S. Jackson and F. A. Glover, *Judges.*

Arbitration—Section 313, Act VIII., 1859.

Case No. 371 of 1868.

ecial Appeal from a decision passed by the Principal Sudder Ameen of Manbhoom, dated the 28th December 1867, modifying a decision passed by the Moonsiff of Chatna, dated the 31st August 1867.

Bykuntnath Chatterjee (Plaintiff), *Appellant,*

versus

aikh Nuzurooddeen and others (Defendants), *Respondents.*

aboo Bungshee Dhur Sein for Appellant.

Baboo Rash Beharee Ghose for Respondents.

An application for arbitration as provided by Section 3, Act VIII., 1859, is wholly invalid, unless made by the parties materially interested.

Jackson, J.—THIS is a case in which the bject of the suit before the Moonsiff was ferred to arbitration.

The Moonsiff saw reason to set aside the ard given by the arbitrators; but on peal, the Judge reversed that decision, and ve judgment in accordance with the ard.

It is unnecessary to enter into the grounds set forth in the petition of special appeal against the Judge's decision, because it is manifest that the order of reference to arbitration is void. It appears that the application for this purpose was not concurred in by all the defendants, inasmuch as one defendant, who had a substantial interest in the suit, did not apply.

We think that there can be no doubt that an application for arbitration, as provided by Section 313 of Act VIII. of 1859, must be made by *all* the parties who are materially interested; and in this case, the reference having been made to arbitration upon an application not by all the parties, was wholly invalid and must be set aside.

The case must, therefore, be remanded to the Zillah Judge in order that he may determine the appeal upon other grounds.

The 16th July 1868.

Present:

The Hon'ble L. S. Jackson and F. A. Glover, *Judges.*

Co-sharers—Joint property.

Case No. 287 of 1868.

Special Appeal from a decision passed by the Judge of Moorshedabad, dated the 29th November 1867, reversing a decision passed by the Moonsiff of that District, dated the 20th July 1867.

Gooroodoss Dhur and others (Defendants), *Appellants,*

versus

Bejoy Gobind Bural and others (Plaintiffs), *Respondents.*

Baboo Rajendurnath Bose for Appellants.

Baboo Bhuggobutty Churn Ghose for Respondents.

A co-sharer in landed property has no right to do any thing (*e.g.*, commence a building) which alters the condition of the joint property, without the consent of his co-sharers.

Jackson, J.—WE think that the decision of the Lower Appellate Court in this case is quite correct.

A co-sharer in landed property has no right to do any thing which alters the condition of the joint property, without the consent of his co-sharers. If he thinks his interest in the property might be improved by works of a particular character, he can effect a partition and improve his particular share.

It seems in this case the plaintiff interposed when the defendant commenced the infringement of his (plaintiff's) rights. The suit was reasonable, and the Judge was quite right to order the removal of the materials of the building and the building itself as far as it had gone.

The special appeal is dismissed with costs.

The 16th July 1868.

Present:

The Hon'ble L. S. Jackson and F. A. Glover, *Judges.*

A byragee's rights—Hindoo Law—Civil Courts.

Case No. 336 of 1868.

Special Appeal from a decision passed by the Judge of Sylhet, dated the 9th December 1867, reversing a decision passed by the Moonsiff of that District, dated the 30th July 1867.

Juggunnath Paul (Plaintiff), *Appellant,*

versus

Bidianund Dutt and others (Defendants), *Respondents.*

Baboo Bama Churn Banerjee for Appellant.

Mr. C. Gregory and *Baboo Debender Narain Bose* for Respondents.

If a Hindoo, becoming a *byragee*, chooses to retain possession of, or to assert his right to, property to which he is entitled, he does an act in which he will not be restrained by the Courts.

Jackson, J.—THE plaintiff in this case was a co-sharer in certain joint immoveable property. It seems that some years previous to the institution of the suit, the time being variously stated as from 10 or 11 to 13 or 14 years, the plaintiff became a *byragee*, and, as he says, "relinquishing the world" (or "*shungshars*"), set out on a pilgrimage to various places sacred among the Hindoos.

He alleges that, before his departure, he made over his share of the family property to the care of his nephew Bidianund, otherwise called Thakoordhone, stipulating only that in the event of his return the property was to revert to him.

During his absence, Bidianund seems to have sold the property to one Fyezoollah, since deceased, who was the husband of the defendant Soobuk Beebee, now in possession.

The plaintiff, therefore, sued to recover possession of such property as is withheld from him by the defendant.

The Moonsiff, before whom the case first came, held that the plaintiff's allegation being found to be true, he was entitled to regain possession of his property, notwithstanding that he had become a *byragee.*

The Judge, on appeal, held, on the contrary, that the plaintiff, having become a professed *byragee*, was thereby civilly dead, and that his nephew, as heir, thereupon entered on immediate enjoyment of the property, and consequently the defendant's vendor had a complete title, and the plaintiff's suit must be dismissed.

The defendants, it should be mentioned, had also set up the plea of limitation, contending that the plaintiff having been out of possession without any trust for more than 12 years, his suit was barred; but the Judge considered that limitation did not apply. The plaintiff now appeals specially, and urges that the Judge's view of Hindoo Law is incorrect.

It appears to us indisputable that a Hindoo becoming a *byragee*, if he chooses to retain possession of, or to assert his right to, property to which he is entitled, does an act which may be *morally* wrong, but in which he will not be restrained by the Courts.

If, therefore, it were clear that the plaintiff, on quitting his home, had made over his share of the property in trust to his nephew, and that the nephew, in violation of such trust, had sold that property to the defendant, we should have no hesitation in reversing the decision of the Judge, and ordering possession of the property to be given to the plaintiff. But, before we can do this, the question of limitation must first be disposed of.

The female defendant denies that any trust existed in respect of this property, and she alleges that at the time, and in consequence of the plaintiff becoming a *byragee*, the nephew did, in fact, as of right, take possession and hold adversely to the plaintiff, and subsequently sold the property to her husband, and that such adverse holding has continued for more than 12 years. The plaintiff's evidence is to the contrary, but the Judge has not found distinctly on this point.

It is, therefore, necessary to remand the case to the Lower Appellate Court in order that he may find whether, as alleged by the plaintiff, the defendant's vendor held this property in trust for the plaintiff; or, as alleged by the defendant, adverse possession had continued for more than 12 years. In the latter event the suit must be dismissed; if otherwise, the plaintiff is entitled to a decree.

d

The 16th July 1868.

Present:

The Hon'ble J. B. Phear and C. Hobhouse, *Judges.*

Decree prejudicial to reversioners—Allegation of fraud—Onus probandi.

Case No. 2911 of 1867.

Special Appeal from a decision passed by the Principal Sudder Ameen of Backergunge, dated the 16th August 1867, affirming a decision passed by the Moonsiff of Madareepore, dated the 20th August 1866.

Gresh Chunder Chatterjee and another (two of the Defendants), *Appellants,*

versus

Mohesh Chunder Nyalunkar (Plaintiff), *Respondent.*

Baboos Romesh Chunder Mitter and *Otool Chunder Mookerjee* for Appellants.

Baboo Bungshee Dhur Sein for Respondent.

N, as reversionary heir of the former proprietor and as now entitled to possession on the death of that proprietor's mother, sues for land in the possession of *C*, who obtained it by purchase at a sale in execution of a decree passed on a bond granted by *O*, which bond and decree are alleged by *N* to be fraudulent and collusive transactions.

HELD that the burden is on the plaintiff to prove that the decree was fraudulently obtained.

Phear, J.—IN this suit, the plaintiff seeks to recover from the defendants certain lands, which, he alleges, formerly belonged to one Ooma Sunker, and of which, he says, he is entitled to the possession and enjoyment as reversionary heir of Ooma Sunker on the death of Ooma Sunker's mother, Bissessuree. The plaintiff further states that the defendants have obtained possession, and are in possession, of this property by virtue of a purchase which they made at a sale in execution of a decree obtained against Bissessuree upon a bond granted by Ooma Sunker; but he adds that this bond and this decree were collusive and fraudulent transactions, carried out for the purpose of depriving him, the heir, of the property. The defendants admit the heirship of the plaintiff, but maintain that the bond and the sale in execution of the decree are perfectly good.

On this state of facts, the burden obviously is on the plaintiff to prove that the decree, in execution of which the sale took place, at which the defendants purchased, was fraudulently obtained, in order to deprive him of the property. If the decree be a valid one, if the suit in which it was made was a real one, the sale held in execution of that decree was undoubtedly operative to pass the property of the judgment-debtor, and it would pass the property against the reversionary heirs. The reversionary heir, therefore, can only succeed by showing that that decree was obtained in fraud of him; and the Principal Sudder Ameen, in reciting what had taken place in the Lower Court, rightly says that the plaintiff, upon his right to inherit being established, was at liberty to call in question the decrees and the sale under which the property had been sold and had been bought by the defendants. But he seems to have lost sight of this consequence on that state of things, that it became incumbent on the plaintiff, in fact, to set aside that decree before he could succeed in this suit. We have had some doubt in our minds whether the Lower Appellate Court did really in the end make any great mistake in the placing of the burden of proof, although it seemed at first to approach the question with the intention of putting the *onus* upon the defendant. At any rate, the Principal Sudder Ameen does state side by side, as far as we understand him, the evidence brought forward by the plaintiff and the defendants, respectively, in support of their respective allegations, and he has come to the conclusion that the defendants have not proved the *bona fides* of their case, which was, no doubt, an unnecessary conclusion for him to come to in the first instance; but, on the other side, he seems also to have arrived at the conclusion that the plaintiff had proved that the transactions impeached were fraudulent, and ought to be set aside. We have had the evidence on the record bearing upon this issue read out to us, we believe, *in extenso*, and we certainly think that, whatever amount of suspicion it may be calculated to throw with regard to the bond, it is very far short, indeed, of being sufficient to make out that the decrees upon the bond were obtained by collusion in order to defraud the plaintiff.

There is no legal evidence, in our opinion, upon the record sufficient to entitle us or any Court to say that these decrees should be set aside, and declared void as against the plaintiff. It, therefore, follows that the sale in execution of both decrees will be good and effective and operative to pass the property. It is not suggested that the decrees being good, the purchase at the execution-sales was in any way fraudulent.

Under these circumstances, it seems to us unnecessary to enquire very closely into the question which has been raised on special appeal, as to whether or not the Principal Sudder Ameen threw the burden of proof upon the wrong side. We think that the decree which has been given in favor of the plaintiff cannot be sustained, and that, therefore, this special appeal must be decreed, and the decision of both the Lower Courts reversed, and the plaintiff's suit dismissed. The special appellant must have the costs in all the Courts.

The 17th July 1868.

Present:

The Hon'ble H. V. Bayley and A. G. Macpherson, *Judges.*

Limitation—Trusts—Plaintiff's disregard of a summons—Section 170, Act VIII., 1859.

Case No. 31 of 1868.

Special Appeal from a decision passed by the Judge of East Burdwan, dated the 26th March 1867, affirming a decision passed by the Additional Principal Sudder Ameen of that District, dated the 6th September 1866.

Narain Doss Chela (Defendant), *Appellant,*

versus

Maharajah Mahtab Chunder Bahadoor (Plaintiff), *Respondent.*

Baboo Nubo Kishen Mookerjee for Appellant.

Baboos Juggadanund Mookerjee and *Chunder Madhub Ghose* for Respondent.

In a suit to recover advances made from time to time for work and on other accounts, money having been entrusted to defendant to be accounted for by him, it was held that the matter partook of the nature of a trust to which no limitation at all would apply.

Under Section 170, Act VIII., 1859, it is discretionary with a Court to pass such orders as it thinks proper in regard to a plaintiff who disobeys its summons to attend, and it is no ground of special appeal that further steps were not taken by the first or the Lower Appellate Court.

Bayley, J.—THERE is no ground for interfering with the decision of the Lower Appellate Court in this case.

The plaintiff sued to recover certain sums, *viz.*, Rupees 846-11-8, for garden-account, Rupees 166-10-9 on other accounts of work done, and Rupees 469-9-0 on account of buildings.

The first Court gave the plaintiff a decree for Rupees 846-11-8 on account of garden-accounts, and Rupees 112-2-7 on account of work done, and Rupees 27-6-3 on adjustment of accounts, being a total Rupees 946-4-6 with proportionate costs. The Lower Appellate Court confirmed that decree.

The defendant appeals specially, urging in his *first* ground of special appeal that the period of limitation ought to have been counted from the date of each separate advance alleged to have been made by the plaintiff.

* * * * * * *

Fourthly.—That the plaintiff was summoned to produce his accounts, and the Lower Appellate Court ought not to have given any decree in plaintiff's favor without compelling him to produce them.

As to the item of 846 rupees, it is admitted by the defendant as correct in his own handwriting on the 22nd Magh at the foot of the accounts, and no possible question of limitation can arise as to this sum.

As to the sum of Rupees 112 odd, looking to the manner in which advances were from time to time made and money was entrusted to the defendant to be accounted for by him, I am clearly of opinion that this matter partakes of the nature of a trust to which no limitation at all will apply.

* * * * * * *

On the *fourth* point, I am of opinion that, under Section 170, Act VIII. of 1859, it is quite discretionary with the first Court to pass such orders in regard to a plaintiff, who disobeys the Court's summons to attend, as it thinks proper; and it is no ground of special appeal that further steps were not taken by the first or the Lower Appellate Court. It is a matter of discretion, and it is not made out by the defendant that there was any error in using that discretion judicially.

In this view, I would dismiss the special appeal with costs.

Macpherson, J.—I concur.

The 17th July 1868.

Present:

The Hon'ble H. V. Bayley and A. G. Macpherson, *Judges.*

Interest—Bonds enforced as decrees—Section 52, Act XVI., 1864.

Case No. 231 of 1868.

Miscellaneous Appeal from an order passed by the Judge of Rajshahye, dated the 27th February 1868, reversing an order passed by the Sudder Moonsiff of that District, dated the 14th December 1867.

Kallooram Baboo (Decree-holder), *Appellant,*

versus

Doorganath Talookdar (Judgment-debtor), *Respondent.*

Baboo Bhuggobutty Churn Ghose for Appellant.

Baboo Sreenath Banerjee for Respondent.

When a bond under Section 52, Act XVI., 1864, is enforced as a decree, no interest is to be allowed on it, if the bond does not provide for interest after the date on which the debt was payable.

Macpherson, J.—It appears to us unnecessary to call upon the other side, as we have no doubt that the order by the Lower Appellate Court is right. The bond is, under Section 52, Act XVI. of 1864, to be enforced as a decree in a suit. Reading it as a decree in a suit, there is no direction for payment of interest at the rate of 5 per cent. per mensem subsequent to the date on which the principal money is by the bond made payable. Under such circumstances, the rule that no interest is allowed where the decree is silent as to interest must be applied. The conduct of the respondent since the bond was put in suit does not appear to us to support the petitioner's contention. If the judgment-creditor gets 12 per cent., he probably gets more than he is entitled to.

The appeal is dismissed with costs.

The 17th July 1868.

Present:

The Hon'ble J. B. Phear and C. Hobhouse, *Judges.*

Liability of Court of Wards for personal debts—Section 4, Act XIV., 1859.

Case No. 459 of 1868.

Special Appeal from a decision passed by the Judge of Cuttack, dated the 10th December 1867, affirming a decision passed by the Principal Sudder Ameen of that District, dated the 28th June 1867.

Shaikh Reazooddeen (Plaintiff), *Appellant,*

versus

The Collector of Cuttack on the part of the Court of Wards (Defendant), *Respondent.*

Baboos Obhoy Churn Bose and *Taruck-nath Sein* for Appellant.

Baboo Kishen Kishore Ghose for Respondent.

The obligation of a Collector, on behalf of the Court of Wards, properly to manage a lunatic's estate, is different from liability to pay the latter's personal debts; and the acknowledgment of an agent for the management of a zemindar's property is not the acknowledgment of the principal within the meaning of Section 4, Act XIV., 1859.

Phear, J.—The plaintiff sues the Collector of Cuttack on the part of the Court of Wards as the representative of the Rajah of Kunnika, a lunatic, for the purpose of obtaining payment of a debt which was originally incurred by the Rajah when sane. Both the Lower Courts have dismissed the plaintiff's suit, on the ground that it is barred by limitation, and it is admitted by the plaintiff's pleader that the suit is so barred, unless the right of action is kept alive or is new—dated by a written order which has been made by the Collector of Cuttack upon a certain petition presented to him by the plaintiff, and which order, the plaintiff says, has the effect of an acknowledgment within the meaning of Section 4, Act XIV. of 1859.

According to the terms of this Section, an acknowledgment, to have the effect of giving a new date to the right of action, must be made by the person who, but for the law of limitation, would be liable to pay the debt. Therefore, in order that this writing of the Collector should be operative as an acknowledgment within that Section, the Collector, at the time he made it, must have been a person who, but for the law of limitation, was liable to pay the debt. It is unfortunate in this case that the plaint does not very accurately disclose the facts which have taken place; but it seems to me that, upon the best case which the plaintiff can make, judging from the argument of his pleader, the Collector does not appear to be liable to pay this debt. It may be (but of that I have at present no certainty) that, on the events which have happened, and under Section 19, Regulation X. of 1793,

the Collector, or the Collector on behalf of the Court of Wards, is the person who is bound to properly manage the lunatic's estate on his behalf. But that obligation is of an entirely different character from the liability to pay his personal debts. If the Collector is in the position of a trustee or agent bound to manage the estate for the benefit of the lunatic, and charged with (among other things) the care of paying his debts out of the assets which may come to his hands; and if he fails in his duty in this respect, he may be compelled to discharge it by proper recourse to a Civil Court. But it appears to me that he is not, in consequence of that character alone, necessarily liable to be sued in respect of each particular debt. Of course, he may, by his conduct towards the plaintiff, have made himself personally liable for the debt, but that I do not understand to be the allegation which is made in this case. He, or he on the part of the Court of Wards, is sued solely as a representative of the lunatic. He may be in some sort such representative, but whatever the representative character may, strictly speaking, amount to, I think it is not shown that it constitutes him, within the meaning of Section 4, the person who would, but for the law of limitation, be liable to pay this debt.

It seems to me that the Rajah, although said to be a lunatic, is himself still this person. Nothing has happened to transfer his original liability to the Collector or to the Court of Wards, and these parties can at most be his agent or attorney. It is not argued that either of them is, under any express power or by law, his attorney for the purpose of making this acknowledgment, and I may here observe by the way that the plaintiff admits that no adjudication of lunacy has as yet been made by a Civil Court. But, assuming the Collector or the Court of Wards to be merely the Rajah's agent for the management of his property, the acknowledgment of the agent is not the acknowledgment of the principal within this Section. For this reason, it seems to me that the acknowledgment has not the operation which the plaintiff desires to attribute to it, or rather, I should say, that the writing of the Collector at the foot of the plaintiff's petition has not the effect of an acknowledgment under Section 4, and the Lower Courts are right in the conclusion at which they have arrived, namely, that it does not save the suit from being barred.

We think that the special appeal should be dismissed with costs.

The 17th July 1868.

Present:

The Hon'ble F. B. Kemp and E. Jackson, *Judges.*

Title and possession.

Case No. 256 of 1868.

Special Appeal from a decision passed by the Principal Sudder Ameen of Tirhoot, dated the 26th November 1867, reversing a decision passed by the Moonsiff of Seetanuddy, dated the 30th January 1867.

Ram Churn Pattuck and others (Plaintiffs), *Appellants,*

versus

Khoor Pandey and another (Defendants), *Respondents.*

Mr. R. E. Twidale for Appellants.

Baboo Unnoda Pershad Banerjee for Respondents.

A suit for confirmation of title and possession, when possession was found to be with the defendant, was held to have been properly dismissed, whatever the finding on the point of title.

Jackson, J.—This was a suit for confirmation of title and possession. The Courts below have taken different views of this case, the first Court decreeing for the plaintiff, and the Appellate Court for the defendant. The question of title turns upon the issue whether a certain ancestor of the family lived separate or joint with other members of the family. The Appellate Court held that he lived separate, and upon this finding decreed the defendant's title to be superior to that of the plaintiff.

It is said on special appeal that this finding is founded on hearsay evidence, and this fact is admitted by the pleader for the respondent.

It is clear, therefore, that the decision of the Judge might, on this point, have been taken exception to. But, as the Lower Appellate Court finds very clearly that the possession of the disputed property was with the defendant, there is no doubt that that Court was right in dismissing the suit of the plaintiff, whatever may have been the finding on the point of title. We dismiss the appeal with costs.

The 17th July 1868.

Present:

The Hon'ble F. B. Kemp and E. Jackson, *Judges.*

Agreement to execute a pottah—Registration—Clause 2, Section 17, Act XX., 1866.

Case No. 239 of 1868.

Special Appeal from a decision passed by the Second Principal Sudder Ameen of Hooghly, dated the 23rd November 1867, modifying a decision passed by the Moonsiff of Salikha, dated the 11th April 1867.

Nand Ram Ghose and another (Intervenors), *Appellants,*

versus

Maunoo Bibee (Plaintiff) and others (Defendants), *Respondents.*

Baboos Ashootosh Chatterjee and *Taruck-nath Sein* for Appellants.

Baboo Khetturnath Bose for Respondents.

Where defendants had contracted to execute a mourosee pottah of certain land at a given rent for a consideration, of which a portion was paid as earnest-money, and the balance was to be paid within 15 days, and had agreed that, if they failed to execute the pottah, the *baeena-puttro* was to be considered a pottah, and plaintiff, on allegation of failure, sued the defendants for possession on the footing that the *baeena-namah* was a mourosee pottah.

HELD that the deed under which the plaintiff sued was a pottah, and under Clause 2, Section 17 of Act XX., 1866, an instrument whose registration was compulsory. As an unregistered document, it could not hold its ground against a registered pottah put in by intervenors.

Kemp, J.—THE intervenors in the Court below are the special appellants.

The plaintiff (special respondent) sued the four defendants who were brothers, and one of whom is her husband, on the allegation that they contracted to execute a mourosee pottah of 15 cottahs of land at a rent of 12 rupees for a consideration of 150 rupees; that, out of this consideration, 15 rupees were paid as earnest-money, and that it was contracted that the balance, or Rupees 135, was to be paid within fifteen days, and the defendants were to execute a mourosee pottah, and, failing to do so, the *baeena-puttro* was to be considered to be a pottah. The plaintiff, alleging that the defendants failed to perform their part of the contract, sues for possession of the 15 cottahs, on the footing that the *baeena-namah* is to be considered as a mourosee pottah under the terms of the contract.

The Principal Sudder Ameen observes that it was not compulsory on the plaintiff to register the *baeena-puttro*, the said deed being, to use the words of the Principal Sudder Ameen, "only an agreement for a future transaction."

In support of this finding, the Principal Sudder Ameen quotes a decision of a Divisional Bench of this Court, published in Volume VII., Weekly Reporter, page 280. The Principal Sudder Ameen, holding that the document on which the plaintiff bases his case was not such a document as under the Registration Law was inadmissible as evidence unless registered, refused to give the defendants (the intervenors), whose lease from the plaintiff's lessors was admittedly registered, any preference as against the deed of the plaintiff under the provisions of Section 50 of Act XX. of 1866.

In special appeal, it is contended that this finding of the Principal Sudder Ameen is wrong in law, and we are of opinion that it is so. The deed under which the plaintiff sues is nothing more or less than a pottah, and in the plaint itself this much is admitted, for the plaintiff asks for possession under this deed, treating it as a pottah. Now, under Clause 2, Section 17 of Act XX. of 1866, the document in question being an instrument which created a right in immoveable property, the registration of the same was compulsory, and not optional.

The decision quoted by the Principal Sudder Ameen refers to a contract which was simply preliminary, and not to a contract which amounts, as in this case, to a mourosee pottah. The *baeena-namah* was registered by one only of the contracting parties, namely, by Panaoollah, the husband of the plaintiff. The other brothers, or Tumeezooddeen, Khuyrat Ally, and Nasser Ally, took no steps to register the document; nor did the plaintiff take any measures to compel them to do so. The defendant's pottah is admittedly registered, and therefore, being an instrument of the description mentioned in Clause 2, Section 17 of Act XX. of 1866, is entitled to a preference over the unregistered document of the plaintiff, both documents relating to the same property.

We, therefore, reverse the decision of the Principal Sudder Ameen, and restore that of the first Court. The special appeal is decreed with costs.

The 17th July 1868.

Present:

The Hon'ble J. B. Phear and C. Hobhouse, *Judges.*

Jurisdiction — Appeals filed beyond time — Excuses for delay — Lower Court's discretion.

Case No. 470 of 1868 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of Nuddea, dated the 18th December 1867, reversing a decision passed by the Deputy Collector of that District, dated the 11th September 1865.

Mowree Bewa (Defendant), *Appellant,*

versus

Soorundarnath Roy (Plaintiff), *Respondent.*

Baboo Issur Chunder Chuckerbutty for Appellant.

Baboos Grish Chunder Mookerjee and *Kalee Mohun Doss* for Respondent.

It is competent for the High Court sitting on special appeal to look into the grounds which a Judge has given for admitting an appeal after the lapse of the period limited for that purpose by the Procedure Code.

HELD, with reference to a decision of the Full Bench, reported at page 181 of Vol. IX., Weekly Reporter, to the effect that a new statement of the law by the High Court was not a sufficient excuse for delay in applying for a review of a judgment, that it is still less an excuse for delay in appealing against a judgment.

Phear, J.—THE history of these cases is curious enough, but we need not narrate it at length now. It is sufficient to say that, on 29th of June 1865, 21 cases of appeal, parallel cases, were determined by the Judge of Nuddea, and all remanded to the Court of first instance for re-trial. Of these 21, the plaintiff in one only appealed specially to the High Court against the remand-order of the Judge, and he was successful enough to get the remand-order reversed, and the decree of the first Court, which had been appealed against to the Judge, substantially upheld. While this special appeal was pending, the 20 cases in which the plaintiff had not appealed were heard on remand by the first Court, and in all of them the plaintiff's suit was dismissed, the first Court then reversing the decision to which it had before come. This took place on the 11th of September 1865. The decision of the High Court on the one case in which the appeal had been preferred was pronounced on the 6th of January 1866. One year and nine months after the judgment of the High Court, namely, on the 30th of October 1867, the plaintiff in the remaining 20 cases appealed to the Judge against the decision of the Deputy Collector. The Judge admitted these appeals, although they were greatly out of time, and in each case, reversing the decision of the first Court, gave a decree accordant with the decree of the High Court in the analogous case which had been specially appealed. In 17 of these cases the defendants, who are the parties aggrieved by the decision of the Judge, appeal specially to this Court, and the first (we may say the principal) ground of appeal is that the Lower Court, the Judge, was wrong in admitting the appeals after the lapse of so long a period as had occurred beyond the time limited for that purpose by the Procedure Code.

It has been urged on the part of the special respondent that this Court cannot take an objection of this kind into consideration. It is said that, inasmuch as the Judge has expressed himself satisfied with reasons put forward by the appellants for their delay, it is not for this Court to interfere with the exercise of his discretion.

There cannot, however, be any doubt that on an appeal to this Court against the decree of a subordinate Court, every thing which had preceded that decree as an act of Court is open to revision. It is, therefore, competent for us, sitting here on special appeal, to look into the grounds which the Judge has given for admitting the appeals in which the decision now appealed against was passed; and if we think that the grounds upon which he acted in so admitting the appeals are impeachable here in special appeal, we are bound to reverse his decision accordingly.

The cause which would induce this Court to interfere with the exercise of a discretion of the kind here referred to upon special appeal would commonly be that the discretion was exercised without proper legal material to support it. Other grounds of impeachment might, no doubt, be imagined, such as that the discretion had been exercised capriciously, or with malice, and so on; but these are likely to be seldom exhibited. In this case, the Judge having said that he was judicially satisfied that the appellants, in coming to him so late as they did, had accounted for their delay, and there being no imputation upon his honesty, we have only to see whether he had before him material sufficient in law to enable him to come to the conclusion that the delay was justified.

His own statement on this point is that "the grounds showing the cause of delay "were reasonable, for it is an undisputed

"fact that the appellant's former mooktear, "since dead, owing to old age, &c., had "resigned his duties;" and before that he had said: "It is shown that the appel-"lant could not have appealed on his pre-"sent grounds during the prescribed period." The cause of delay which we first read from the judgment of the Judge is one that might justify a delay of a few days, but could not possibly be any reason for not bringing a suit within two years. The other ground, namely, that the appellant could not have appealed on his present grounds during the prescribed period, is perfectly valueless. His present ground we understand to consist in the judgment of the High Court delivered on the 6th of January 1866 in the cognate case, wherein the plaintiff had been diligent enough to appeal. And that judgment was not special in any way as an enunciation of law. However, had it, in fact, pronounced an interpretation of the law which had not previously been accepted, it would not have afforded a reason for a delay in bringing the appeal. This is, we think, clear from the reasoning and the decision of the Full Bench, reported in Volume IX., Weekly Reporter, page 181, which laid down that a new statement of the law by the High Court was not a sufficient excuse for delay in applying for a review of a judgment. And it seems to us that, if it is not an excuse for delay in applying for a review of a judgment, still less can it be an excuse for delay in appealing against a judgment. But, as we have already said, the characteristic of the judgment of the 6th of January 1866 was not that it laid down any new principle of law, or sanctioned any new interpretation of the law, but it was a decision between parties upon the facts of the case. It is true that the facts of the case were, if not precisely the same, at least very analogous to those obtaining in the case now before us: but that seems to us the greater reason why the decision of the 6th of January 1866 is no excuse for the delay. If, in the one case similarly situated with the others, he could, by diligence in applying to the High Court, obtain the remedy which he did, in fact, obtain, he might, in like manner, have obtained a similar remedy in all the other cases. And he might not only have appealed against the original remand-order made in the 20 cases as he did in the one, but he might, at any rate, have appealed immediately upon the decision of the Deputy Collector on the 11th of September 1865; and, had he done so, there cannot be any doubt that he would have obtained the benefit of the decision of the High Court of the 6th of January 1866. And whichever way the conduct of the plaintiff, now special respondent, is looked at, it seems to us that he is absolutely without any excuse at all for delaying to bring his appeal until two years had elapsed after the passing of the decree which is appealed against. In this view of the facts involved in these cases, as exhibited by the judgment of the Lower Appellate Court, it seems to us that the Judge had no ground whatever to go upon when he arrived at the conclusion that the appellants before him had satisfactorily accounted for their not having come within the time prescribed by the Act. We, therefore, think that his decision admitting the appeal was wrong in law, and consequently that his final decree on appeal cannot be supported.

This being so, we think that this appeal must be decreed, and the decision of the Lower Appellate Court reversed. The effect of this will be to confirm the decision of the first Court. The appellant must get his costs in this Court and in the Lower Appellate Court.

The 18th July 1868.

Present:

The Hon'ble G. Loch and F. A. Glover, *Judges.*

Ghatwals—Their appointment by zemindars—Possession and title—Resumption and settlement.

Case No. 357 of 1867.

Regular Appeal from a decision passed by the Principal Sudder Ameen of Bhaugulpore, dated the 14th September 1867.

Mahaboob Hossein, *alias* Horee, and others (Defendants), *Appellants,*

versus

Mussamut Putasoo Koomaree, mother and guardian of Thakoor Brojo Lall Singh (Plaintiff), *Respondent.*

Messrs. G. C. Paul and *R. E. Twidale* for Appellants.

Baboos Chunder Madhub Ghose and *Mohinee Mohun Roy* for Respondent.

Plaintiff, as guardian of her minor son, sued to establish his right to, and to recover possession of, her husband's ancestral ghatwallee mehal, which, after resumption, had been settled with her son, and then sold for default of payment of Government revenue.

As the resumption was ultimately set aside by the Sudder Court, the settlement and sale were annulled, and the auction-purchaser withdrew. On entering again upon possession, plaintiff was prevented from collecting rents, and was ousted by defendant *M*, who claimed under a *kutkina* from defendant *T*, who held a lease from the zemindar.

HELD that, though plaintiff failed to prove possession and ouster, she was entitled to go into the question of title.

HELD that, as the resumption and settlement-proceedings have been cancelled, the minor son must be looked upon as holding his former position.

HELD that, as the appointment of a ghatwal rests with the zemindar, who may, *if necessary*, appoint a suitable person, and as no necessity exists (Government no longer requiring the services of ghatwals in that part of the country), the plaintiff is not entitled to recover possession.

HELD with, reference to Section 128, Code of Civil Procedure, that it is not necessary for parties in a case to file documentary evidence, unless it be called for by the Court.

Loch, J.—THE plaintiff, as guardian of her minor son, alleges that her husband, Thakoor Sheo Shewuk Singh, held Mouzah Nuzam, Pergunnah Nirpulpara, Mehalah Khuruckpore, as his ancestral ghatwallee mehal; that it was resumed by Government, and, after the death of her husband, was settled with her minor son Thakoor Brojo Lall Singh in October 1851; that, owing to default in the payment of the Government revenue, the property was sold on 25th February 1858, and purchased by Jowahir Ram; that, as the resumption-proceedings were ultimately set aside by the Sudder Court on 29th February 1860, the settlement-proceedings and the subsequent sale were annulled; that the auction-purchaser, considering that he had no further right in the property, withdrew, and plaintiff entered upon possession in 1270-71 (1864); that in 1273 F. S. (1866), the defendant Mahaboob Hossein, claiming under a *kutkina* from the defendant, Mrs. Sandys, who held a lease from Rajah Neelanund Singh, zemindar of Mehalah Khuruckpore, prevented the plaintiff from making collections, and ousted her on 15th Aughran 1274, and collected the rents due from the ryots for 1273. Plaintiff, therefore, sues to establish her son's right to the ghatwallee tenure, and to recover possession with mesne-profits to date of re-entry.

On the part of the defendants it is contended that, as plaintiff admitted the justness of the resumption-proceedings, and entered into a settlement for the resumed lands, and thereby gave up all her rights and interests as ghatwal, she has now no right to recover in that capacity; that, though the settlement and subsequent sale in 1857 be invalid as against the defendant (zemindar), yet it is not so against the plaintiff who acquiesced therein, and allowed the estate to be sold for arrears of revenue; and as the auction-purchaser retained possession under the sale, without any objection on the part of the plaintiff, she cannot now claim any right or title as ghatwal; that by the judgment of the Privy Council, dated 13th August 1855, in the appeal of Rajah Neelanund Singh, the ghatwallee mehals of Khuruckpore were declared to be not liable to resumption, and on 29th February 1860 an order for the release of the property was made, and the mehal was accordingly given up by Government, but these proceedings do not restore any rights to the plaintiff; that the allegation of plaintiff that she recovered possession after the auction-purchaser had withdrawn, and that she was subsequently ousted by Mahaboob Hossein, is untrue; that the appointment and removal of ghatwals rests with the zemindar, and no one, especially a woman, can claim any right to a ghatwallee tenure without the consent of the zemindar; that the defendant, Rajah Neelanund Singh, in virtue of the authority vested in him, entered into a settlement with the auction-purchasers in 1862, but that, subsequently, having made an arrangement with Government of 9th November 1863, whereby, in consideration of an addition of Rupees 10,000 to the annual jumma paid by him, the Government agreed to dispense with the services of the ghatwals in Mehalah Khuruckpore, he annulled the ghatwal-lease made in August 1862, and settled the mehal in fine with Mrs. Sandys, who, on the 30th December 1863, made a *kutkina*-settlement with Mahaboob Hossein.

The Principal Sudder Ameen held that plaintiff had failed to prove her possession subsequent to the auction-sale, but that she had not been deprived of her right to succeed to the ghatwallee tenure either by the resumption or sale-proceedings, for the settlement was forced upon her; that, though the mehal was released from resumption at the instance of the zemindar, she obtained no rights thereby, for Government, by giving up its claim, restored the mehal to the position it was in before resumption; that it is established that a zemindar cannot, at his own pleasure, appoint or remove a ghatwal, and as no cause had, in the present case, been made out for removing the ghatwal (plaintiff), she was entitled to recover possession. The Principal Sudder Ameen, accordingly, gave a decree to the plaintiff for possession with

esne-profits from date of dispossession to ate of re-entry.

An appeal has been preferred by the de-ndants—

1st.—That the Principal Sudder Ameen d refused to admit certain documentary idence material to the right decision of the se, though offered in time.

2nd.—That the Principal Sudder Ameen d examined only three out of 14 witnesses oduced by the appellants.

3rd.—That plaintiff having failed to prove e fact of ouster, the suit should have been smissed without any consideration of his le.

4th.—That plaintiff having submitted to e resumption and settlement proceedings, d allowed the property to be sold for rears of revenue, she can have no fresh ght under the Privy Council decree passed the appeal of the defendant, Rajah eelanund Singh, to which she was no rty.

5th.—That as the Rajah (defendant) has o need of the services of a ghatwal, and e plaintiff is incompetent to discharge the ties of that office, it was wrong to give e plaintiff a decree.

The above include all the points that were gued before us.

On the first point, we think that the ap-llant should be allowed to file the docu-ents which he requests the Court's per-ission to put in, for the proceeding draw-g up the issues fixed no time for the oduction of the documentary evidence; d we are not shown that at the first hear-g of the case, the Principal Sudder Ameen lled for the documents. The law (Section 28) is clear upon this point. The parties e required to bring with them and *have in adiness at the first hearing of the suit, to produced when called upon by the Court,* l their documentary evidence of every escription, &c. It is not necessary for the parties to file this evidence unless it be called for, and in this case we do not find that it was called for, but it was offered the day after the issues were fixed, and was rejected.

The second ground taken was not pressed.

On the third ground, we think that though plaintiff has failed in the Lower Court to prove that she was in possession, and was ousted by the defendant, she is entitled to go in to the question of title, and to recover possession, if she be able to establish her right to succeed.

On the fourth ground, we think that the mere fact of the plaintiff having submitted to the resumption and settlement proceedings, is not a sufficient reason for holding that she has no cause of action, or that any right she might have had to succeed to the ghatwallee-tenure has been extinguished by her submission to those proceedings; nor, if the sale for arrears has been annulled, will the fact of such sale deprive the plaintiff of any right? The effect of the Privy Council decree was to set aside the resumption and settlement, and to restore the ghatwallee-tenure to its former position. It remains to be seen whether the sale of the tenure for arrears of revenue, while the property was held by plaintiff as a permanently-settled estate, deprives her of the right to bring the present action, the sale not having been distinctly cancelled by any express order or decree; or whether the right to sue does not rest in the auction-purchaser to whom the rights and interests of the plaintiff, as proprietor, were transferred at the time of sale.

It is very clear that Putasoo, the mother and guardian of the plaintiff, took no steps to set aside the sale and acquiesced in it, for notwithstanding the decree obtained by the defendant Rajah Neelanund Singh before the Privy Council, by which the ghatwallee-tenures of Khuruckpore were declared not to be liable to resumption by Government, yet she applied for the surplus proceeds of sale in February 1860. There is nothing to show that she received any part of the money, but her application for it is sufficient to show her acquiescence in the state of matters then existing. A suit was brought by the defendant Rajah Neelanund Singh to recover the mesne-profits, which had been collected by Government in the shape of revenue under the settlement, and which was directed to be refunded. Plaintiff was a party to that suit, as well as the auction-purchaser; but though the Rajah's claim to the money was rejected on 26th March 1862, it does not appear that the plaintiff was put back into his former position. There are words, however, in another proceeding of 24th November 1862, which are to the effect that the auction-purchaser had no right, and that matters had reverted to their former position. This judgment was confirmed in appeal by the High Court on 10th October 1863. The proceeding of the 24th November 1862 appears to us sufficient to show

that the sale, as well as all other proceedings, had been virtually, if not in express terms, cancelled: and this being the case, the auction-purchaser does not stand in the way of the plaintiff to prevent his establishing his rights to the ghatwallee-tenure.

But in support of the fifth ground taken in appeal, it is argued, *first*, that plaintiff never was a ghatwal; he never was appointed to the office; the tenure was resumed in the lifetime of his father, and the settlement was made during his minority with his mother in his name. *Secondly*, it has been ruled by this Court that the zemindar has the right to appoint and remove ghatwals, and that the ghatwallee-tenures may be resumed when the Government do not require their services.

We do not think the fact that plaintiff never was appointed as ghatwal can deprive him of any right he may have. The peculiar circumstances of the case prevented his asserting his rights, whatever they be, at an earlier stage; and as the resumption and settlement proceedings have been cancelled, we must look upon him as holding the position of the son of a ghatwal who has died while holding that office—an office which by custom has become hereditary subject to the confirmation of the zemindar. It is necessary to explain what appears to be contradictory in the previous sentence. The fact is that the office has descended from father to son so unbrokenly that the office has at length been considered hereditary, for the zemindar never appears till of late years to have attempted to exercise his undoubted right of appointing a person other than the heir of the deceased ghatwal, to a vacant appointment, or of refusing his sanction to the succession of the heir. Now, it cannot be doubted that in the inception of this office, when the zemindars were entrusted with police powers, as was found to be the case when the late East India Company assumed the dewanny, the ghatwals held their lands from the zemindars and were appointed by them, and were liable to removal by the same authority. They received lands out of the zemindary, and appear never to have been interfered with by the Mahomedan Government, though jaghirdars, who held service-lands direct from the State to protect the country from the inroads of various lawless tribes, required to have the grant renewed on the occasion of the death of each incumbent. The ghatwals appear to have been looked upon as a kind of rural police, whose services, like those of chowkeydars and other village police or servants, were paid by grants of land; and the importance which the ghatwals of Khuruckpore have attained arises from the circumstance of the country in which they were located being hilly and jungly, and so thinly populated that they were able to take possession, without opposition, of vast tracts of land much in excess of the area originally granted to them, and because the zemindars of Khuruckpore were for several generations more inclined to spend money than to look after their own affairs; so that when the East India Company's Government during the time of Warren Hastings commenced to make inquiries, it was found that the ghatwals were in possession of considerable estates, instead of limited areas, as entered in their sunnuds of appointment. In their judgment of the 25th July 1855, the Privy Council accepted the reports of the Collector of Bhaugulpore as showing the position held by the ghatwals and their relationship to the zemindar. The ghatwals, according to the Collector, had no right of inheritance, nor *proprietary interest* in their lands, but held right of possession so long as they performed the terms and conditions of their sunnuds. In a report of 1816, the Collector says that the ghatwals pay a fixed rent to the zemindar of Khuruckpore, and *continue under his control, direction, and subjection*. It was held by the Court of Sudder Dewany Adawlut (6 Sudder Reports, page 170, Hurlall Sing, appellant) that the lands being held conditionally on the performance of certain defined duties, *they were not divisible on the death of the ghatwal*, but descended to the eldest son. In 1783, the Governor-General in Council addressed a letter to the zemindar of Khuruckpore to the effect that as the office of ghatwal was in his gift, he would, *should he deem it necessary and proper*, appoint a person to the office of ghatwal, adding that if the zemindar thought it advisable, he might *retain it* (the ghat) *under his own control*, informing the Government of the circumstance. In a letter from the Collector of Bhaugulpore to the Rajah of Khuruckpore, he says that the settlement of the rent between the watchmen (ghatwals) and the zemindars rested with the zemindar, so did the *dismissal* and *transfer* of the ghatwals; and the Privy Council says: "And in the reports of the "Collectors to which we have already referred, it is stated that it is the province of the

"Rajah to *appoint* and *dismiss* the ghatwals "attached to the Khuruckpore estates; that "he usually, but not always, makes a report "to the Government when he does so; that "the settlement rests with him, and he "*raises* or *depresses the rent;*" and the conclusion come to by the Privy Council with regard to these ghatwallee tenures was "that "they were a part of the zemindary of "Khuruckpore, and were included in the "settlement of that zemindary, and covered "by the jumma assessed upon it," and that consequently the Government had no right to resume any of these tenures as lands excluded from the Permanent Settlement.

It will be observed from the above review of the judgment of the Privy Council that the power of appointing and dismissing and transferring of the ghatwals is admitted to belong to the zemindar; that the Government of Warren Hastings considered that it rested with the zemindar to appoint another ghatwal in the room of Ranee Sibessuree, dismissed from office, should he think it advisable, or he might retain the ghat under his own control. It appears also, that the settlement of the land rested with the zemindar, who might raise or depress the rent. We have it also clearly laid down that the ghatwallee-tenure was not hereditary — at least not in the beginning—and that the lands were not divisible among the several heirs of a deceased ghatwal. The Privy Council does not go so far to say that the zemindar had a right to dismiss the ghatwal and resume the lands of the tenure. That was a question not before their Lordships, nor is it a question that we need enter upon in the present case.

We think it also unnecessary to note all the judgments of the late Sudder Court and of the High Court in regard to these ghatwallee-tenures, as the question in the present case is different from that which arose in other cases; but we will refer to the judgment of the late Sudder Court of 1867, quoted at page 1812 of the reports for that year, and also to another reported at page 1669 of the Sudder Reports for 1858. The principle laid down in these two judgments was to this effect, that the zemindars could resume the ghatwallee-tenure if the services of the ghatwals were not required; but that if the Government required the services of the ghatwals, the zemindar could not resume so long as Government demanded such service. In the case before us, the office has become vacant by the death of the ghatwal. It is the inherent right of the zemindar of Khuruckpore to appoint another. No one can interfere with this right. He is responsible for putting in a suitable person, should Government require the services of the ghatwals. But the Government has considered this rural police to be useless. It has established a new police, upon whom the responsibility which formerly rested on the ghatwals now rests. The services of the ghatwals is no longer required. Why should the Rajah appoint another ghatwal under these circumstances? Certainly not to perform police duties, for that is no longer required of the ghatwal in Khuruckpore. Then what right has the plaintiff to take possession? His only right would be that he has obtained the office of ghatwal from the zemindar; but the zemindar was not bound to appoint him. He might have appointed any body else who would have been entitled to all the profits of the lands appertaining to the office without any interference from the plaintiff. Had the plaintiff been weak in body or mind, and so incapable of performing the duties of the office, the zemindar was not bound to appoint him or any of his relations as a substitute for him. He might have selected any stranger whom he thought fitted for the appointment. It is true, as observed above, that in this office of ghatwal, son has succeeded father continually, and the zemindar does not appear to have interfered, though the succession was not legal or valid till confirmed by the zemindar and reported by him to the Government authorities.

It appears to me, therefore, that as the appointment of a person to the vacant office of ghatwal rests with the zemindar, he may, if necessary, appoint a suitable person; that in this case, no necessity exists, as Government have given up their right to insist on the appointment of persons to that office, and no longer require the services of ghatwals in Khuruckpore; and that as the plaintiff is not entitled to succeed to the property by hereditary right, but only on appointment by the zemindar, the plaintiff is not entitled to recover possession on the grounds he claims, and I would therefore reverse the order of the Lower Court, and dismiss the plaintiff's suit with costs.

Glover, J.—I concur generally in this judgment.

The 18th July 1868.

Present:

The Hon'ble H. V. Bayley and A. G. Macpherson, *Judges.*

Defamation—Damages—Libel—Publication.

Case No. 70 of 1868.

Special Appeal from a decision passed by the Judge of East Burdwan, dated the 31st July 1867, affirming a decision passed by the Principal Sudder Ameen of that District, dated the 11th April 1867.

Komul Chunder Bose (Plaintiff), *Appellant,*

versus

Nobin Chunder Ghose (Defendant), *Respondent.*

Baboo Ashootosh Chatterjee for Appellant.

Baboos Kishen Kishore Ghose and *Greeja Sunkur Majoomdar* for Respondent.

In a suit to obtain damages for defamation contained in a letter written and sent by defendant to plaintiff, where the only damage alleged was the injury to plaintiff's feelings—

HELD that such injury was not in itself a ground for giving damages in a civil action:

HELD also that as the letter was received and read by the plaintiff alone, this did not constitute publication.

Macpherson, J.—I AM of opinion that this appeal ought to be dismissed, because I think that the judgment of the Lower Appellate Court is substantially right. The suit is brought for damages for defamation of character. The defamation is contained in a letter written and sent by the defendant to the plaintiff. The damage alleged is the injury to the plaintiff's feelings; and in the plaint no allegation is made of any publication of the libel beyond its being stated that the letter was sent to and read by the plaintiff himself.

It appears to me that the plaintiff's case is deficient in several respects. In the first place it is not proved that there was any publication, for it is admitted that the letter was addressed to the plaintiff himself, and it was not proved that the letter was read by any body excepting the plaintiff. It is now said that it might have been proved that the letter was in fact received in the first instance and opened by the nephew of the plaintiff. Admitting, however, that the plaintiff could have proved this, the fact of the letter being opened by the nephew or by any one else would not constitute publication by the defendant, unless the plaintiff could have gone further and also proved that the defendant, when he despatched the letter, knew that in the ordinary course of business in the plaintiff's house the letter would be opened and read by the nephew or by some one else other than the plaintiff himself.

Then the letter itself, although it may, when read as the writer intended it to be read, mean much that is insulting and abusive, does not, on the face of it, contain open and direct abuse, and there is no evidence whatever to show what the inuendoes are, or what impression the reading of the letter would have produced on the minds of ordinary persons. Attached to the plaint is a schedule of the plaintiff's explanation of the letter and the inuendoes; but there is no evidence to support these explanations, and in the absence of evidence I am not myself able to say whether these explanations are or are not correct.

Further, the only damage alleged is damage to the feelings of the plaintiff caused by the receipt of the letter. Such injury is not in itself a ground for giving damages in a civil action. This case is very different from one in which a person, without pleading any special damage, brings a suit for damages sustained by him by reason of a libel really published, and injuring him in the general estimation of his fellow men. In such a case the injury to the feelings of the person libelled may no doubt be taken into consideration. But in the case before us there is no evidence of publication, or of the plaintiff having been injured in the estimation of any body; there is no proof of any injury save that which the plaintiff privately received from his feelings being hurt by the receipt of this letter.

On behalf of the appellant, it is alleged that the Lower Courts acted improperly in not enforcing the attendance of witnesses cited by him to prove the publication of the letter by the defendant before it was despatched by him. But I think that the Lower Appellate Court was right, looking at the course the case took, in saying that as the plaint confined itself to stating that the letter was published by being sent to the plaintiff himself, the Principal Sudder Ameen was not wrong in what he did.

Although the plaintiff's case is incomplete and he is not entitled to recover damages, there is little doubt that the letter

written by the defendant was a highly improper one, and one which ought not to have been written. Under these circumstances, I do not think that we should grant the application made to us by way of cross-appeal to relieve him from the order of the Lower Court, directing him to pay his own costs. Notwithstanding that the defendant may have expressed his regret that any thing which he did should have hurt the feelings of the plaintiff, it appears to me, looking to all the circumstances of the case, that the Judge properly left each party to bear his own costs, and that the best thing we can do is to follow the same course as regards the costs in this Court.

Bayley, J.—I concur.

The 20th July 1868.

Present:

The Hon'ble J. B. Phear and C. Hobhouse, *Judges.*

Infidel executor—Mahomedan will.

Case No. 582 of 1868.

Special Appeal from a decision passed by the Judge of the 24-Pergunnahs, dated the 30th December 1867, affirming a decision passed by the Second Principal Sudder Ameen of that District, dated the 4th April 1867.

Jehan Khan (Defendant), *Appellant,*

versus

C. K. Mandy, executor to the estate of Khodejaurussa Bibee, deceased, (Plaintiff), *Respondent.*

Messrs. R. E. Twidale and *G. A. Twidale* for Appellant.

Baboos Debendro Narain Bose and *Anund Gopal Paleet* for Respondent.

The appointment of an infidel executor does not invalidate a Mahomedan's will, and, until he is removed by a Civil Court, all the acts of such an executor are good and valid.

Phear, J.—We think that the Lower Courts are quite right in this case. It is clear from the authorities to which we have been referred, namely, the Hidaya, Baillie, and the case reported in the Select Sudder Dewanny Reports, that the appointment of an infidel executor does not invalidate the will; and, further, that all the acts of such an executor, and his dealing with the property under the will, until he is removed and superseded by the Civil Court, are good and valid. We think that this in itself is enough to give an executor such an interest in the will as entitles him to come into Court to establish it, if it be disputed, and that is all that has happened in this case. The Lower Courts have found as a fact that the will is a good and genuine instrument, and that on the face thereof, the defendant is not entitled to the certificate under Act XXVII. of 1860.

It is not necessary in this case for us to say whether now-a-days, if an application were made by a person interested in the will to have the infidel executor removed, and some other proper person appointed in his place, the application would be granted. But on the grounds which have already been mentioned, it seems to us that the Lower Courts are entirely right in their conclusions. We therefore dismiss the appeal with costs.

The 20th July 1868.

Present:

The Hon'ble J. B. Phear and C. Hobhouse, *Judges.*

Benamee purchase—Alienation by benameedar.

Case No. 699 of 1868.

Special Appeal from a decision passed by the Principal Sudder Ameen of Sarun, dated the 24th February 1868, affirming a decision passed by the Moonsiff of Pursah, dated the 3rd April 1867.

Bhugwan Doss (one of the Defendants), *Appellant,*

versus

Upooch Singh and others (Plaintiffs), *Respondents.*

Mr. R. E. Twidale and *Baboos Onookool Chunder Mookerjee* and *Greeja Sunkur Mojoomdar* for Appellant.

Baboo Ubinash Chunder Banarjee for Respondents.

Property bought by *P* in the name of *S* was mortgaged by *P* through his *benameedar S*, by conditional sale to *L*, who, dying after foreclosure, left it in possession of his widows, defendants Nos. 3 and 4, from whom plaintiff purchased it at a sale in execution of a decree against them. Defendants Nos. 1 and 2 resisted on the ground that *S's* conditional sale did not pass

the rights and interests of *P*, which they bought at an auction-sale in execution of a decree against *P*.

HELD that the decree of foreclosure was good and binding against Nos. 1 and 2, unless they could show fraud. If property is purchased in the name of a *benameedar*, and the indicia of ownership are placed in his hands, the true owner can only get rid of the effect of an alienation by showing that it was made without his acquiescence, and that the purchaser took with notice of that fact.

Phear, J.—THE plaintiff sues in this suit for an entry of certain names in the Towjee of the Collector after expunging the names that are already there, and finally for replacing the names, which are first to be entered, by his own. And the foundation of this order is to be a declaration that he is entitled to certain property in suit as against the defendant.

The title which the plaintiff sets up is as follows, namely: that the property in dispute originally belonged to one Gunga Pershad; that it was bought by Gunga Pershad in the name of Gour Surn Persaud; that on the 26th of July 1851, Gunga Pershad, through his *benameedar* Gour Surn Persaud mortgaged the property by conditional sale to Bhugwan Lall; that on the 29th of December 1854, Bhugwan Lall foreclosed, and, we suppose, dying shortly after, his widows, the defendants Nos. 3 and 4 in this suit, obtained possession; and that finally on the 7th of July 1863, the plaintiff himself purchased the same property at an execution-sale effected in consequence of a decree passed against the widows.

The defendants 1 and 2 resisted the claim of the plaintiff, on the ground that Gour Surn Persaud's conditional sale on the 26th of July 1851 did not pass the property of Gunga Pershad, and that they, on the 1st of December 1851, bought the rights and interests in the same property at an auction-sale in execution of a decrée against Gunga Pershad. And they say that in 1853, they had their names put in the Collector's Towjee, and have since had enjoyment of the property. They, moreover, maintain that the foreclosure of the mortgage effected on the 29th of December 1854, cannot bind them, because they were no parties to the foreclosure decree; and, further that their rights were specifically reserved by the decree.

It is obvious from this statement of the antagonistic claims of the plaintiff and of these defendants, that this suit depended entirely upon matter of fact. It seems to us that the Lower Appellate Court has found the facts as alleged by the plaintiff. We think that the Principal Sudder Ameen has, in terms, found that Gunga Pershad bought the property in the name of Gour Surn Persaud, and that it was on that account that the conditional sale of 26th July 1851 was made in the name of Gour Surn Persaud. If this be so, then the decree of foreclosure of 29th December 1854 obtained, no doubt, as far as concerns name, against Gour Surn Persaud alone, would be good and binding against the defendants Nos. 1 and 2, so as to foreclose the equity of redemption which they purchased of Gunga Pershad, unless they can show that the foreclosure was effected in fraud of them or of their vendor and consequently was void and inoperative. It was a matter of small consequence whether their rights were reserved by the decree or not. If the notice which must have preceded the foreclosure decree of December 1854 was served upon the right person, then the decree will bind the equity of redemption, into whosesoever hands it may have passed. It might, no doubt (supposing the fact were so), have been possible to show, that the notice of foreclosure was served upon Gour Surn Persaud, and kept from the knowledge of them, the defendants, although the mortgagee was well aware that the equity of redemption had passed from Gunga Pershad, or Gour Surn Persaud, into the hands of the defendants at the execution-sale; but until this is shown as a matter of fact, it must be presumed that the proceedings in the foreclosure were regular and valid, and as far as can be gathered from the record, Gour Persaud was the right person against whom the suit should have been brought.

So again, we think, we ought to observe, that the *onus* lay upon the defendants to show that the conditional sale executed by Gour Surn Persaud was not binding upon them or their vendor, if such were the fact, because if property is purchased in the name of a *benameedar*, and all the indicia of ownership are placed in his hands, the true owner can only get rid of the effect of an alienation by the *benameedar*, by showing that it was made without his own acquiescence, and that the purchaser took with notice of that fact. It seems to us certain that if the defendants desire in this case to have the advantage of Gour Surn Persaud's conveyance not being binding upon Gunga Pershad, it was for them to make out that it was not so binding. I am assuming, of course, in stating this, that the facts are such as the Principal Sudder

meen has found them to be. If then ngs Pershad's interest in the property s mortgaged in July 1851 to Bhugwan all, and if his equity of redemption, into hosesoever hand it had passed, was foreclosed the 29th of December 1854, it follows cessarily that the plaintiffs, who bought ugwan Lall's rights and interests on the h July 1865, obtained the absolute owner-ip, and consequently they are entitled, against the defendants who dispute that nership, to have a declaration in this t that they are the absolute owners of e property. We think, however, that the der of the Court ought not to go beyond s point. There ought to be no direction the Collector of the kind asked for by e plaintiff, and consequently the de-e of the Lower Courts must be modified that extent. With the declaration of nership which we think ought to be ade, in his hands, the plaintiff may go to e Collector, and there is no doubt that e Collector will then, upon that title, do at is right and proper with regard to tation of names.

Although we have modified to some ex-t the decree of the Lower Courts, we ve not interfered materially with the de-ion on the merits at which they have ived; and, therefore, we think that the pellant must pay the plaintiff's costs.

The 20th July 1868.

Present:

he Hon'ble J. B. Phear and C. Hobhouse, *Judges.*

Joinder of causes of action—Procedure.

Case No. 727 of 1868.

ecial Appeal from a decision passed by the Principal Sudder Ameen of Nuddea, dated the 7th March 1868, reversing a decision passed by the Moonsiff of that District, dated the 29th May 1867.

Golam Mustafa Khan (Defendant), *Appellant,*

versus

Sheo Soonduree Burmonee (Plaintiff), *Respondent.*

Baboo Mohinee Mohun Roy for Appellant.

Baboo Greesh Chunder Ghose for Respondent.

Where plaintiff claimed property which she alleged to have passed into the hands of different defendants by several acts of wrongful alienation at different times, and the Court of first instance tried the case as a whole, notwithstanding that it found the causes of action to be several and distinct against several defendants—

HELD that the Lower Appellate Court, when this objection was made before it, ought to have tried the case as made up of separate suits against so many different defendants.

Phear, J.—THE plaintiff claims the property which is the subject of suit as having originally belonged to her husband and then to her son; and she alleges that it has passed into the hands of the different defendants by several sets of wrongful alienations to them effected at different times.

The 1st issue in the Court of first instance was: "Whether there are several "causes of action or only one, and whe-"ther the plaint is, therefore, improper, as "it was against several defendants." The Moonsiff found this issue in favor of the defendants, that is to say, he was of opinion that the causes of action sued upon were several and distinct, and against several defendants. Notwithstanding this conclusion, he tried the case as a whole, received evidence on both sides, and gave a determination on the merits. This was also in favor of the defendants, as he dismissed the plaintiff's suit. The plaintiff appealed, and the first issue in the Principal Sudder Ameen's Court was: "Whether the plaintiff's "suit has been brought on different grounds "or not," a repetition of the objection which was made in the Court of first instance. In regard to this issue, the Principal Sudder Ameen ruled that, under the circumstances of the case, there was no ground for the plaintiff bringing separate suits.

It appears to us that the Principal Sudder Ameen was entirely wrong in the conclusion which he thus arrived at. We think that he was bound to give effect to the objection which was made before him, and he ought to have tried the case as being made up of so many separate suits against so many different defendants. We think also that there has been some misapprehension in the mind of the Principal Sudder Ameen with regard to the issues which he had to try between different parties, and we are inclined to trace this confusion which has arisen from the circumstance that so many different actions have in effect been tried as one. Amongst other things, a result has been

brought about, which is clearly wrong, namely, that the Principal Sudder Ameen has given costs against all the defendants alike, calculated upon the whole value of the subject of the amalgamated suit. Upon the whole, we think that we are bound to send back the case to the Lower Appellate Court for re-trial, and we do so with directions that the Court treat it as so many separate suits brought by the plaintiff against the separate sets of defendants whom she separately charges with having taken possession of different portions of the property, and kept her out of the enjoyment thereof.

The Lower Appellate Court will try these suits upon the evidence which is already on the record, but it will be careful, in eventually awarding costs, to treat the several sets of defendants as several distinct parties, each concerned only with the particular portion of the property for which he defends. The costs will follow the event.

The 20th July 1868.

Present:

The Hon'ble J. B. Phear and C. Hobhouse *Judges.*

Onus probandi—Suit for declaration of lakhiraj title.

Case No. 676 of 1868.

Special Appeal from a decision passed by the Principal Sudder Ameen of the 24-Pergunnahs, dated the 30th December 1867, affirming a decision passed by the Sudder Ameen of that District, dated the 10th April 1867.

Hurrendur Kishore Bahadoor (Defendant), *Appellant,*

versus

Kedarnath Mitter (Plaintiff), *Respondent.*

Mr. J. S. Rochfort and *Baboo Kalee Mohun Doss* for Appellant.

Baboos Oopendur Chunder Bose and *Bhowanee Churn Dutt* for Respondent.

Where plaintiffs sued for declaration that certain lands were *lakhiraj*, on the ground that defendant had obtained a decree in the Collector's Court against them for rent—HELD that the onus lay upon the plaintiffs to show that they were holding the land as true *lakhiraj*, and that the Collector's decree was wrong.

Phear, J.—IN this case, the plaintiffs ask the Court to declare that certain lands in their possession are *lakhiraj*, and their cause of action, which they say entitles them to this declaration against the defendant, is that the defendant has lately in the Collector's Court obtained a decree against them for rent of these very lands. Both the Lower Courts have given the plaintiffs the decree they seek. The Lower Appellate Court places its judgment upon this foundation, namely, "The plaintiffs state that the "land in question is held by them rent-free; "unless the defendant be able to prove the "said allegation to be false, the plaintiffs "must be successful in their suit." The Lower Appellate Court then proceeds to discuss the value and weight of the evidence adduced by the defendant, and concludes with these words: "For all these reasons, "the defendant has not been able to prove "in the least that the disputed land is not "*lakhiraj*, or that the tenure has come "into existence subsequently to December "1790," and upon this finding the Lower Appellate Court gives a decree for the plaintiffs, without, as it seems to us, enquiring into the nature or value of the plaintiff's evidence.

It is objected on special appeal that the Lower Appellate Court has erred in thus making its decision turn upon whether or not the defendant had made out that the land was *not lakhiraj*, and we think that the objection is valid. We see nothing in this case to relieve the plaintiffs, who come into Court to seek a specific remedy, from the burden of proving that they are entitled to that remedy. It seems to us that it was incumbent upon the plaintiffs to show that they were holding this land as true *lakhiraj*, and that the decree obtained against them by the defendant was wrong.

The special respondent has endeavoured to support the opinion of the Lower Appellate Court as to the incidence of the *onus* of proof by quoting a decision of this Court passed by the majority of three Judges in April 1864, which is reported in the special number of the Weekly Reporter, page 174; but it is sufficient to say with regard to that decision that the case in which it was passed is by no means parallel with the present case. There, on the facts which were admitted, the zemindar (defendant) was guilty of having illegally ousted the plaintiff from possession of the lands in dispute, unless he could show that they were not *lakhiraj* lands, and were, on the contrary, his (the zemindar's) *mál* lands. The Court there held that, on those facts, the *onus* lay upon the defendant to prove his defence. In our case, the defendant has nothing to justify, until the plaintiff

makes out at least a *primâ-facie* case, to the effect that the decree in the Revenue Court was an improper decree, and passed in prejudice of his (the plaintiff's) title.

We are, therefore, clearly of opinion that the Principal Sudder Ameen has committed an error in his treatment of this case. We, therefore, remand it to the Lower Appellate Court for re-trial upon the evidence which is on the record. The issue to be tried should be, whether or not the lands are the plaintiff's *lakhiraj* lands. Costs will follow the event.

The 21st July 1868.

Present:

The Hon'ble F. B. Kemp and E. Jackson, *Judges.*

Travelling beyond the plaint—Pre-emption—Co-partnership—Vicinage.

Case No. 271 of 1868.

Special Appeal from a decision passed by the Principal Sudder Ameen of Tirhoot, dated the 23rd November 1867, affirming a decision passed by the Moonsiff of that District, dated the 23rd January 1867.

Koonj Beharee Lall (one of the Defendants), *Appellant,*

versus

Gridharee Lall (Plaintiff), *Respondent.*

Mr. R. E. Twidale for Appellant.

Baboo Anund Gopal Paleet for Respondent.

A plaintiff suing to establish a right of pre-emption on the ground of co-partnership with the vendor cannot be allowed to travel beyond his plaint, and obtain a decree by right of vicinage.

Jackson, J.—The plaintiff prefers this suit to obtain possession of 1 beegah 13½ cottahs of Fukeeranah land, on the ground that he was entitled to it by right of pre-emption, and in preference to the defendant to whom those lands have been sold by their former owner. The special pre-emption-claim put forward in the plaint is right as a co-partner with the vendor. The answer of the defendant was that he also was a co-partner in the land, and as such was as well entitled to purchase the property as the plaintiff. Both Courts have decreed the plaintiff's claim. The Principal Sudder Ameen, upon this direct issue as raised between the parties, recording his opinion that the allegation of the defendant was whimsical and fanciful. The Principal Sudder Ameen does not seem to have entered into the question of fact that was thus raised between the plaintiff and the defendant, and has, in reality, given no opinion upon it.

The special appellant's objection is based upon this point, but it is stated by the pleader for the respondent that, even if his right on the ground of co-partnership cannot be sustained, still the plaintiff is entitled on the ground of vicinage, and that, in fact, both Courts have decreed the claim of the plaintiff on the ground of vicinage, the Principal Sudder Ameen stating that the defendant himself admitted that the lands in dispute were within the boundaries of the plaintiff's putty. It appears to us that the question of vicinage was not admitted by the defendant, but that the defendant distinctly stated that his property was adjacent to the disputed land, as well as the plaintiff's property, and upon this point there appears to have been no evidence taken, and no real decision has been arrived at; but it appears to us immaterial, because the right which the plaintiff claims is not a right of vicinage, but a right as co-partner. He distinctly uses in his claim the Mahomedan term showing that he claims his right as a co-partner. He cannot be allowed to travel beyond his plaint, and he cannot, therefore, obtain a decree by right of vicinage, and we think we ought not to return the case for any further trial on that point. On the right on which the plaintiff claimed, his suit must be dismissed.

We therefore decree the appeal, reverse the Principal Sudder Ameen's decision, and dismiss the plaintiff's suit with all costs.

The 21st July 1868.

Present:

The Hon'ble H. V. Bayley and A. G. Macpherson, *Judges.*

Illegal dispossession—Admission.

Case No. 121 of 1868.

Special Appeal from a decision passed by the Principal Sudder Ameen of East Burdwan, dated the 29th September 1867, affirming a decision passed by the Moon-

siff of that District, dated the 10th May 1867.

Bykunt Coomar (Defendant), *Appellant*,

versus

Chunder Mohun Chowdhry and others (Plaintiffs), *Respondents*.

Baboo Khettur Mohun Mookerjee for Appellant.

Baboo Umbika Churn Banerjee for Respondents.

In a suit to recover possession and mesne-profits of alleged *istemoorari* lands, where defendant pleaded that they were not such lands—HELD that, as plaintiff's father had been in quiet possession of the tenure, whatever it might have been, and plaintiff himself had been in possession until dispossessed by defendant without any sufficient title, the plaintiff was entitled to a decree.

If a defendant's admission is read against him, the whole of it must be taken together. But by this it is not meant that separate and distinct allegations made without any qualification may not be used separately against him. The judgment of the Full Bench in the case of Poolin Behari Sein (9 W. R. 190) discussed and explained.

Bayley, J.—I AM of opinion that this appeal ought to be dismissed with costs. The plaintiff sues for possession and mesne-profits on the ground of having been dispossessed from certain ancestral *istemoorari jummai lands*.

The defendant's case is that he has not dispossessed the plaintiff; that the lands in dispute are *not* the plaintiff's *istemoorari* lands; that the plaintiff's father once held the lands, but being unwilling to pay an enhanced rent, he (the plaintiff's father) gave them up by a deed of relinquishment. The first Court decreed the plaintiff's suit. The defendant appealed, and the Lower Appellate Court dismissed the defendant's appeal, upon which he (the defendant) has appealed specially, urging before us only two grounds:—

1st.—That the Lower Appellate Court has erred in not requiring the plaintiff to prove an *istemoorari* title before giving him a decree for possession, and that, until the plaintiff had proved such title, no proof should have been required from him (the defendant).

2nd.—That the Lower Appellate Court was wrong in taking a part of the defendant's statement as an admission against him, whereas, as a rule of law, the Lower Appellate Court should have taken the whole together.

In my opinion, these pleas are untenable, because it is clear from the written statement of the defendant that the plaintiff's father was in quiet possession of the tenure, whatever it might have been, and under the ordinary rules of inheritance, that tenure, as it existed in the father's hands, would have descended to the son, had not the plaintiff's father, as the defendant alleges, relinquished the lands.

But it has been found as a fact by the Lower Appellate Court that the *plaintiff himself* was in possession of the lands in dispute, and was dispossessed therefrom by the defendant; and that, not only was there no sufficient title shown by the defendant so as to justify the plaintiff's possession being disturbed by defendant, but that the whole of the title set up by the defendant was fraudulent and unaccompanied by any kind of possession whatever.

Under these circumstances, I hold that plaintiff's prayer for possession must be decreed, the defendant having shown no title to disturb that possession.

As to the second plea, I think that the contention of the defendant as to the doctrine of law as to admissions which he wishes us to accept and consider supported by the various precedents cited by him has no application whatever to the facts of the present case before us.

It is true that an admission which is qualified in its terms, must be ordinarily accepted as a whole, or not taken at all as evidence against a party; but where a party makes separate and distinct allegations *without any qualification*, the rule of law contended for does not apply. For instance, in the present case, the defendant in his written statement makes one clear and distinct allegation that the plaintiff's father had possession, and that he (the defendant) had no possession whatever at that time. Then he makes another distinct and unqualified allegation that the plaintiff's father having *relinquished* the lands, he (the defendant) succeeded to the land. There are two such separate statements here that I cannot see why the one statement cannot be taken quite distinct from the other. I think the plea untenable for these reasons, and therefore do not make any further remark on the legal doctrine as to admissions.

I would dismiss this special appeal with costs.

f

Macpherson, J.—I wish to add a few rds, because it is clear to me from the peated attempts which have lately been ade before us to put a wholly wrong con-uction upon the judgment of the Full ench in the case of Poolin Behari Sein *versus* Watson and Co. (Weekly Reporter, olume IX., page 190), that that judgment s been greatly misunderstood. In the dgment of the Chief Justice, Mr. Justice yley, and myself, there occurs the follow-g sentence: "If you read a man's answer, u must take the whole admission together." his sentence has been repeatedly cited before recently as laying down that no portion a defendant's written statement can by y possibility be read against him without ery portion of the statement from the ginning to the end being also read. To ve such an effect to what we say is to give a far wider meaning than was ever intend-. The context shows clearly enough at the true meaning is, and it is the only eaning which the passage properly bears. is simply this, that, if a man makes a alified statement, you cannot use the state-ent against him apart from the qualification. t it is not laid down by us, and was never tended to be laid down, that, if a man akes a series of independent and unquali-d statements, these statements may not used against him. While I still consider e judgment in Poolin Behari's case to be rfectly right, I may state distinctly that at case, in my opinion, goes no further than lay down that an unfair use is not to be ade of a man's written statement by trying convert into an admission by him that hich he never intended to be an admission.

In the present instance, there are two stinct statements of fact made by the fendant: the first is that the plaintiff's cestor held the tenure, and was in posses-on of the lands in dispute up to a certain te; the second is that, on that date, the aintiff's ancestor relinquished the lands. d that thereupon a settlement of the me lands was made with the defendant. here is, in what is said as to relinquishment d subsequent settlement with the defend-t, no qualification whatever of the state-ent and admission by the defendant that e plaintiff's ancestor held the tenure for a rtain time. The matter of relinquishment bsequently referred to is not a qualifica-tion of the statement that the plaintiff's an-cestor once held the tenure, but is a perfect-ly fresh and distinct fact. There was, there-fore, nothing wrong in law, and nothing contrary to the rule laid down in Poolin Behari's case, in reading against the defendant so much of his written statement as stated that the plaintiff's ancestor once held the tenure, and was in possession thereof until he relinquished it.

The 21st June 1868.

Present:

The Hon'ble G. Loch and F. A. Glover, *Judges.*

Right of action—Execution—Parties to a suit—Section 11, Act XXIII., 1861.

Case No. 2086 of 1867.

Special Appeal from a decision passed by the Judge of Sylhet, dated the 5th June 1867, reversing a decision passed by the Moonsiff of that District, dated the 29th December 1866.

Gour Kishore Chowdhry (Plaintiff), *Appellant,*

versus

Mahomed Hassim Chowdhry and others (Defendants), *Respondents.*

Baboo Debendro Narain Bose for Appellant.

Baboo Mohinee Mohun Roy for Respondents.

In a suit brought by *M* against *K* and others, certain lands belonging to *G* were included, and *G* was made a defendant; these lands, however, were released from the claim, and *G* excluded from the decree obtained by plaintiff against the other defendants. In execution, however, *M* had them measured as a part of the decreed lands; and *G's* petition of objection under Section 230 of Act VIII., 1859, having been struck off the file, *G* brought a suit to have his title established.

HELD that, though, as a "party to the suit" brought by *M*, *G* would have been bound, by Section 11, Act XXIII., 1861, to seek his remedy in the execution-department, yet, as he was released from the operation of the decree, he must be considered a stranger, and permitted to bring his present action.

Loch, J.—THE plaintiff sued for confirmation of title to certain lands which he claimed as appertaining to his Talook Lukkhun Sham. He stated that, in a former suit brought by the defendants against Kisto Monee and others, to recover possession of the lands of Kyot Koona, the lands which form the subject of the present suit had been included in the claim, and he had been made a defendant; that the lands were found to belong to him, and were released from the claim, and the decree was against the defendant Kisto Monee and others, and excluded him; that notwithstanding this decision in the plaintiff's favor, the defend-

ant had in execution of that decree had these lands measured as part of the decreed lands; that he filed a petition of objection, which was at first treated as a case under Section 230 of Act VIII. of 1859, but was afterwards struck off by the Principal Sudder Ameen without enquiry, and he is in consequence obliged to bring this suit to have his title established to the lands declared in the defendant's decree to belong to him (the plaintiff), and to have the chittahs of the Ameen who gave possession to the defendants corrected.

The first Court gave plaintiff a decree, holding that the lands claimed were clearly part of the plaintiff's talook Lukkhun Sham, and had been declared to be such under the decree held by defendant against Kisto Monee. In appeal, the Judge did not go into the merits of the case, but looking upon the plaintiff as one of the parties to the suit brought by the defendant against Kisto Monee, held that he should have sought his remedy in the execution-department, and that his objection should have been heard and disposed of under Section 11, Act XXIII. of 1861, and he accordingly dismissed the appeal.

In special appeal, it is urged that the Judge's view of the law is erroneous; that appellant was released from the claim of the defendant, and the lands claimed by defendant declared to belong to the appellant, and that he was no party to the decree; and that the effect of the Judge's order would be to enable the defendant, in execution of his decree against a third party, to set aside a judgment of the Court which had, in the presence of the defendant, declared that the lands which formed the subject of the present suit belonged to the special appellant.

The words of the law (Section 11, Act XXIII. of 1861) are, as stated by the Judge, "Any other question arising between the *parties to the suit* in which the decree was passed, and relating to the execution of the decree, shall be determined by order of the Court executing the decree, and not by a separate suit." The words of the law are "parties to the *suit*," not "parties to the *decree*;" and it cannot be denied that the plaintiff was a party to the defendant's suit. He was, however, released from the operation of that decree, and must, we think, as regards the execution of that decree, be considered a stranger to the suit in which he had no further interest or concern. Looking upon him in that light, no objection can be taken to his present action which is to have a declaration of his title with regard to those lands which were declared to be his by the former decree, but which title he considers has been endangered by the act of the Ameen deputed to give possession to the defendant of the other lands decreed to him.

The order of the Judge must be set aside, and that of the first Court restored, and the appellant will get his costs in all Courts.

The 22nd July 1868.

Present:

The Hon'ble F. B. Kemp and E. Jackson, *Judges.*

Suit to establish proprietary right—Possession—Limitation.

Case No. 424 of 1868.

Special Appeal from a decision passed by the Principal Sudder Ameen of West Burdwan, dated the 21st December 1867, affirming a decision passed by the Sudder Moonsiff of that District, dated the 30th August 1867.

Protap Narain Mookerjee (Plaintiff), *Appellant,*

versus

Kartick Chunder Mookerjee and others (Defendants), *Respondents.*

Baboo Nil Madhub Sein for Appellant.

Baboo Rash Beharee Ghose for Respondents.

Where plaintiff sues to establish proprietary right as against a mokurrureedar, it is not necessary for him to prove that he has been in actual possession within 12 years.

Jackson, J.—We think that the Lower Courts have not clearly determined the point of limitation in this case. They say that the plaintiff's witnesses and documentary evidence do not prove that the plaintiff has been in possession at any time within 12 years of the institution of the suit. It is to be remarked that the plaintiff does not claim that he ever held actual possession of the land; his statement is that the defendant was in actual possession of the land, but that the defendant held as mokurrureedar under the plaintiff as proprietor, and in proof of this he has put in his purchase as proprietor. He has put in a mokurruree pottah and a map in which it is stated that the defendant's father acknowledged the plaintiff's proprie-

tary rights, and admitted that he held as mokurrureedar under the plaintiff. There is nothing in the decision of the Principal Sudder Ameen to show that he has considered the question of this mokurruree, and it is clear that, if it is true that the defendant held as mokurruredar under the plaintiff, the plaintiff would not be barred by limitation.

The case is remanded in order that the Principal Sudder Ameen may re-consider his decision in the case, and may record a judgment on the facts which are at issue between the parties.

The 22nd July 1868.

Present:

The Hon'ble F. B. Kemp and E. Jackson, *Judges.*

Jumma-wasil-bakee papers — Evidence — Presumption of uniform rent—Section 4, Act X., 1859.

Case No. 2078 of 1867 under Act X. of 1859.

Special Appeal from a decision passed by the Officiating Additional Judge of Hooghly, dated the 31st May 1867, affirming a decision passed by the Deputy Collector of that District, dated the 27th June 1866.

Shib Pershad Doobey (Defendant), *Appellant,*

versus

Promothonath Ghose and others (Plaintiffs), *Respondents.*

Baboos Opender Chunder Bose and *Poorno Chunder Shome* for Appellant.

Baboos Debendro Narain Bose and *Bykuntnath Paul* for Respondents.

HELD in a suit for enhancement of rent that *jumma-wasil-bakee* papers, when produced by the zemindar at the citation of the defendant himself, were not merely corroborative, but, under Section 4, Act X., 1859, good and sufficient evidence as against the latter in rebutting the presumption under Section 4, Act X., 1859.

Kemp, J.—THIS was a suit for enhancement. Both the Lower Courts have decreed the plaintiffs' suit. The Judge found that the presumption in favor of the ryot (the defendant), "that, as the rent had not been changed in the period of 20 years before the commencement of the suit, it must be held that the land was held at that rent from the time of the Permanent Settlement," was rebutted by the evidence filed by the plaintiff (the zemindar). This evidence consists of *jumma-wasil-bakee* papers, which show that the rent varied in 1227 and in 1229, and that the creation of the defendant's tenure was of a date long subsequent to the perpetual settlement.

It has been pressed upon us very earnestly by the pleader for the special appellant, who has certainly argued the case for his client with great ability, that these *jumma-wasil-bakee* papers are only corroborative evidence, and that they are not independent proof of the facts stated therein. A decision, amongst other decisions of this Court, published in Volume VIII., Weekly Reporter, page 280, has been quoted by the pleader. The circumstances of that case are very different from those of the present case. In the case before us, the *jumma-wasil-bakee* papers are not produced by the zemindar, but he was cited to produce them by the defendant himself who relied upon them. They were also attested, and therefore, in our opinion, these *jumma-wasil-bakee* papers are good and sufficient evidence, and do rebut the presumption under Section 4 of Act X. of 1859. The defendant, who adduced this evidence and relied upon it, cannot be permitted to take advantage of it in as far as it helps his case, and to ignore it to the extent to which it is against his interest.

Then, it is said that these *jumma-wasil-bakees* show a variation of only a few annas, and rulings of this Court have been shown to us to the effect that a variation of only a few annas in the *jumma* is not sufficient to destroy the presumption arising under Section 4. But these *jumma-wasil-bakees* prove something further than a mere variation of a few annas in the *jumma.* They prove that the *jumma* of the defendant was fixed at a period much later than the time of the Perpetual Settlement, and this fact alone is sufficient to rebut the presumption under Section 4.

Then it is said that the defendant's objection with reference to 2 beegahs 15 cottahs being lakhiraj is not decided by the Judge, but we find that this plea was not taken in the Court of first instance, and on the question of rates there is no objection in the petition of appeal to the Judge.

We, therefore, dismiss this special appeal with costs.

The 22nd July 1868.

Present:

The Hon'ble J. B. Phear and C. Hobhouse, *Judges.*

Sale of land—Non-payment of purchase-money —Giving and re-taking possession.

Case No. 2429 of 1867.

Special Appeal from a decision passed by the Principal Sudder Ameen of Nuddea, dated the 26th June 1867, reversing a decision passed by the Moonsiff of Kooshtea, dated the 25th January 1867.

Prem Soonduree Dossia (Plaintiff), *Appellant,*

versus

Grish Chunder Bhuttacharjee and others (Defendants), *Respondents.*

Mr. J. S. Rochfort and *Baboo Sreenath Banerjee* for Appellant.

No one for Respondents.

A party selling land may refuse to give delivery until the consideration is paid; but, having given delivery, he has no right to re-take possession, and pay himself the purchase-money out of the usufruct.

Phear, J.—In this case, the plaintiff purchased of the defendant the lands in suit, and obtained possession of them from him. Afterwards, on the ground that the plaintiff had not paid the purchase-money for these lands, the defendant re-took possession, and still holds possession against her. The Lower Appellate Court has, in substance, decided that the defendant is entitled thus to hold possession of those lands, until by the usufruct he shall have paid himself the amount of the purchase-money.

It seems to us that this decision is erroneous. No doubt, had the defendant never parted with his possession of the lands to the plaintiff under the purchase, he might have refused to give delivery until the consideration was paid; but having given delivery to the plaintiff, her title and her right to possession thereupon became complete, and in every thing that the defendant has done since, he has been a trespasser and wrong-doer. His right, even in the first instance, was not a right to repay the amount out of the usufruct of the property, but merely to withhold delivery of possession until the purchase-money was paid. After he had given over the property, he probably had the right to claim that the land should be treated as security for the unpaid purchase-money; and to realize this, he should have to come into Court to obtain an order that it should be sold; but he had no right of his own act to oust the plaintiff from her rightful possession.

The decision of the Lower Appellate Court is, in our opinion, wrong, and must be reversed. The plaintiff's suit must be decreed, and she must have her costs both in this Court and in the Lower Appellate Court.

The 22nd July 1868.

Present:

The Hon'ble J. B. Phear and C. Hobhouse, *Judges.*

Onus probandi—Joint property—Ekrarnamah—Cause of action — Pro-forma defendant.

Case No. 50 of 1868.

Special Appeal from a decision passed by the Officiating Judge of Nuddea, dated the 31st August 1867, affirming a decision passed by the Principal Sudder Ameen of that District, dated the 18th September 1866.

Ram Chunder Mitter (Defendant), *Appellant,*

versus

Kisto Kaminee Dossee (Plaintiff) and another (Defendant), *Respondents.*

Baboos Onookool Chunder Mookerjee and *Bama Churn Banerjee* for Appellant.

Baboos Ashootosh Chatterjee and *Grish Chunder Mookerjee* for Respondents.

A plaintiff suing for a share of certain joint-property which she claimed under a family-arrangement said to have been reduced to writing as an ekrarnamah, and upon the happening of the necessary conditions, it was HELD that the rules with regard to the *onus* of proof which are applicable to a suit for a share of joint-family property were not directly applicable, and the plaintiff was bound to give some *primâ-facie* proof of her cause of action.

HELD that in such a case plaintiff's right to sue would accrue after the date of the ekrarnamah.

Where a party is made a defendant without a cause of action being alleged, his co-defendant should not be made to pay his costs, which should be paid by the plaintiff.

Phear, J.—We think it very clear that the Court of first instance, and therefore the Lower Appellate Court, had no jurisdiction to try the plaintiff's claim to the moveable property. Consequently, so far as the decrees of the Lower Courts concern that property, they must be reversed, and the plaintiff's suit dismissed. The defendant must be paid his costs in proportion to the

value of that property in all the Courts by the plaintiff.

As regards the immoveable property, the nature of the plaintiff's suit is very clearly set out and described in the first part of the judgment of the Lower Appellate Court. It appears from that description that the plaintiff's cause of action was special. She said that a certain mehal, the joint-property of three brothers, was in Bysack 1262, by an arrangement between those brothers, settled upon certain purposes. Amongst others, a one-fourth share of the income of it was assigned as a provision for certain ladies of the family, and for the expenses of idols. The management of the property was in the mother's hands, and there was further a condition that, should any of the ladies for whose maintenance the share was assigned die, her share of the property should revert to the three brothers equally. And the plaintiff goes on to say that these arrangements in respect of this mehal were reduced in writing in the shape of an ekrarnamah. She now comes into Court to claim the share to which her husband was entitled of this mehal, under the arrangement which she said had thus taken place, and upon the happening of the necessary conditions.

From this, I think it sufficiently obvious that she does not sue upon the ordinary allegation that the property, a share of which she claimed, was joint-family property hitherto undivided. Consequently, those rules with regard to the *onus* of proof which have been laid down as applicable to such a case, namely, a case where the plaintiff is suing for a share of joint-family property, are not directly applicable in this case. The plaintiff must, in short, like any other plaintiff, give some *primâ-facie* proof of the particular cause of action upon which she has chosen to come into Court. I think, therefore, that the Lower Appellate Court is wrong in saying that the *onus* of proving his case fell here upon the defendant. It seems to me that, until the plaintiff had given same legal evidence of the ekrarnamah and of the happening of the events after the execution of the ekrarnamah, sufficient to entitle her, in the character in which she appeared in Court, to claim a share in the property settled by that ekrarnamah, the defendant ought not to have been called upon to prove his case at all. With this view, I think that the objection made by the special appellant, to the effect that the Lower Appellate Court had erred in throwing the burden of proof upon the defendant, is correct, and must be upheld. It follows that the plaintiff's suit, so far as regards her claim to the immoveable property in question, has not been properly tried, and the case must be remanded to the Lower Appellate Court for re-trial.

If I am right in saying that the plaintiff's cause of action is founded on the ekrar which she herself puts forward as its basis, it follows that her right to come into Court to sue for the property necessarily accrued after the date of the ekrarnamah; and as she says that that date was in Bysack 1262, it follows that the cause of action upon which she sues accrued within 12 years of the date of bringing her suit; and, therefore, I think that the special appellant's objection, on the ground that the Lower Appellate Court has erred in saying that the suit is not barred, cannot be maintained.

The special appellant also objected that the first Court did not do its duty in regard to compelling the attendance of certain witnesses who had been named by him; but after consideration of the arguments, and the acts which have been adduced before us, we think that there was no such fault on the part of the Lower Court in this respect as to constitute a defect in the investigation, and to call for the interference of this Court in special appeal.

The special appellant's last objection is that he ought not to have been made liable for the costs of a co-defendant whom the plaintiff terms a *pro-formâ* defendant, and against whom she has not alleged any cause of action in her plaint. We think this objection is good. If the plaintiff made a person a defendant without even going to the extent of alleging a cause of action, still less proving one against him, certainly it was most improper that the Court should make his co-defendant pay his costs. It seems to us that the proper course would have been to dismiss the plaintiff's suit as against that unnecessary defendant, and to make the plaintiff pay his costs; and accordingly we think it right to order that the present suit be dismissed as against Tara Chunder Mitter, and that the plaintiff do pay his costs in all the Courts.

On the whole, as I have already said, we think that the case must be remanded for re-trial as to the plaintiff's claim to the immoveable property, and it must be tried upon the evidence which is already upon the record. The costs of the remaining defendants will follow the result of the remand.

The 23rd July 1868.

Present :

The Hon'ble J. B. Phear and C. Hobhouse, *Judges.*

Registration—Deed of sale—Act XX., 1866.

Special Appeal from a decision passed by the Second Principal Sudder Ameen of the 24-Pergunnahs, dated the 2nd November 1867, reversing a decision passed by the Moonsiff of Baraset, dated the 14th February 1867.

Mofuzel Hossein (Intervenor), *Appellant,*

versus

Golam Ambiah (Plaintiff), *Respondent.*

Baboo Poorno Chunder Shome for Appellant.

Baboos Debendur Chunder Ghose and *Ashootosh Dhur* for Respondent.

An unregistered contract of sale, though not such as absolutely to require registration according to Section 49, Act XX., 1866, in order to be admissible as evidence (even if sufficiently complete to pass rights of property from the vendor to the purchaser), cannot have any priority against any other authentic instrument of conveyance executed afterwards by the vendor, and duly registered.

Phear, J.—In this case, it appears that one Abdool Wahid, the first defendant, being owner of certain property, after entering into a contract of sale of the property with the plaintiff, sold it again to the other defendant. The contract of sale, whatever it was, between the plaintiff and the vendor (defendant) was not registered, and it seems that it was not of such a character as absolutely to require registration according to the provisions of Section 49, Act XX. of 1866, in order that it should be admissible in evidence, but the kobalah under which the special appellant purchased was duly registered, and after the registration, the special appellant obtained possession of the property from the vendor. Upon this having occurred, the plaintiff brought the present suit against the vendor (defendant), seeking specific performance of his contract. The present special appellant then intervened, and was made a defendant by the Court under the provisions on that behalf of Section 73 of the Civil Procedure Code. The Lower Appellate Court has given the plaintiff a decree against both the defendants. The vendor (defendant) makes no remonstrance against this, but the second purchaser (defendant) now appeals specially to this Court.

It appears to me that the addition of the special appellant as a party to the case was not called for, but I cannot go to the length of saying that it was an improper exercise of discretion on the part of the first Court. As, however, the intervenor has thus become a defendant on the record, the question between him and the plaintiff in the suit is simply this, namely, whether or not the plaintiff makes out as against him such a title to the property as gives him (the plaintiff) a right to a decree for possession. The special defendant says that the plaintiff's alleged purchase is not established by the evidence, and it would seem from the finding of fact stated by the first Court in its judgment to be very doubtful, indeed, whether the transaction between the plaintiff and the vendor (defendant), upon which the plaintiff relies, really did amount to a sale of the property; whether, in short, it passed any proprietary rights to the property or not. But assuming that it was sufficiently complete to pass from the vendor (defendant) to the plaintiff rights of property as between those two persons, still, inasmuch as it was not registered, it seems to us that, by the operation of Section 50, Act XX. of 1866, it cannot have any priority as regards the property comprised in it against any other authentic instrument of conveyance executed afterwards by the vendor (defendant), and duly registered. It follows, then, that the plaintiff's title from the vendor (defendant), traced as it is through an unregistered instrument, cannot prevail against the defendant's title, which is deduced from the same owner under a duly registered kobalah. Treating, therefore, as we have already said we must, the question between the plaintiff and the special appellant as if it arose in a suit brought by the plaintiff against the special appellant to recover the property in suit, the plaintiff has not made out that he is entitled to succeed.

In this view, the decision of the Principal Sudder Ameen is erroneous in law, and must be set aside as between these two parties only. As regards the plaintiff and the vendor (defendant), it will remain undisturbed. The special appellant must have his costs in this Court and in the Lower Appellate Court.

The 23rd July 1868.

Present:

The Hon'ble J. B. Phear and C. Hobhouse, *Judges.*

Jurisdiction—Section 23, Act X., 1859—Registration in zemindar's sherishta—Section 1, Civil Procedure Code.

Case No. 3078 of 1867.

Special Appeal from a decision passed by the Principal Sudder Ameen of Nuddea, dated the 30th August 1867, reversing a decision passed by the Moonsiff of Chooadangah, dated the 20th May 1867.

Madhub Chunder Paul and others (Plaintiffs), *Appellants,*

versus

Mr. A. Hills and another (Defendants), *Respondents.*

Baboo Anund Gopal Palit for Appellants.

No one for Respondents.

The jurisdiction given to Collectors by Section 23, Act X., 1859, is not exclusive, but concurrent, Civil Courts having cognizance under Section 1, Civil Procedure Code, of all suits to enforce a right of a civil nature, unless that cognizance is expressly barred.

Phear, J.—We think the Principal Sudder Ameen is wrong in holding that the Civil Court had no jurisdiction to entertain the subject of this suit. Section 27, Act X. of 1859, gives to the transferree of a permanent transferable interest in land the right to have his name registered in the sherishta of the zemindar in the place of that of his vendor; and every zemindar is by the same Section required to admit to registry, and otherwise give effect to, all such transfers when made in good faith. There can be no doubt that, if the Section stopped there, the transferree would be entitled to come into a Civil Court to enforce the right, if necessary, which the Section gives him. But the Section goes on to say that, if any zemindar refuses to admit to registry, and so on, the transferree may make application to the Collector, and the Collector shall enquire into the case, and pass the requisite orders. The Principal Sudder Ameen is of opinion that these words have the effect of giving jurisdiction to the Collector, and to the Collector exclusively, to entertain the question of right arising under this Section, and has upon that ground dismissed the plaintiff's suit. But the first Section of the Civil Procedure Code enacts that the Civil Courts should take cognizance of all suits of a civil nature, with the exception of suits of which their cognizance is barred by any Act of Parliament, &c. Now, the right given by Section 27 is undoubtedly a right of a civil nature, and therefore the Civil Courts have cognizance of all suits necessary for the purpose of enforcing such a right, unless that cognizance is barred expressly. But the words of Section 27, which give a power to the Collector to entertain suits of this kind and to determine them, do not bar the jurisdiction of the Civil Courts, in this respect differing from other parts of Act X.; as for instance Section 23, in which exclusive jurisdiction is in certain cases given to the Collector, and agreeing with Sections of the same Act in which the jurisdiction to be given to the Collector is not exclusive, but concurrent.

We think, therefore, that the decision of the Principal Sudder Ameen must be reversed, and as the Principal Sudder Ameen has found all the facts necessary for a determination of the case in favor of the plaintiff, we direct that the plaintiff's suit be decreed. The plaintiff must have his costs both in this Court and in the Lower Appellate Court.

The 24th July 1868.

Present:

The Hon'ble H. V. Bayley and A. G. Macpherson, *Judges.*

Butwarra-papers—Evidence.

Cases Nos. 1163 to 1165 of 1868 under Act X. of 1859.

Special Appeals from a decision passed by the Judge of East Burdwan, dated the 8th February 1868, affirming a decision passed by the Deputy Collector of that District, dated the 31st October 1867.

Drobo Moyee Gosmanee (Plaintiff), *Appellant,*

versus

Dhurmo Doss Koondoo (Defendant), *Respondent.*

Baboo Otool Chunder Mookerjee for Appellant.

Baboos Kishen Succa Mookerjee and *Umbika Churn Banerjee* for Respondent.

Butwarra-papers are only evidence of the proportionate assessment of Government revenue payable by proprietors after partition; not evidence, binding ryots as to what holdings are theirs, or what their areas, rates, or periods of occupancy.

Bayley, J.—We are of opinion that these three appeals must be dismissed with costs. It is quite clear that the butwarra-papers

are only evidence as respects the proportionate assessment of the Government revenue which proprietors shall pay after the partition of their estates, and therefore can be no evidence binding ryots as to what holdings are those of particular ryots, or what may be the areas, or rates, or periods of occupancy.

It is pressed upon us that the tenure in dispute could not be a decennially-settled tenure, for in that case it would have been entered in the butwarra-papers; but as we have said before that the butwarra-papers are no evidence against the ryots in this case, this ground is futile.

In regard to the last point, *viz.*, that the dakhilahs have not been attested, it seems quite clear to us, from the express terms of the judgment of the Lower Appellate Court, that the only case put forward by the appellant before that Court was that the butwarra-papers should have been received as evidence. The three appeals are, therefore, dismissed with costs.

The 24th July 1868.

Present:

The Hon'ble J. B. Phear and C. Hobhouse, *Judges.*

Onus probandi—Joint-family property—Legal presumption—Hindoo law.

Case No. 769 of 1868.

Special Appeal from a decision passed by the Principal Sudder Ameen of Sarun, dated the 29th November 1867, reversing a decision passed by the Sudder Ameen of that District, dated the 10th December 1866.

Sheo Golam Sing (Plaintiff), *Appellant,*

versus

Burra Sing and others (Defendants), *Respondents.*

Baboo Romesh Chunder Mitter for Appellant.

Baboo Ubinash Chunder Banerjee for Respondents.

In a suit to recover property on the ground that it was purchased as the vendor's undivided share in the joint-family property of three brothers, where defendants averred that it was the self-acquired property of the elder brother, who was not plaintiff's vendor—

HELD that the plaintiff was bound at least to show that the defendants constituted a joint family, and that they had enjoyed the property jointly at some period since its acquisition. The single fact of a family living joint, or in commensality, is not enough to raise a presumption in law that property acquired by an individual member is joint.

Phear, J.—THE first objection of the special appellant to the judgment of the Lower Appellate Court is this. "That the "Lower Appellate Court has thrown the "burden of proof with regard to the question of separation on the wrong party "that is, your petitioner. It was for the "defendants to prove their plea." This objection really goes to the root of the whole contest, for, if it cannot be maintained, the decision of the Principal Sudder Ameen must remain good against the plaintiff. It amounts to this, that, whereas the Principal Sudder Ameen has come to the conclusion that the plaintiff has not proved his case, this objection urges that it was not for the plaintiff to prove his case, but for the defendant to establish his defence. And the reason why the burden of proof is not to rest upon the defendant, who is resisting, rather than upon the plaintiff, who is making the claim, is remarkable. The plaintiff says that he is entitled by purchase to the property of one of three brothers, and alleging that the land which is the subject of suit is the joint-family property of the three brothers, he seeks to recover his vendor's undivided share in it. The defendants entirely deny that the lands belong to the brothers jointly, and on the contrary aver that it was the self-acquired property of the elder brother, who was not the vendor of the plaintiff. Upon this statement, the plaintiff's pleader argues that the plaintiff's case is made out, for he maintains that the brothers must be presumed to be living jointly until the contrary is proved, and further that all property acquired by one member of a joint family must be presumed to be acquired for the benefit of the whole until it is shown to be otherwise.

We have looked as carefully as we can through the later decisions of the Sudder Court and of this Court, but we can find nothing which goes any way towards supporting this position. It is, no doubt, laid down in many cases that the normal condition of a Hindoo family is joint. Therefore, starting with the fact of a family being joint, it must be presumed to afterwards remain joint, unless some proof of a subsequent separation is given. Also that, where property is shown to have been once joint-family property, it is presumed to remain the joint-property of all the members of the joint-family, until something to the contrary is

shown. But, on the other hand, there is more than one case which lays down that the single fact of a family living joint or in commensality is not enough to raise a presumption in law that property acquired by an individual member of that family is joint property. To render it joint property, the consideration for its purchase must have proceeded either out of ancestral funds or have been produced out of joint property or by joint labour. But neither of these alternatives is matter of legal presumption. It can only be brought to the cognizance of a Court of Justice in the same way as any other fact, namely, by evidence; consequently, whosoever's interest it is to establish it, he must produce the evidence.

In the case reported by Mr. Sutherland, Full Bench decisions, page 57, the Chief Justice in delivering judgment remarks: "It was contended that as the two brothers lived in commensality the presumption was that their property was joint." On this point, he goes on to say, the rule is correctly laid down in certain cases which he mentions and among these is the decision of the Sudder Court, reported in Sudder Dewanny Adawlut decisions, 1852, page 3; and on turning to the report of the judgment there given, we find the Court saying: "The *onus probandi* in this case appears "to us to be clearly on the plaintiff. By "his own admission, the properties in dispute "were not acquired by the use of the "patrimonial funds, nor have the defendants "ever acknowledged that they were acquired "by the joint exertions and aid of the "plaintiff and his father. It was, therefore, "for the plaintiff to prove his own allega-"tions as to the original joint interest in the "purchase of the properties. The mere "circumstance of the parties having been "united in food raises no such sufficient "presumption of a joint interest as to relieve "the plaintiff from the *onus* of proof."

It seems to us upon those authorities, and certainly upon the reason of the thing, that the plaintiff, coming into Court to claim a share in property as being joint-family property, must lay some foundation before he can succeed in his suit. He must at least show that the defendants whom he sues constitute a joint family, and that the property in question became joint property when acquired, or that at some period since its acquisition it has been enjoyed jointly by that family. It will be sufficient for this purpose for him to show that the family of which the defendants came was at some antecedent period, not unreasonably great, living joint in estate, and that the property in question was either a portion of the patrimonial estate so enjoyed by the family, or that it has been since acquired by joint funds.

In this case, the Principal Sudder Ameen has found that the plaintiff has given no proof of the family being joint, beyond the admitted fact of three persons being brothers; and the plaintiff has also given no sort of proof that these brothers ever were living in the joint enjoyment of any property, still less that this property was acquired by the use and employment of any joint funds. It seems to us that he was entirely right, on this finding, to dismiss the plaintiff's suit without looking further into the case.

The appeal will be dismissed with costs.

The 24th July 1868.

Present:

The Hon'ble J. B. Phear and C. Hobhouse, *Judges.*

Execution—Representatives of deceased judgment-debtor—Procedure—Sections 203 and 246, Act VIII. of 1859.

Case No. 707 of 1868.

Special Appeal from a decision passed by the Judge of Sarun, dated the 30th December 1867, affirming a decision passed by the Moonsiff of that District, dated the 15th February 1867.

Shurfun Bebee (Defendant), *Appellant,*

versus

The Collector of Sarun on behalf of the Court of Wards (Plaintiff), *Respondent.*

Messrs. R. E. Twidale and *C. Gregory* for Appellant.

Baboos Kishen Kishore Ghose and *Juggodanund Mookerjee* for Respondent.

Where a decree is passed against certain parties as representatives of a deceased party, it can only be executed against the property of the latter, unless the defendants fail to satisfy the Court that they duly applied all such his property as came into their possession, in which case the decree may be executed against property belonging to the defendants to the extent of the deceased's property not properly applied by them. (Section 203, Act VIII., 1859.)

The provisions of Act VIII., 1859, relative to execution against a living judgment-debtor are not applicable after he is dead. By his death his property passes from him; and if it is still liable for the debt, the transferee should be put on the record in place of the deceased

or regularly sued. There is no ground for applying Section 246 to him, as if he were holding *benamee* for the dead man.

Phear, J.—THE plaintiff in this suit, alleging that he is owner in possession of one-third of an 8-annas share of a specified mouzah, and that his enjoyment thereof is menaced by reason of the defendant having attached it, caused it to be sold, and then himself purchased it in execution of a decree held by him against a third person, prays for a declaration of his (the plaintiff's) right of ownership and possession.

The title which the plaintiff sets up is as follows :—

The 8-annas share in question formerly belonged to one Shahamut Ali Khan, who by two deeds made in the years 1810 and 1813 respectively, mortgaged it under the form of a conditional sale to Hurchal Oopadhya. Shahamut had three sons, Hossein Ali, Soojat Ali, and Nusserut, and in 1819 he sold nearly all his property, including the premises mortgaged by the deeds of 1810 and 1813, to his two eldest sons, Hossein Ali and Soojat Ali. In the following year, 1820, these two sons, with the view to liquidating their father's debts, entered into a new arrangement with Oopadhya, and amongst other things got him to accept a fresh mortgage from them of the 8-annas share in lieu of the original two mortgages of the same given in 1810 and 1813. Afterwards, namely, in 1830, Oopadhya took due steps for foreclosing the mortgage against Hossein and Soojat, and obtained his final decree for foreclosure in 1831. Subsequently to this again, it appearing that the mouzah was being held free of payment of Government revenue, the Government resumed it, and in 1842, amongst other mehals, settled the 8-annas share with Oopadhya's widow as representing the proprietor, her late husband, then deceased. From Oopadhya's widow, the plaintiff derived by purchase the one-third of the 8-annas share in respect of which he sues.

The case put forward by the defendant is certainly very remarkable. With one exception, he scarcely contravenes the plaintiff's facts. He says that he has become by purchase the holder of a decree which was obtained in 1836 against the heirs of Shahamut on a money-debt of the latter, and that in execution of that decree, he in 1866 caused the rights and interest of Nusserut (Shahamut's third son) in the mouzah in question to be attached and sold, and at that sale he himself (the decree-holder) becam the purchaser. Standing thus in the sho of Nusserut, he maintains that the plaint has not made out a right to possession the share to which Nusserut, as one of Shah mut's three sons, was entitled in the 8-ann of the mouzah, subject to the first mortgag transaction of 1810 and 1813, because t sale of 1819 was, he avers, a fraudul transaction between the father and the t elder brothers; and the foreclosure effect against Hossein and Soojat in 1831 could n affect Nusserut's interests.

It appears, further, as part of the facts this case, that when the property in suit w attached in 1866 at the defendant's instan in execution of his decree of 1836, the pr sent plaintiff duly preferred his claim to under the provisions of Section 246 of A VIII. of 1859, but this claim was di allowed by the Court which was charge with the execution of the decree. An thereupon the plaintiff brought this suit. cannot help thinking that there has been ve much of a blunder made in these executio proceedings, and that by reason thereof th plaintiff has been placed in a false positio He and his predecessors have, by the admis sion of the defendant, been in the enjoyment o this property as of right for nearly fort years, and it cannot be just that because th defendant has chosen to seize it in execu tion of a decree against a third person, th plaintiff should be reduced to the necessity o bringing an action to defend his possessio and for that purpose to prove his title as i he were seeking to get it out of the hand of one who was *de facto* holding it with a pre sumptive show of right. The truth is, as i seems to me, that the Court which issue process of execution misapprehended its dut in that respect. The decree of 1836 wa passed against certain defendants, including I suppose, Nusserut, not as persons individu ally liable thereunder, but representatives o Shahamut. Consequently, by the presen law which regulates the execution of decrees and which did so in 1866, the decree coul be executed only by the attachment and sal of property of the deceased Shahamut, unles the defendants failed to satisfy the Cour that they had duly applied all such proper ty of the deceased as was proved to hav come to their possession, in which case th decree might be executed out of property be longing to the defendants to the extent of the deceased's property proved to have been not properly applied by them. (See Section 203, Act VIII. of 1859.) Now, in 1866,

hen the decree was sought to be executed, hahamut had been dead upwards of 40 ars, and it is literally absurd to talk of ere being at that time any property seiz-le as belonging to him. It remained then the execution-creditor to establish that, the death of Shahamut, property of his sed to the defendants which had not en duly applied by them. Upon his suc-ding in doing this, he would become itled to ask for the attachment and sale an equal amount of property belonging the defendant or defendants, whom he shown to be guilty of such misapplication. does not appear that any step of this ure was taken, and, therefore, no founda-n has been laid upon which the execution-editor could base his claim to seize the ht, title, and interest of his judgment-btors in any property. Under this view of e facts, he ought not to have been allowed seize and sell Nusserut's rights and in-rests in the property which is in suit.

But, moreover, when the decree against usserut and others, representatives of Sha-mut, was sought to be executed in 1866, usserut himself had long been dead; and en supposing that his own property was iginally liable to satisfy that decree, it had, his death, passed to other hands, and effec-ally changed owners. The execution-editor's sole resource would, therefore, be e property of Nusserut's representatives n the like hypothesis as to misapplication f property of Nusserut come to their hands, s was made in the case of Nusserut when reated as representative of Shahamut Sections 210 and 211 of Act VIII. of 1859); nd it is not pretended that any enquiry has een held as to whether or not any assets f Nusserut ever came to the hands of his epresentatives now on the record, and, if so, n what extent they were rightly applied. The truth is that a mistake has been made n considering that certain provisions of Act VIII. of 1859, relative to obtaining execution of a decree against a living judgment-debtor, are applicable where execution is sought after the judgment-debtor is dead. While the man is alive, property belonging to him may be in the hands of others than himself, and hence the necessity of some such provisions as those of Section 246 for the purpose of preventing evasion and fraud. But by the fact of the debtor's death, his property passes from him. It may be that it will, in the hands of the transferree, remain still liable to satisfy the deceased's debts; but, if so, the transferree, for the same reason, becomes the representative of the deceased for the payment of those debts, and the proper mode of getting at such property of the deceased as he holds is to put him on the record in the place of the deceased in the ordinary mode which would necessitate the establishment of his representative character, or else to bring a regular suit against him. There is no ground for treating him as if he were holding benamee for the dead man, and therefore no ground for acting as if Section 246 applied.

With these views, and indeed on the state of the case as it is disclosed by the representations of both sides, it seems to me that this suit should be dealt with as if the defendant were in the position of plaintiff seeking to establish a right to follow the assets of Shahamut into the hands of the present holder, and to take them in satisfaction of Shahamut's debts. The *onus* is on him to make out that he has an equitable right to this property, which originated either at the death of Shahamut, or which sprung up in consequence of the decree against Shahamut's representatives, and has survived the alienations of the last 30 or 40 years, so as to enable him to assert it against the present plaintiff. It is obvious that a task of this kind is not likely to be an easy one under any circumstances. But in this case, the defendant's own story entirely cuts the ground from under him. He does not pretend that there is in the plaintiff's hands any property which can be unconditionally taken in satisfaction of a decree against either Shahamut or Shahamut's representatives. All he says amounts to this, namely, that the right of Nusserut to redeem the property in suit is still alive; that this right to redeem, considered as a beneficial interest in the land, is liable to be taken in execution of the decree against Shahamut's representatives; that it has been so taken; and that he has bought it. I need not point out that, even if all this be correct, it does not give the defendant a title to the property which is the subject of contest. According to this (his own account), he has bought nothing which the plaintiff has. He has only purchased the right to stand in Nusserut's shoes. At most, this gives him a right to sue for redemption, and he has no sort of claim to the judgment of the Court in this suit.

For these reasons, I think we ought not to interfere with the decision of the Lower Appellate Court, and that this appeal should be dismissed with costs.

The 24th July 1868.

Present:

The Hon'ble J. B. Phear and C. Hobhouse, *Judges.*

Damages—Losses (past and prospective).

Case No. 747 of 1868.

Special Appeal from a decision passed by the Judge of the 24-Pergunnahs, dated the 30th December 1867, modifying a decision passed by the Principal Sudder Ameen of that District, dated the 22nd April 1866.

Koomaree Dossee and another (Defendants), *Appellants,*

versus

Bama Soonduree Dossee (Pauper-plaintiff), *Respondent.*

Baboos Gopal Lall Mitter, Debendro Narain Bose, and *Grish Chunder Ghose* for Appellants.

Baboo Mohendro Lall Shome for Respondent.

Damages should be awarded according to the loss caused to plaintiff by the wrongful act of defendant; and, where such act renders it probable that plaintiff will be a loser in future time, the award should embrace prospective loss.

Phear, J.—We do not think that it was necessary in this case for the plaintiff to prove anything more than that she had such a right in the land as entitled her to possession, and it seems to us that the Judge has not erred in law in considering that the treaty of sale between the plaintiff's landlord and the plaintiff afforded evidence of such right to possession as entitled her to succeed in this suit against her landlord's vendee. We also think that the finding of the Judge to the effect that the transaction between the plaintiff and Bromomoyee was never completed, and that a portion only of the land was sold, cannot be disturbed now upon special appeal. It seems to us that there was evidence upon the record which would justify the conclusion of the Judge in this respect, and the absence of the conveyance which the special appellant points out is, in fact, evidence tending to support the plaintiff's story rather than the reverse.

The only other point raised by the special appellant is as to the quantum of damages. There is no doubt that, if the plaintiff had a right to possession of this land, and had been kept out of possession by the defendant, she would be entitled to some damages. It generally happens in cases of this kind that the damages are properly represented by the loss of the profits during the time that the plaintiff has been kept out of possession. But this is not strictly the case here. It is obvious, we think, on the facts which have been found by the Courts, that the plaintiff is entitled to something more than that. The question always is, as this Court has said on more occasions than one, what is the damage, so far as can be reasonably ascertained, which has been caused to the plaintiff by the wrongful act of the defendant. Now, the first Court has found that the defendant has not only kept the plaintiff out of possession, but has cut down all the fruit-bearing and timber trees, and carried away or destroyed by brick-making all the fertile soil. Therefore, in addition to depriving the plaintiff of the enjoyment of the land during the time she has been kept out of possession of it, the defendant has reduced the land to such a condition that it will not, for the future, be so productive or advantageous to the plaintiff as it was before she was ousted from it, and that it will probably cost her some outlay to make it productive at all. In other words, he has not only caused damage to her in respect to past time, but has also rendered it in the highest degree probable that she will be to some extent a loser in her possession of the land in future time, and the Courts are perfectly right in making the best calculation they can of the prospective loss in addition to that which has actually occurred. In all these estimates of loss, and particularly where the estimates concern that which is to happen in the future, there must necessarily be some degree of vagueness, some want of precision, and the finding of damage, either past or future, will not be bad in law merely because it cannot be justified by the evidence with perfectly logical accuracy. Sitting here on special appeal, we ought seldom to interfere with the estimate of damage which has been arrived at by a Court which is the Judge of fact, unless we see either that there is no evidence upon which the estimate could be formed at all, or that the estimate is clearly excessive. We should hardly in the case which is before us be disposed to say that even the estimate of the first Court was excessive, and we certainly cannot say that there is no evidence of damage at all. Still less, therefore, can we sustain the objection of the special appellant with regard to the finding of the Lower Appellate Court, which has, in fact, reduced the damages that had been arrived at by the first Court.

We think, therefore, that all the grounds of special appeal put forward by the defendant fail him, and we dismiss the appeal with costs.

The 25th July 1868.

Present :

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble Dwarkanath Mitter, *Judge*.

Contract to cultivate—Jurisdiction—Section 10, Act X., 1859.

Reference to the High Court by the Judge of the Small Cause Court at Pubna, dated the 23rd June 1868.

Gureeboollah Puramanick (*Plaintiff*),

versus

Fukeer Mahomed Kholoo (*Defendant*).

Where, on the allegation that defendant had sub-let land to him for the purpose of raising crops under a contract to share the produce between them, plaintiff sought to recover the value of his share of the crop which defendant had appropriated—the High Court were of opinion that the claim was not for a sum exacted in excess of rent within the meaning of Section 10, Act X., 1859, and that, if proved, it might be enforced by the Small Cause Court.

Case.—THE plaintiff, as burghadar, to whom the defendant sub-let his jote land for the purpose of raising crops of *kolai* under a contract to share the produce between themselves, seeks to recover from the defendant Rupees 7-14, being the value of his share of the crop which he (the defendant) appropriated to his own use.

The defendant, while he denies the existence of any such contract, contends that an action of this nature will lie in the Revenue Court, and not in the Small Cause Court.

The only question for decision is, whether the cultivator, using land for raising crops under such a contract, can maintain an action in the Small Cause Court?

It appears from the face of the plaint that the plaintiff cultivated the defendant's land, not as a servant, but as sub-tenant. The defendant does not admit that he sub-let the land to the plaintiff under a contract as aforesaid. Here, however, a question of fact arises, whether the plaintiff raised the crop as a sub-tenant, and whether the defendant did appropriate the whole of the crop (if so raised by the plaintiff) to his own use, that is, he took more than he was entitled to as his own share; and, if he has done so, what remedy in law is there for the plaintiff to recover his share of the produce?

The Small Cause Court rulings, page 113, dated 16th March 1865, lay down in the matter of Sreenath Dutt *versus* Dwary Dhallie: "That, where a cultivator is a "mere servant of the landlord, a suit for "damages will lie against him in the Small "Cause Court. If the cultivator is a tenant "to whom the landlord has sub-let the land, "a suit for non-fulfilment of his contract by "the tenant will lie under Act X. of 1859."

Under this ruling, the landowner cannot sue his tenant-cultivator for the non-fulfilment of his contract in the Small Cause Court, but the present action has been instituted on the part of the tenant-cultivator to recover the value of his share of the crop from the landowner. I am of opinion that, if it is proved that the plaintiff cultivated the land as a sub-tenant on condition to give half the produce to the landowner, and the defendant took more than what was due to him under the contract, the case ought to be viewed as one for exaction in excess of rent, for, under the provision of Section 2, Act X. of 1859, consideration paid, whether in cash or in kind, is equally treated as rent. Consequently, the plaintiff's suit to recover what has been appropriated by the defendant in excess of his own share of the crop falls under Section 10, Act X. of 1859, and his remedy, therefore, lies in the Revenue Court under Clause 2, Section 23 of the said Act.

I have come to this conclusion under a conviction that the tenant-cultivator ought to lay his claim in the same Court where the landowner has his remedy for the recovery of their respective shares of the produce.

I have, therefore, dismissed the plaintiff's claim contingent upon the decision of the High Court.

Judgment of the High Court.

Peacock, C. J.—We are of opinion that the plaintiff's claim is not one for a sum exacted in excess of rent within the meaning of Section 10, Act X. of 1859; consequently, that the claim, if proved, may be enforced by the Small Cause Court.

The 25th July 1868.

Present :

The Hon'ble H. V. Bayley and A. G. Macpherson, *Judges.*

Title to land—Oral evidence.

Case No. 274 of 1868.

Special Appeal from a decision passed by the Principal Sudder Ameen of East Burdwan, dated the 25th November 1867, reversing a decision passed by the Moonsiff of Cutwa, dated the 14th January 1867.

Troylukhonath Ghose and another (Plaintiffs), *Appellants,*

versus

Nubo Coomar Roy and others (Defendants), *Respondents.*

Baboo Mohendro Lall Seal for Appellants.

Baboo Poorno Chunder Mookerjee for Respondents.

In a suit to recover lands on an alleged title by purchase, the High Court declined to interfere in special appeal with a finding of the Lower Appellate Court that the depositions of plaintiffs' witnesses, uncorroborated by any documentary evidence of title, which in such cases is almost always available, could not establish the truth of his statements.

Bayley, J.—THE plaintiffs sued for the recovery of certain lands on an alleged title by purchase.

The first Court decreed the plaintiffs' claim, and the Lower Appellate Court reversed that decision on the ground that the plaintiffs' kobalah was not proved, and that, without any documentary evidence to corroborate the oral testimony of the plaintiffs' witnesses, the Lower Appellate Court could not be satisfied of the justice of the plaintiffs' claim.

The plaintiffs appeal specially, urging that under several precedents of this Court, oral evidence ought not to have been rejected in this summary way.

We are, however, of opinion that those precedents do not apply to the present case. The judgment of the Lower Appellate Court, taken as a whole, is clearly to the effect that, in this case the depositions of the plaintiffs' witnesses as to their possession, uncorroborated as they were by any documentary evidence of title, which in cases like the present is almost always available to parties really having possessory interest in the land, could not satisfy the Lower Appellate Court as to the truth of the plaintiffs' statements.

That being a finding of fact upon a legal ground, we see no reason to interfere in special appeal. The judgment of the Lower Appellate Court is accordingly affirmed, and this appeal dismissed with costs.

The 25th July 1868.

Present:

The Hon'ble F. B. Kemp and E. Jackson, *Judges.*

Onus probandi—Enhancement of rent—Plea of different ownership.

Case No. 456 of 1868 under Act X. of 1859.

Special Appeal from a decision passed by the Additional Judge of Hooghly, dated the 10th December 1867, affirming a decision passed by the Deputy Collector of Serampore, dated the 29th December 1866.

Prem Chand Barik (one of the Defendants), *Appellant,*

versus

Brojonath Koondoo Chowdhry and others (Plaintiffs), *Respondents.*

Baboo Woomesh Chunder Banerjee for Appellant.

Baboo Mohendro Lall Seal for Respondents.

In a suit for enhancement of rent where defendant pleads that a parcel of it is *debuttur* land, the property of another party, the onus lies on the plaintiff to prove that the land is *mál*, even though the alleged owner puts forward no claim.

Jackson, J.—THIS was a suit for enhancement, in which the defendant alleged that certain portions of the land were *debuttur* lands, and that they did not belong to the plaintiff, but to another party whose ryot he was. As regards 5 parcels of land, both Courts clearly found that these lands being the *debuttur* belonging to another party, the plaintiff was not entitled to rent for those lands, and they dismissed the plaintiffs' suit.

As regards another parcel, called Daug No. 2, comprising 1 beegah 2 cottahs 10 chittacks, the defendants also alleged this was *debuttur* land, not the property of the plaintiff. The Judge, however, decreed the claim for rent as regards these lands, because the alleged owner put forward no claim to them and because the defendants did not prove that they were that person's property.

It is said on special appeal that the Judge has thrown the *onus* on the wrong party, and that it should have been for the plaintiff to prove that the land for which he sued was his *mál* land. We think this contention is correct. The *onus* of proof is on the plaintiff, and the plaintiff's vakeel cannot show us any proof to substantiate the plaintiff's assertion that the land was *mál*. It follows that the plaintiff's claim to assess rent on the 1 beegah 2 cottahs 10 chittacks comprised in plot No. 2 must be dismissed. The decision of the Judge is modified to that extent. The respondent will pay the appellant's costs of the appeal to this Court.

The 25th July 1868.

Present:

The Hon'ble F. B. Kemp and E. Jackson, *Judges.*

Arbitration—Section 27, Act XXIII., 1861—Right of appeal—Purchase of decree.

Case No. 224 of 1868.

Miscellaneous Appeal from an order passed by the Judge of West Burdwan, dated the 26th February 1868, reversing an order passed by the Moonsiff of Bancoorah, dated the 16th January 1868.

Tara Chand Hajrah (Decree-holder), *Appellant,*

versus

Doorga Churn Hajrah and others (Judgment-debtors), *Respondents.*

Baboo Nil Madhub Sein for Appellant.

Baboo Anund Chunder Ghossal for Respondents.

Section 27, Act XXIII., 1861, bars appeal to the High Court in suits cognizable by a Small Cause Court, even when the suit has been referred to arbitration.

The purchaser of a decree has a right to appeal, even though not a party to the suit.

Kemp, J.—A PRELIMINARY objection has been taken to the hearing of this appeal by the pleader for the respondents, to the effect that, under Section 27 of Act XXIII. of 1861, no appeal will lie to this Court, inasmuch as the suit, which is now in the execution-stage, is of a nature cognizable in the Courts of Small Causes, the amount demanded not exceeding 500 rupees. We have referred to the original suit, and find that the statement of the pleader for the respondent is correct. But it is argued by the pleader for the special appellant that, as the suit was referred to arbitration, the nature of the suit becomes changed, and no longer falls within the purview of Section 27 of Act XXIII. of 1861. The pleader informs the Court that there is a ruling to this effect, but he is unable to produce it, and he is also unable to give the particulars of that decision or of the facts of the case he alludes to. It is then said that we ought, under the powers conferred by Section 35 of Act XXIII. of 1861, to pass such orders in the case as to the Court may seem right. We have been asked to exercise this power of revision on the ground that the Judge acted without jurisdiction in hearing the appeal, inasmuch as the appellant before him was not one of the parties to the suit in which the decree was passed. But we find that the appellant before the Judge is the purchaser of the decree, and therefore, under a ruling of this Court, published in Volume VIII., Weekly Reporter, page 197, Huro Lall Dass, judgment-debtor, *versus* Soojamut Ali, the purchaser of the decree had the right to appeal.

The appeal is, therefore, dismissed with costs.

The 27th July 1868.

Present:

The Hon'ble F. B. Kemp and E. Jackson, *Judges.*

Deposit to stay a sale—Clause 4, Section 13, Regulation VIII. of 1819 and Section 6, Act VIII. of 1865.

Case No. 115 of 1868.

Special Appeal from a decision passed by the Principal Sudder Ameen of West Burdwan, dated the 9th November 1867, reversing a decision passed by the Moonsiff of Bakoonda, dated the 17th July 1867.

Kartick Surmah and another (two of the Defendants), *Appellants,*

versus

Bydonath Saeenee and others (Plaintiffs), *Respondents.*

Baboo Nubo Kishen Mookerjee for Appellants.

Baboo Nil Madhub Sein for Respondents.

Money deposited to protect from sale a tenure advertised under the provisions of Act VIII., 1865, must,

under Section 6, be considered as a loan made to the proprietor of the tenure, which becomes security to the depositor, who is entitled, on applying, to obtain immediate possession in order to recover the amount from any profits belonging to the tenure.

Kemp, J.—THIS was a suit to recover with interest certain moneys deposited by the plaintiff to protect from sale a superior tenure which was advertised for sale under the provisions of Act VIII. of 1865. The Lower Appellate Court has given the plaintiff a decree, holding that the tenure of the plaintiff was one not protected by Section 16 of the aforesaid Act, and consequently that the sale of the superior tenure would have jeopardised the existence of the plaintiff's own tenure.

Under Section 6 of Act VIII. of 1865, if the sum due under a decree, together with interest to date of payment and all costs of process, be paid into Court at any time before the sale commences, whether by the defaulting holder of the under-tenure, or any one on his behalf, or any one interested in the protection of the under-tenure, such sale shall not take place, and the provisions of Section 13, Regulation VIII. of 1819, for the recovery of sums paid by others than the defaulting holder of the under-tenure to stay the sale of the said under-tenure, shall be made applicable to all similar payments made under this Section. We think that the Principal Sudder Ameen was right in holding that the tenure of the plaintiff does not fall within the purview of Section 16 of Act VIII. of 1865, but he was wrong in decreeing payment with interest of the sum claimed by plaintiff, for under Clause 4 of Section 13 of Regulation VIII. of 1819, which, by Section 6 of Act VIII. of 1865, is made applicable to payments of this description, the plaintiff's deposit must be considered as a loan made to the proprietor of the tenure to preserve it from sale by such deposit, and the tenure so preserved becoming security to the plaintiff, he must be considered to have a lien thereon, and the plaintiff is entitled, on applying for the same, to obtain immediate possession of the tenure of the defaulter in order to recover the amount so deposited from any profits belonging thereto.

The suit to recover in the present shape is, therefore, dismissed, and the decree of the Principal Sudder Ameen reversed with costs. The plaintiff may apply under the provisions of Section 13 of Regulation VIII. of 1819, which have been re-enacted in Section 6 of Act VIII. of 1865.

The 27th July 1868.

Present:

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble Dwarkanath Mitter, *Judge*.

Arbitration—Time for sending in award.

Case No. 253 of 1868.

Miscellaneous Appeal from an order passed by the Principal Sudder Ameen of Beerbhoom, dated the 10th March 1868.

Gunga Gobind Naek and others (Judgment-debtors), *Appellants*,

versus

Kalee Prosunno Naek and others (Decree-holders), *Respondents*.

Baboos Unnoda Pershad Banerjee, *Onookool Chunder Mookerjee*, and *Greeja Sunkur Mojoomdar* for Appellants.

Mr. R. T. Allan and *Baboos Oopendur Chunder Bose* and *Taruck Nath Sein* for Respondents.

Where no time is fixed for sending in an award in the order of Court referring a case to arbitration, the award itself falls to the ground.

Peacock, C. J.—IT appears to us that the case of Nusserwanjee Pestonjee *versus* Meer Mynooddeen Khan Wallud Meer Sudrooddeen Khan Bahadoor, which has been cited from the 6th Volume of Moore's Indian Appeals, page 134, is binding upon us, and that, in consequence of no time having been fixed in the order directing the arbitrators for sending in the award, the award itself falls to the ground.

We do not think that this is a mere technical objection. Section 318 of Act VIII. of 1859 provides that "an award shall not be "liable to be set aside only by reason of its "not having been completed within the period "allowed by the Court unless," &c. But the award could not be set aside even if any of the exempted reasons existed, unless a time for making the award was fixed in the order referring the case to arbitration.

The case will be remanded to the Principal Sudder Ameen to proceed with the execution-case without reference to the award. Each party will bear its own costs of this appeal.

f

The 27th July 1868.

Present:

The Hon'ble F. A. Glover and Dwarkanath Mitter, *Judges.*

Procedure of Appellate Court when suit is undervalued—Valuation of a suit.

Case No. 51 of 1868.

Special Appeal from a decision passed by the Principal Sudder Ameen of Chittagong, dated the 8th November 1867, reversing a decision passed by the Moonsiff of that District, dated the 25th April 1867.

Augopura Chowdhry (one of the Defendants), *Appellant,*

versus

Meah Bibee and others (Plaintiffs), *Respondents.*

Mr. R. E. Twidale and *Baboo Chunder Madhub Ghose* for Appellant.

Baboo Bhowanee Churn Dutt for Respondents.

If a Lower Appellate Court finds a suit to have been undervalued when its proper value would have placed it beyond the jurisdiction of the Court of first instance where it was instituted, it should dismiss the case, and not remand it with a view to the deficient stamp duty being made up.

In a suit for possession of a share of an undivided estate, and to set aside a kobalah by which the estate had been illegally alienated, plaintiff is not bound to value his claim according to the price stated in the kobalah.

Glover, J.—THIS was a suit for possession of a share in a mehal, and for setting aside a kobalah by which the property had been illegally alienated.

The plaintiffs valued their suit at three times the Sudder jumma of the share claimed by them, and the first Court gave them a decree.

On appeal, the Principal Sudder Ameen held that as the plaint included a prayer for the cancelment of a kobalah, the amount said to have been paid under that kobalah, *viz.*, Rupees 6,062, should have been added to the valuation of the plaint, and that the plaintiffs' suit, not having so included it, was undervalued. The Principal Sudder Ameen therefore reversed the decision of the Moonsiff, and sent the case back to him with directions to call upon the plaintiffs to make up the proper amount of stamp duty, and then to send the case up to the Judge for transmission to the proper tribunal.

The defendant appeals specially against this order, urging that if the Principal Sudder Ameen considered the suit undervalued, he ought to have dismissed it at once, and not have sent it back to the Moonsiff for the purpose of receiving the proper stamp duty.

A cross-appeal is filed by the special respondent under Section 348 of the Procedure Code, urging that the Moonsiff's valuation was correct, and that the appeal ought to have been heard by the Principal Sudder Ameen on its merits.

I have no doubt that the Principal Sudder Ameen was wrong in returning the case to the Moonsiff as he did, for as the difference in valuation, if proved, affected the jurisdiction of the Moonsiff's Court, Section 350 of the Procedure Act would not apply, and the case ought to have been dismissed as not brought in the proper Court.

But I need not decide the special appeal on this ground, being of opinion that the objection taken in cross-appeal must be allowed.

Admitting that as the plaint was for a share of an undivided mehal, three times the Sudder jumma was the proper valuation according to Act X. of 1862, and that the market price was the correct basis of valuation, it is nowhere shown that the 284 rupees at which the plaintiff valued his suit was not the market price of the land. The kobalah certainly does mention the sum of Rupees 6,062; but, in the first place, this is the price alleged to have been paid, for the entire mehal; and, secondly, the plaintiff was not bound by the price said to have been paid under a kobalah, which he averred to be collusive and which he was seeking to set aside.

The only ground for objecting to the plaintiffs' valuation is that their claim included the value of the kobalah, for there is no evidence to show that the market value of the land sought to be recovered is higher than the plaintiffs placed it.

It appears to me, therefore, that the suit was cognizable by the Moonsiff, and that the Principal Sudder Ameen should have tried the appeal on its merits.

The case is now remanded to him for the purpose.

Under the circumstances, each party will pay their own costs in this Court. The

costs below will follow the result of the remand now ordered.

Mitter, J.—I am also of the same opinion except as to the matter of costs.

The ground upon which the Lower Appellate Court has reversed the decision of the Court of first instance is manifestly untenable. The plaintiff (respondent) was bound by no law to value his suit according to the price stated in the defendant's kobalah which he sought to set aside. It has been contended on behalf of the defendant that the suit being for a fractional part of a zemindaree, the valuation must have been according to the market price of the share sued for. But this was not the defendant's contention in either of the Lower Courts, and he cannot be permitted to raise it for the first time at this late stage of the proceedings. The decision of the Principal Sudder Ameen too is based not upon the ground that the 284 rupees at which amount the suit was valued was below the market value of the share sued for, but upon the ground that the plaintiff having asked for the reversal of a kobalah for a much higher amount, the Moonsiff had no jurisdiction to entertain such a suit. In this he was clearly wrong and the defendant cannot now be permitted to raise a new question of fact, *viz*, that the market value of the share sued for is much higher than the amount at which the suit was valued, more particularly when the Court of first instance has already decided the case upon the merits. The case must, therefore, go back to the Principal Sudder Ameen to be disposed of upon the merits. I think the defendant ought to pay all the costs incurred by the plaintiff in the Lower Appellate Court as well as in this Court.

The 28th July 1868.

Present:

The Hon'ble F. B. Kemp and E. Jackson, *Judges.*

Recital in a deed—Evidence—Consideration money.

Case No. 526 of 1868.

Special Appeal from a decision passed by the Judicial Commissioner of Assam, dated the 24th December 1867, reversing a decision passed by the Deputy Commissioner of Luckimpore, dated the 10th August 1867.

Lolitta Dossia (Defendant), *Appellant,*

versus

Ruttun Mollee Bhuttacharjee (Plaintiff), *Respondent.*

Baboos Romesh Chunder Mitter and *Anund Gopal Palit* for Appellant.

Baboo Debendro Narain Bose for Respondent.

As it has been held by the Privy Council that, according to the practice in India, the recital in a deed of the payment of consideration-money is not conclusive evidence of such payment, a Judge was declared to have acted correctly in considering evidence on the question whether consideration so recited had passed or not.

Kemp, J.—THE Lower Appellate Court found on the evidence that no consideration passed, although there was a recital in the deed to that effect.

In special appeal, it is contended that as the deed itself contained an acknowledgment of the payment of consideration-money, such acknowledgment was conclusive evidence of that payment being made, and that the Lower Appellate Court was wrong in taking into consideration the evidence on the question as to whether consideration passed or not.

We think that the Lower Appellate Court is correct in considering the evidence, and it has been held by the Privy Council in the case of Chowdhry Dabee Persaud and Banee Persaud *versus* Chowdhry Dowlut Singh, published at page 161, Judgments of the Privy Council published by Sutherland,* that, according to the practice in India, the recital in a deed of the payment of consideration-money is not conclusive evidence of such payment.

We, therefore, dismiss the special appeal with costs.

---

* *See* also 6 W. R., Priv. Coun., p. 55.

The 28th July 1868.

Present:

The Hon'ble F. A. Glover and Dwarkanath Mitter, *Judges.*

Limitation—Construction of term "decision" in Code of Civil Procedure—Cause of action—Wasilat in kind—Interest.

Case No. 32 of 1868.

Special Appeal from a decision passed by the Officiating Judge of Midnapore, dated the 4th September 1867, reversing a decision passed by the Principal Sudder Ameen of that District, dated the 23rd January 1867.

Sreemutty Raye Kishoree Dossee and another (Defendants), *Appellants,*

versus

Bonomally Churn Mytee (Plaintiff), *Respondent.*

Baboos Onookool Chunder Mookerjee and *Nuleet Chunder Sein* for Appellants.

Mr. R. T. Allan and *Baboo Hem Chunder Banerjee* for Respondent.

A putnee, having been sold for arrears under Act VIII., 1819, was bought by one *M*, from whom *B* purchased a portion. Not being able to get possession, *B* sued the ryot for rent under Act X.; but the putnee having been again sold for arrears, he gave up his claim to possession, and sued for the rents payable during the years he had been kept out of possession less what was barred by limitation. His suit was dismissed on the intervention of an heir of the zemindar, who objected that the lands cultivated by the ryot were not within the portion bought by *B*. *B* then sued the zemindar and ryot for the wasilat accruing during the years he had been kept out of possession. The Judge held that plaintiff had established his claim, and remanded the case for inquiry as to the amount of wasilat, retaining it on his file pending the inquiry, and eventually decreed it in favor of the plaintiff.

HELD that limitation, as regards appeal, would run, not from the Judge's order of remand, but from the final decision.

HELD that the plaint was bad as against the ryot; but it did disclose a cause of action against the zemindar who was said to have kept the plaintiff out of possession of his purchased land.

HELD that no difference should be made between wasilat paid in kind and wasilat paid in cash; both should be calculated in specie, and bear interest at the usual rate.

Glover, J.—THIS was originally a suit for possession of certain lands forming part of a putnee-tenure, and for wasilat during the years 1267, '68, '69, '70, '71, and '72 B. S.

A putnee consisting of six mouzahs (a tank and kutcherry house excepted) was granted by the zemindar Gokool Monee in February 1853 to one Anundee Lall Doss. The putneedar fell into arrears, and the tenure was sold under Act VIII. of 1819. One Modhoo Soodun bought it on the 4th of Bysack 1266 (1859), and from him the plaintiff purchased a portion, *viz.*, 3 mouzahs, Kadeema, Pykan Bukra Nuddee, and Pannee Bazar. Not being able to get possession, he sued the ryot in possession under Act X. of 1859 for rent. He afterwards gave up his claim to possession, his vendor's title having been extinguished in consequence of the putnee being again sold for arrears, and sued for the rents payable during the years he had been kept out of possession, deducting all beyond three years as barred by limitation.

Raj Kishore, the heir of Gokool Monee, the original grantor of the putnee, intervened on the ground that the ryot, Gunga Narain, was not plaintiff's tenant, the land he cultivated not being within the three mouzahs bought by the plaintiff. The intervenor's objection was allowed, and the plaintiff's suit was dismissed.

He then brought this suit against both zemindar and ryot for the wasilat accruing during the years he had been kept out of possession.

The defendant (the zemindar) objected that the land on which wasilat was claimed, had not been purchased by the plaintiff; that the sale itself was illegal, the putneedar being bound by the terms of his lease not to alienate any fractional part of the holding, and that, in any case, as the plaintiff had, in the former suit against the ryot, given up the rent for three years as barred by limitation, he could not sue again for the money as wasilat.

The Judge held that the plaintiff had made out his title to get back the wasilat for the time he was kept out of possession, but remanded the case to the Court of first instance for certain enquiries to be made regarding the amount of wasilat. He retained the case on his own file pending the enquiry, and eventually decreed in favor of the plaintiff.

Against this decision, the defendant now appeals specially.

A preliminary objection under Section 348 of the Civil Procedure Code is taken by the special respondent's pleader, that, so far as his client's title to get wasilat is concerned, the plaintiff's appeal is out of time, the Judge's decision having been passed on the 1st of August 1867, and no special appeal having been preferred within the period allowed by law.

This objection comes within the ruling of the Full Bench in the case of Mirza Himunt Bahadoor *versus* Gobindo Pandee and others

(5 Weekly Reporter 91). In that decision, it was laid down that the word "decision" in Act VIII. means a decision upon the whole case; and as the plaintiff's case was not finally decided by the Judge until after he had received the additional information sent for, it follows that the decision against which the defendant could appeal within the 90 days was not passed until the 4th of September 1867, the previous judgment as to the plaintiff's title notwithstanding, and on this calculation the defendant is entitled to his special appeal on both points. The special respondent's objection *in limine* is, therefore, overruled.

An objection was taken by the special appellant, and which was allowed to be argued, although not entered in the grounds of special appeal, that the plaint disclosed no cause of action, and should have been rejected at once.

As against the ryot, the plaint clearly was bad, inasmuch as he could not be made liable for the wasilat in the shape of rents, which the nature of the plaint showed to have been paid to the zemindar. But there was, I think, a cause of action disclosed against the zemindar who was said to have kept the plaintiff out of possession of his purchased land. It has been argued, indeed, that the zemindar may have retained possession *bonâ fide*, not knowing that the plaintiff had bought the land, he not having registered his name in the zemindaree serishta. But whatever his means of knowledge may have been, they could not have barred the plaintiff from his remedy against the party illegally, preventing him from collecting his dues, nor could it, I think, be said that, on the face of his plaint, the special respondent had no cause of action.

The *first* ground of special appeal noted in the petition has not been pressed.

The *second* is, that the Judge has mistaken the special appellant's case, and has decided that the land on which wasilat is claimed was that purchased by the plaintiff, on grounds which have nothing to do with the question.

The Judge has found no doubt "that the plaintiff has sufficiently shown that the lands were within his purchased share," but he has found this on the ground that the zemindar was "proved to have let all his lands except "a kutcherry and a tank, and that it was "therefore futile for him to allege that the "lands are and have been in his *khas* pos-"session.

But the question for the Judge to decide was, not whether the lands claimed by the special respondent were within the putnee of six mouzahs as granted by the zemindar, but whether they were within the three mouzahs of that putnee purchased by the special respondent. It was alleged from the first that they were not within those three mouzahs, and the Judge's reasoning, therefore, fails. Before a decree can be given to the special respondent, the Judge must find that the land on which he claims wasilat was within the three mouzahs purchased by him; it is not enough to find that it was within the original putnee of six mouzahs.

The next ground of special appeal is that, as special appellant in the former suit against the ryot abandoned his claim for the rents of 1267, 1268, and 1269 B. S., he cannot sue for them now. As against the ryot, undoubtedly he could not, but as I have already decided that, as against the zemindar, the special appellant might be held to have a cause of action, there seems to be no reason why the special appellant may not recover the wasilat for six years, supposing him to prove his title to them, his former abandonment notwithstanding.

Another ground of special appeal is that the Judge has assessed the mesne-profits on a wrong principle. He has, with reference to the rents paid in kind, allowed an alleged custom, and added on 50 per cent. at the end of each year as a penalty for non-payment.

This appears to be a very unusual, and at the same time unfair, method of calculating wasilat. On rents paid in money, a certain rate of interest, *viz.*, 12 per cent., is allowed; and why, because the rents are collected in kind instead of in cash, the interest should be increased up to 50 per cent., it is not easy to conceive. If the special respondent be found entitled to wasilat, he should recover them, I think, in the usual way, and no difference should be made between wasilat paid in kind and wasilat paid in cash. The value of both should be calculated in specie, and the usual rate of interest allowed.

I think that the case should go back to the Judge for a finding as to whether the special respondent ever did purchase, the particular lands on which he claims wasilat. If this point be found in his favor, he will be entitled to wasilat for six years calculated in the manner noticed above.

Costs will follow the result.

Mitter, J.—I concur with my learned colleague. I would only wish to add that the point of possession is one of very great importance in this case, and that point must be enquired into before it can be satisfactorily determined as to whether the lands in suit do really appertain to any of the three villages purchased by the plaintiff or not. Upon the plaintiff's own showing, it appears that he himself has never got possession since the date of his purchase. Unless, therefore, he is in a position to show that his predecessors were in possession, I cannot make out how he can succeed in establishing his title, the putnee-pottah merely specifying the names of six entire villages. I would also call the attention of the Lower Appellate Court to the conduct of the plaintiff. He sued the ryot-defendant for rent under the provisions of Act X. of 1859, and having failed in that suit, he now brings this action for mesne-profits, treating the ryot-defendant and the special appellant as co-trespassers. The case ought to go back to the Lower Appellate Court for a fresh decision upon the merits.

The 29th July 1868.

Present:

The Hon'ble H. V. Bayley and C. Hobhouse, *Judges.*

Onus probandi.

Case No. 1769 of 1867 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of Rungpore, dated the 28th May 1867, reversing a decision passed by the Deputy Collector of that District, dated the 26th February 1866.

Palanoo Khamaroo Doss (Defendant), *Appellant,*

versus

Mozuhur Ali and another (Plaintiffs), *Respondents.*

Baboo Rajendurnath Bose for Appellant.

Moulvie Syud Murhamut Hossein for Respondents.

In a suit for rent where plaintiff claimed as mokurrureedar, but in no way established his allegation that defendant was his tenant, the Lower Court was held to have acted illegally in going into defendant's case, and giving plaintiff a decree, because defendant had failed to prove his case.

Bayley, J.—The plaintiff in this case states that he is a mokurrureedar holding under the zemindar, and the defendant is his sub-tenant. The defendant's case is that he is not the plaintiff's sub-tenant, and that the plaintiff is not a mokurrureedar to whom he is bound to pay any rent at all.

After first one and then a second remand, the case has come back, and it is quite clear, as the Judge himself states, that the plaintiff in no way substantiated his allegation that the defendant was his tenant. Leaving the plaintiff's claim unproved, the Lower Appellate Court erroneously goes into the defendant's case, and thinking that the defendant also has failed to prove his case, gives the plaintiff a decree. This is entirely illegal. As the plaintiff had to prove his case, and has entirely failed to prove his case, we reverse the decision of the Lower Appellate Court, decree this appeal, and dismiss the plaintiff's suit with all costs.

The 29th July 1868.

Present:

The Hon'ble F. B. Kemp and E. Jackson, *Judges.*

Pre-emption—Tender of price—Mahomedan law.

Case No. 561 of 1868.

Special Appeal from a decision passed by the Principal Sudder Ameen of Mymensingh, dated the 20th December 1867, reversing a decision passed by the Moonsiff of Bazilpore, dated the 26th November 1866.

Khoffeh Jan Beebee (one of the Defendants), *Appellant,*

versus

Mahomed Mehdee (Plaintiff), *Respondent.*

Baboos Debendro Narain Bose and *Rajendur Nath Bose* for Appellant.

Baboo Taruck Nath Dutt for Respondent.

It is not incumbent on a pre-emptor to tender the price at the time of making his claim.

Kemp, J.—This suit was based upon a right of pre-emption. The Lower Appellate Court has found that the plaintiff, the special respondent, has proved that he performed the usual acts required under the Mahomedan law to establish his right. It is now contended in special appeal that, because the first Court found that the plaintiff had no money to pay, his suit ought to have been dismissed.

In the first place, we observe that this point was not in issue before the Court of first instance. Moreover, it is not incumbent on the pre-emptor to tender the price at the time of making his claim (*vide* Baillie's Digest of the Mahomedan law, page 488), and unless the plaintiff pay for the property, his decree in right of pre-emption would be infructuous.

The special appeal is dismissed with costs.

The 29th July 1868.

Present:

The Hon'ble L. S. Jackson and Dwarkanath Mitter, *Judges.*

Under-tenure—Rents—Suspension of payment.

Case No. 211 of 1868 under Act X. of 1859.

Special Appeal from a decision passed by the Officiating Judge of Shahabad, dated the 20th December 1867, affirming a decision passed by the Assistant Collector of that District, dated the 14th September 1867.

Gudadhur Lall (Plaintiff), *Appellant,*

versus

Ram Jhan Gunderee (Defendant), *Respondent.*

Baboo Kishen Succa Mookerjee for Appellant.

Baboo Poorno Chunder Shome for Respondent.

Where a party purchases another's zemindary-rights in an estate in which that other had created an under-tenure with a fixed rent, the circumstance that payment of rent on account of such tenure was suspended while the zemindary was in the hands of the former proprietor does not affect the rights of his successor or the fixity of the rent.

Jackson, J.—THIS was a suit for arrears of rent. The facts are shortly these:—

The plaintiff purchased the zemindary-rights which formerly belonged to the defendant. While the zemindary was in the defendant's hands, he created an under-tenure of a garden in favor of a member of his family, and that under-tenure afterwards devolved on himself. After the purchase by the plaintiff, he, in an erroneous view, as it appears, of his own rights, sued to recover possession of the garden itself, but it was held by the High Court in its decision, reported at page 32, III. Weekly Reporter (Ram Jhan Gunderee, Defendant, Appellant, *vs.* Lalla Gudadhur Lal, Plaintiff, Respondent), that the plaintiff had not acquired any but the zemindary-rights by his purchase, and that he was not entitled to take the under-tenure from the defendant. He now sues to recover the rents of this under-tenure.

There is no question but that the under-tenure was created, and the rent then fixed is not disputed; but the first Court held that, inasmuch as no payment of rent by the defendant to the plaintiff had been proved, it was necessary that the rate of rent should be first legally fixed, and he dismissed the suit.

The Judge affirmed this decision, and dismissed the appeal, observing that the plaintiff, appellant, should bring his suit to get the rate fixed.

On calling upon the vakeel of the respondent to support this decision, he contends that there is no agreement to pay rent between the present zemindar, plaintiff, and the defendant, and there is nothing to show that the rate formerly fixed in the under-tenure is the rate at which the rents should now be paid.

It appears to me that the circumstance of the suspension of payment of rents during the time when the zemindary was in the hands of the former proprietor does not affect the rights of his successor, or affect the rent itself as to its fixity; and if there is any circumstance which entitles the defendant to an abatement of rent, he can establish his claim in the usual way. There is nothing to show that the rate of rent originally fixed is not payable by the defendant on the purchaser's demand.

The decision of the Lower Courts must be reversed, and the plaintiff's suit must be decreed with all costs.

Mitter, J.—I concur.

The Judge has distinctly found that the plaintiff has succeeded in showing that the defendant in this case stood towards him in the position of a tenant; and it is also admitted by the pleader for the defendant that the evidence accepted by both the Lower Courts goes to show that there was a *bond-fide* under-tenure bearing a determinate jumma recorded in the zemindary-papers of the former proprietor.

The mere fact that no rent was received by the former proprietor at any time previous to this suit cannot, therefore, invalidate the plaintiff's claim to recover from the defendant rents at the rates recorded in the zemindary-papers.

I have not been able exactly to understand from the argument of the respondent's pleader whether he meant to say that this under

enure, which his client has purchased, had assed to the plaintiff along with the right, itle, and interest of the former proprietor in he parent-estate, or that the fact of the former roprietor of that estate not having received ny rents from the former tenant, because he was his grand-mother, and from himself hen he succeeded to the under-tenure as eir to his grand-mother, has converted it nto a rent-free holding.

If the pleader intended to advance the first rgument, it is perfectly clear that it is no onger open to him to raise that issue. When the plaintiff had sued this very dendant to recover possession of the underenure in question, the defendant's plea was hat there was a valid under-tenure which did ass with the right, title, and interest of the emindar in the parent-mehal, and the dendant is consequently precluded from aising a contrary plea now that the plaintiff's uit for possession has been dismissed upon is own objection. If, on the other hand, he pleader meant to say that the omission of he former proprietor to collect the rents of he under-tenure from himself when he was he possessor of it, absolves the defendant s a purchaser of it from all objection to pay he rent fixed, I think that the argument eeds no comment to refute it.

The appeal ought, therefore, to be decreed ith all costs.

The 29th July 1868.

Present:

The Hon'ble L. S. Jackson and Dwarkanath Mitter, *Judges.*

High Court's action suo motu—Suit for kubooleut—Failure to prove rate of rent.

Case No. 197 of 1868 under Act X. of 1859.

Special Appeal from a decision passed by the Officiating Judge of Chittagong, dated the 27th November 1867, affirming a decision passed by the Deputy Collector of that District, dated the 17th July 1867.

Hameed Ali and others (Defendants), *Appellants,*

versus

Afaoodeen (Plaintiff), *Respondent.*

Mr. G. A. Twidale for Appellants.

Baboo Poorno Chunder Shome for Respondent.

Where a plaintiff suing for a kubooleut at enhanced rates obtained a decree below, though he was found not entitled to the rate of rent which he claimed, the High Court, considering that, under a ruling of the Full Bench, the suit should have been dismissed, of its own motion in special appeal reversed the decree, notwithstanding the objection was not taken in the written grounds of appeal.

Jackson, J.—THIS was a case of enhancement, not after notice, but by way of a suit for a kubooleut at enhanced rates; and by the judgment of the Lower Appellate Court, the plaintiff has been found not entitled to the rate of rent at which he sued for a kubooleut. That being so, under the recent ruling of a Full Bench of this Court, his suit ought to have been dismissed.

This is a point not taken in the written grounds of appeal, but it is a point so obviously arising in the case that justice seems to require that we should take it ourselves, and we have, therefore, suggested it.

For this reason, the decision of the Lower Appellate Court is reversed with costs.

Mitter, J.—I entirely concur.

It is very true that this objection was not taken in the Court below; but it is one which can arise only when it is finally determined as to what is the rate of rent at which the defendant's tenure ought to be assessed. Taking this fact into consideration, and also that the objection is one which goes to the very root of the suit as it was instituted by the plaintiff, the point is one which this Court is competent to take up of its own motion at the time of the final disposal of the case.

The 29th July 1868.

Present:

The Hon'ble F. B. Kemp and E. Jackson, *Judges.*

Enhancement of rent—Shikmee talookdars—Section 10, Act VI., 1862—Measurement—Assets.

Case No. 541 of 1861 under Act X. of 1859.

Special Appeal from a decision passed by the Officiating Judge of Mymensingh, dated the 19th December 1867, modifying a decision passed by the Deputy Collector of that District, dated the 30th December 1865.

Dabee Doss Neogy Chowdhry and others (Defendants), *Appellants,*

versus

Gobind Mohun Ghose and others (Plaintiffs), *Respondents.*

Baboo Romesh Chunder Mitter for Appellants.

Mr. J. S. Rochfort and *Baboo Bhowanee Churn Dutt* for Respondents

In a suit for enhancement of the rent paid by shikmee talookdars, the plaintiff is bound to afford data (*e.g.*, the rate paid by intermediate tenants of the same class) upon which the Court can come to a satisfactory conclusion as to what would be a fair and equitable rate to be paid by defendant; plaintiff being competent, under Section 10, Act VI. of 1862, to measure the talook, and ascertain the assets.

Kemp, J.—THIS case was remanded by this Court on the 8th of May 1867. The suit was one for enhancement. The defendants are shikmee talookdars. The plaintiff issued notice upon them, treating them as ryots; that is to say, although their *status* as talookdars was admitted in the notice, the grounds of enhancement are such as are only applicable to ryots. The suit of the plaintiff and the notice were, therefore, informal. We directed the Judge to treat the defendants as talookdars, and directed him to endeavour to fix what would be a fair and equitable rate of rent suitable to the intermediate position which the special appellants hold between the zemindar and the occupant ryots.

The Judge, proceeding on the erroneous assumption that we had, in our decision, upheld the enhanced ryotty rates as fair and equitable, and that he was precluded from entering into any inquiry as to whether these rates were fair and equitable, has simply deducted 25 per cent. on these enhanced rates as the talookdar's profits, and has considered the balance to be fair and equitable to be paid by the special appellant to the zemindar. The talookdar, special appellant, appeals, and there is also a cross-appeal, so we are informed, by the zemindar, urging that 10 per cent., and not 25 per cent., was the proper deduction to make as the profits of the talookdar. But as we shall dispose of the case on the appeal of the talookdar, it is unnecessary for us to notice the appeal of the zemindar. We have already observed that the plaintiff's suit was brought in a wrong shape. He has furnished no proof of the rate paid by intermediate tenants of the same class as the defendant. He has not given any evidence as to the "hustabood," or assets of the defendant's talook. In short, there is no data upon which this Court can come to any satisfactory conclusion as to what would be a fair and equitable rate to be paid by the defendant. The plaintiff can, under Section 10 of Act VI. of 1862, measure the talook, and ascertain the assets of the talook, and this course he ought to have pursued before bringing the present suit. The suit in the present shape must be dismissed. The special appeal of the talookdar-defendant is, therefore, decreed with costs. The decision of the Judge is reversed, and the cross-appeal dismissed.

The 31st July 1868.

Present:

The Hon'ble G. Loch and F. A. Glover, *Judges.*

Jurisdiction—Partners—Suit for accounts.

Case No. 610 of 1868.

Special Appeal from a decision passed by the Principal Sudder Ameen of Sylhet, dated 30th December 1867, modifying a decision passed by the Moonsiff of that District, dated the 31st August 1867.

Shurrut Chunder Kur and another (Defendants), *Appellants,*

versus

Ram Shunkur Surmah (Plaintiff), *Respondent.*

Baboos Roopnath Banerjee and *Tarruck Nath Sein* for Appellants.

Baboo Rajendronath Bose for Respondent.

The only mode in which a partner in a concern can obtain redress for any sum wrongfully taken by another partner is by a suit for an account. Such a suit cannot be entertained by a Small Cause Court.

Loch, J.—THIS is a suit brought by one partner against another partner and a servant of the concern, to recover from the partner and the servant certain sums alleged to have been realized from certain debtors which they did not make over to the plaintiff. As one of the defendants is admittedly a partner, and entitled to three annas share of the profits, we think this suit is not properly brought, and that the only mode in which plaintiff can get redress for any sums which have been wrongly taken by his partner, is by a suit for an account. We think, therefore, the suit should have been rejected by the first Court on its institution, and we now reverse the order of the Lower Appellate Court, and decree this appeal with costs.

We do not think that there is weight in the preliminary objection taken by the pleader for the respondent in this case. This is a suit which cannot be disposed of by the Small Cause Court, and therefore a special appeal would lie to this Court.

The 31st July 1868.

Present :

The Hon'ble H. V. Bayley and F. A. Glover, *Judges.*

Registration—Act XIX., 1843.

Case No. 2125 of 1867.

Special Appeal from a decision passed by the Officiating Judge of Midnapore, dated the 8th June 1867, affirming a decision passed by the Moonsiff of that District, dated the 6th February 1866.

Gandharee Debea (Defendant), *Appellant,*

versus

Sonatun Panday (Plaintiff), *Respondent.*

Baboos Bhowanee Chunder Dutt and *Mohendro Lall Shome* for Appellant.

Baboos Kallee Mohun Doss and *Hem Chunder Banerjee* for Respondent.

Priority of registration gives priority of title under Act XIX., 1843, only when the authenticity of the document is proved.

Bayley, J.—In this case the point of special appeal is that priority of registration gives priority of title under Act XIX. of 1843; but looking to that law, it clearly appears that it only does so when the authenticity of the document is *proved.* In this case it has been found as a fact by the Court below that the authenticity is not proved. Therefore, the ground of special appeal fails, and this appeal is dismissed with costs.

The 31st July 1868.

Present :

The Hon'ble H. V. Bayley and F. A. Glover, *Judges.*

An expired decree no evidence.

Case No. 2023 of 1867.

Special Appeal from a decision passed by the Judicial Commissioner of Chota Nagpore, dated the 20th May 1867, affirming a decision passed by the Assistant Commissioner of that District, dated the 9th June 1866.

Ram Soondur Tewarree (Plaintiff), *Appellant,*

versus

Sreenath Dewasi (Defendant) and the Beerbhoom Coal Company (Intervenors), *Respondents.*

Baboo Bhowanee Churn Dutt for Appellant.

No one for Respondents.

A decree declaring plaintiff's title, in a suit under Act X., 1859, not having been executed within the period allowed by law, was held to be no longer a decree, and to be no evidence against the fact of an intervenor in the suit having actually received the rents *bonâ fide.*

Bayley, J.—I am of opinion this appeal ought to be dismissed.

The chief contention in special appeal is that the Lower Appellate Court has wrongly decided that the defendant is in actual receipt of the rents *bonâ fide,* inasmuch as, by a decree of the 26th February 1862, the plaintiff's title was declared in a suit under Act X. of 1859, at which time the defendant appeared as an intervenor in that case; consequently no *bona fides* could exist in the actual receipt of rent by the defendant. It is also contended that another decree, dated 5th September 1865, distinctly declares that the plaintiff holds lands in Surrakdehi Kunaopore, and therefore the statement of the defendant to the contrary should have been considered as of no weight; and this decree, the special appellant also argues, is further proof that the defendant's receipt of rent was not *bonâ fide.* The pleader also cited Weekly Reporter, Volume VII., page 85, Weekly Reporter, Volume IX., page 305, in support of his contention.

It is admitted before us, as in the Courts below, that the decree relied upon of 26th February 1862 was not executed or enforced in any way whatever. It is also admitted that the three years' limitation prescribed by Section 92, Act X. of 1859, expired on the 26th February 1865, and this suit was brought on the 11th April 1866.

In my opinion, when a decree is not executed within the period allowed by law for execution, its operation ceases, and it no longer remains a decree unless revived by order of a competent Court. No such revival appears in this case. The Lower Appellate Court was, therefore, right in thinking that the decree was no evidence against the fact of the defendant's having actually received the rents as required by the law (Section 77), that is, *bonâ fide.* It is contended that the Lower Appellate Court does not state in express terms that the receipt of the rent was *bonâ fide;* but to my mind, looking to the inoperative decree of the plaintiff on one hand, and the actual receipt of rent by the defendant on the other, the Lower Appellate Court substantially holds the receipt to be *bonâ fide,* as contemplated by Section 77, Act X. of 1859.

Referring to the two cases cited above, I have only to say that they only lay down what is an admitted rule of law, *viz.,* that the receipt contemplated by Section 77 is not to

be only *actual* but *bonâ fide*, and they have no further bearing whatever on the present case.

With regard to the plea that, because the decree of 1865 laid down that the plaintiff had lands in Surrakdehi Kunaopore, the defendant's receipts of rent was not *bonâ fide* or compatible with his allegation that there was no such land, I would only remark that I do not think the question of *bona fides* of receipts of rent can be decided in that view, because the one matter is independent of the other.

In this view, I would dismiss the appeal, but without costs, as the respondent does not appear.

Glover, J.—I concur in dismissing the appeal.

The 31st July 1868.

Present :

The Hon'ble H. V. Bayley and A. G. Macpherson, *Judges.*

Mahomedan law—Sale by heirs—Title of purchaser.

Case No. 3088 of 1867.

Special Appeal from a decision passed by the Judge of Gya, dated the 29th August 1867, affirming a decision passed by the Principal Sudder Ameen of that District, dated the 29th November 1866.

Shah Enaet Hossein and another (two of the Defendants), *Appellants,*

versus

Syud Rumzan (Plaintiff), *Respondent.*

Messrs. R. T. Allan and *R. E. Twidale* for Appellants.

Mr. C. Gregory and *Baboo Romesh Chunder Mitter* for Respondent.

By Mahomedan law an heir, like an executor, may properly sell portions of the estate of the deceased, if necessary, for the purpose of paying debts or legacies or otherwise in the course of a due administration of the estate; and there is nothing to invalidate the title of a *bonâ fide* purchaser who pays full consideration, and buys without notice of there being any reason why the sale should not have been made.

Macpherson, J.—MOMTAZ ALI having died owing the plaintiff a sum of money, the latter sued his heirs, and got a decree against them for the amount due, to be realized out of the estate of the deceased. But before the plaintiff got his decree against them, the heirs had mortgaged to the defendant (by granting zur-i-peshgee leases) the property, the subject of the present suit, which formed part of the assets left by the deceased. The plaintiff, in execution of his decree, attached the mortgaged property, had it put up for sale, and bought it himself. He then instituted the suit out of which the present appeal arises, seeking to eject the defendants, and declaring that their conveyances were fraudulent and collusive.

Both the Lower Courts raised, but neither of them decided, an issue as to whether the defendant's mortgages were fraudulent and collusive. But they held that, because the property at one time belonged to the estate of Momtaz Ali, the plaintiff, as a creditor who has got a decree against the estate, has a right to follow the property in the hands of the defendants, and therefore that, by purchasing at the sale in execution of his decree, the plaintiff acquired a good title, and has a right to recover possession from the defendants.

From this decision the defendants appeal, contending that they are *bonâ-fide* mortgagees, who paid full consideration, and had no notice of the plaintiff's claim against the estate, and that, as their mortgages are prior in date to the decree under which the plaintiff purchased, the latter is not entitled to possession until he shall have paid off what is due to the plaintiff in respect of the mortgage.

It appears to me that the mere fact of these lands having once belonged to the estate of the deceased does not show that the plaintiff is entitled to follow them in the defendant's hands, so as to enable him now to recover possession without redeeming. It is quite true that the assets of a deceased Mahomedan are primarily liable for and charged with his debts; and further that it is the duty of the heir to pay all debts before appropriating any portion of the assets to his own use. But, although this is unquestionably so, it does not follow that a third party who purchases from the heir *bonâ fide*, and for full consideration, may not, by his purchase, acquire a good title as against a creditor who *subsequently gets* a decree against the heirs and the estate of the deceased. As regards Hindoos, it has been decided that the creditor of a deceased man has no better position against his debtor's estate than that which he enjoyed in his lifetime; that, when the estate has passed to the heirs of the debtor, the creditor may have recourse to it, so long as it remains in their hands; but that, if he allows

the heirs to dispose of the estate to a *bonâ-fide* purchaser, he cannot follow it in the hands of the latter, but can proceed only against the heirs personally, who are responsible to the extent of the assets. (*See* Full Bench Decisions of the Agra High Court, Volume I., page 72; and II. Weekly Reporter, page 296.)

A case reported at Sudder Dewanny Adawlut Reps., 1859, page 540, was referred to in argument. But it really has no bearing on the question now before us, as it merely decides (what is indisputable) that, if Mahomedan heirs misappropriate assets belonging to the estate of their deceased ancestor, they make themselves personally liable to the extent of the assets misappropriated.

An heir, like an executor, may properly sell portions of the estate of the deceased, if such sale be necessary for the purpose of paying debts or legacies, or otherwise in the course of a due administration of the estate. In Baillie's Mahomedan Law, page 677, it is said: "But if there are debts, and they "cover the whole of the estate, the executor "may sell the whole by general agreement "(*i. e.*, of the heirs); and when the debts "do not cover the whole estate, he may sell "as much of it as may be necessary for "their payment." * * * "When, however, "he has actually sold *akar*, or immoveable "property, for the payment of debts, while "he has other property in his hands sufficient "for that purpose, the sale is lawful. And "if there are general legacies, the executor "may sell as much of the property as may "be necessary for their liquidation," &c.

The law being such, there is nothing *primâ facie* bad in a sale by a Mahomedan heir, nothing which should invalidate the title of a *bonâ-fide* purchaser who pays full consideration, and buys without notice of there being any reason why the sale should not have been made. Of course, if the purchaser is not buying *bonâ fide*, if he is *in any way* acting in collusion with the heir, and knows, or has reason to believe, that the money paid by him will not be duly applied for the purposes of the estate, the purchase would be liable to be set aside.

Owing to the view which the Lower Courts took of the law, the present case has not been properly or fully tried, and it must be remanded for re-trial on the following issues:—

1. Under what circumstances, and why, were the *zur-i-peshgee* leases in question granted to the defendants by the heirs of Momtaz Ali?

2. Did the defendants act *bonâ fide*, and pay full consideration for the leases which they obtained? And had the defendants, at the time they advanced the money, any (and, if any, what) notice of outstanding claims against the estate of Momtaz Ali?

The issues not having been tried or determined in either Court, the Judge will refer them to the Subordinate Judge for trial, who will try the issues, and return to the Lower Appellate Court its finding thereon, together with the evidence.

The appellants are entitled to their costs of this appeal.

Bayley, J.—I concur.

The 1st August 1868.

Present:

The Hon'ble H. V. Bayley and Dwarkanath Mitter, *Judges.*

Oral evidence—Title to land.

Case No. 2126 of 1867.

Special Appeal from a decision passed by the Principal Sudder Ameen of Tipperah, dated the 22nd July 1867, reversing a decision passed by the Moonsiff of that District, dated the 30th November 1866.

Durban Fukeer and others (Plaintiffs), *Appellants,*

versus

Nobin Chunder Mojoomdar and others (Defendants), *Respondents.*

Baboo Anund Chunder Ghossal for Appellants.

Baboo Nuleet Chunder Sein for Respondents.

Oral evidence, if believed, may be as good for proving title to land as documentary evidence.

Mitter, J.—We think that this case ought to be remanded to the Lower Appellate Court for a fresh decision on the merits.

The Lower Appellate Court is clearly wrong in stating that mere oral evidence, unsupported by any documentary evidence, is not admissible to establish a man's title to landed property.

The Moonsiff decreed the claim of special appellant in reliance upon the evidence of witnesses produced by him, and it was incumbent upon the Principal Sudder Ameen

to examine the value of that evidence before he reversed the Moonsiff's decision. Oral evidence, if believed, may be as good for proving a man's title to the land as documentary evidence, and the Principal Sudder Ameen is clearly wrong in rejecting the oral evidence adduced by the plaintiff upon the grounds stated by him.

The case is, accordingly, remanded to be re-tried with reference to the above remarks.

The 1st August 1868.

Present :

The Hon'ble F. B. Kemp and E. Jackson, *Judges.*

Act XL. of 1858—Specification of minor's rights —Jurisdiction.

Case No. 212 of 1868.

Miscellaneous Appeal from an order passed by the Judge of Tirhoot, dated the 17th March 1868.

The Collector of Tirhoot on behalf of the Court of Wards, *Appellant,*

versus

Rajcoomar Deo Nundun Singh, *Respondent.*

The Advocate-General and *Baboo Kishen Kishore Ghose* for Appellant.

Baboos Annoda Pershad Banerjee, Onookool Chunder Mookerjee, and *Chunder Madhub Ghose* for Respondent.

Where, on an application made for the appointment of a manager to the estate of a deceased Rajah, a Zillah Judge, notwithstanding a contention raised before him as to the extent of the minor's interest in the property, passed an order strictly within the provisions of Section 12, Act XL. of 1858, his successor was held to have acted without jurisdiction in having, upon a subsequent application, passed an order specifying the shares of the minor and the party who raised the contention.

THIS is an appeal by the Collector of Tirhoot against an order passed by the Judge of the same Zillah, dated the 17th March 1868. It appears that, on the death of the late Rajah Sheonundun Singh, leaving a minor son, Rajah Sheo Raj Nundun, an application was made by the Collector of Tirhoot to the Civil Court of that District under Section 12 of Act XL. of 1858, praying the Court to direct the Collector to appoint a manager to the property of the minor. The Officiating Judge, Mr. Elliot, on the 10th of August 1867, passed orders on the application, directing the Collector under the aforesaid Section to take charge of the minor's estate, and to appoint a manager and guardian, as may to him seem proper.

It appears that there was some contention before the Judge on the part of the mother of the minor on one side, and the uncle of the minor, the brother of the late Rajah, on the other. The object of the mother's contention was to make out that the Raj was an indivisible Raj, and, as such, that it devolved solely on the minor. The contention of the brother of the late Rajah, Baboo Deo Nundun, was that the right of succession was governed by the ordinary rules of Hindoo Law, and that, under such law, he would have been entitled to 8 annas, but that, having given up his right to 2 annas, the minor was entitled to 10 annas, and he to 6 annas. This contention was obviously beyond the scope of the provisions of Act XL. of 1858. It was a contention in which the Judge had no jurisdiction whatever to pass any decision. Mr. Elliot, though he refers to the contention, confines his order strictly within the provisions of Section 12 of Act XL. of 1858. If that order had been carried out in its integrity, instead of the present Judge attempting to put his construction upon that order, and changing his opinion from time to time, at one time holding properly that he could not interfere, at another time passing an order which is entirely at variance with the order of his predecessor, there would have been no necessity for this appeal. We have no doubt that an appeal lies against the order of the Judge, Mr. Pearson, dated the 17th March 1868. This order was upon an application by the Collector, who, it appears, had been consulted by the manager with reference to the disposal of the produce of the Zerat lands belonging to the estate. The object of the Collector appears to have been to procure an order from the Civil Court recognizing the minor's rights to the whole Raj. The learned Advocate-General, we understand, is not here to support the various applications of the Collector to the Judge, but simply to get rid of the order of the Judge, Mr. Pearson, which attempts to specify, and does, in fact, substantially specify, the shares of the minor and of Baboo Deo Nundun Singh. This order being passed without jurisdiction, and being an order at variance with the order passed by Mr. Elliot on the 10th of August 1867, we reverse the order of Mr. Pearson, dated the 17th March 1868, and decree this appeal with costs.

The 3rd August 1868.

Present:

he Hon'ble H. V. Bayley and Dwarkanath Mitter, *Judges.*

imitation—Mortgage—Oral testimony to contents of deed—Clause 15, Section 1, Act XIV., 1859.

Case No. 2390 of 1867.

pecial Appeal from a decision passed by the Principal Sudder Ameen of Shahabad, dated the 29th June 1867, reversing a decision passed by the Moonsiff of that District, dated the 30th May 1866.

ajoodhya Pershad and others (Defendants), *Appellants,*

versus

Esharee Dyal and others (Plaintiffs), *Respondents.*

Baboo Hem Chunder Banerjee for Appellants.

aboos Unnoda Pershad Banerjee, Romesh Chunder Mitter, and *Poorno Chunder Shome* for Respondents.

In a suit to recover possession of property said to ave been mortgaged to defendant who denies the leged mortgage, where plaintiff cannot produce the iginal mortgage-deed (which, if in existence, must be defendant's custody), he may produce witnesses to peak to its contents.

Suits for the recovery of immoveable property against mortgagee or his legal representatives may be instituted within 60 years from the date of the original ortgage.

Mitter, J.—We are of opinion that this special appeal ought to be rejected with costs. The plaintiff, now respondent before us, instituted this suit for recovery of possession of a 9-pie and 10-krant share of certain landed property. His allegation was that the share in dispute belonged to his father who had mortgaged the same to the ancestor of the defendant in 1232; that on the 15th Kartick 1273, the plaintiff offered the amount due on the mortgage to the defendant, but that the defendant refused either to receive the money or to make over the property to the plaintiff.

The Principal Sudder Ameen has now found, after remand, that the property in suit was the property of plaintiff's father; that the allegation of the defendant, that the property did not belong to the plaintiff's father, is false; and that the plaintiff has produced satisfactory evidence to prove that the property was mortgaged by his father to the father of the defendant. The Principal Sudder Ameen has, accordingly, decreed the suit in favor of the plaintiff, and reversed the decision of the first Court.

The special appellant contends that there is no legal evidence to prove that the plaintiff's father had mortgaged the property to his father.

We have gone through the evidence on the record, and we find that, although a considerable portion of the evidence referred to by the Principal Sudder Ameen is mere hearsay, there is a certain quantity of direct evidence in support of the plaintiff's allegation that the property in suit was really mortgaged by his father to the father of the defendant.

It has been urged by the special appellant that, inasmuch as the plaintiff has not produced the original mortgage-deed, the statements of his witnesses with reference to the contents of that document cannot be received as legal evidence in the cause.

This objection appears to us to be untenable. It was not taken in the Court below, and from the statement of the defendant it is clear that, if the plaintiff had asked the defendant to produce the deed, there was not the slightest chance of the defendant's producing that of which he had already solemnly denied the existence, and which, if in existence, must be in his own custody.

If we were to entertain such an objection now, we would be violating the provisions of the 350th Section of the Code of Civil

Procedure. Admitting the objection to be of any force, all that the defendant can ask us to do is to remand the case to the Lower Appellate Court to give a fresh opportunity to the plaintiff to summon the defendant to produce the original deed, but under the circumstances above stated such a process would be nugatory, because to comply with it would involve the defendant's own liability to a conviction for perjury. Such a remand would, therefore, be clearly infructuous. This objection is accordingly overruled.

It has been further argued that, when a considerable portion of the evidence is merely hearsay, the Principal Sudder Ameen ought now to be called upon to reject that portion, and to form his opinion *de novo* upon the other portion which is legally admissible.

This objection is not taken in the memorandum of special appeal, and, even if it were, we are by no means satisfied that the Principal Sudder Ameen has come to an incorrect conclusion on the fact, or that the defect in the investigation complained of by the special appellant is likely to have produced any error in the decision of the case upon the merits. This objection, therefore, is also untenable.

The last objection taken by the pleader for the special appellant is that the plaintiff having demanded the property back in dispute in 1232, and the defendant having repudiated the mortgage-transaction, the plaintiff's suit is barred by limitation.

We think this objection is not sound. Clause 15, Section 1, Act XIV. of 1859, is the only Section which applies to the circumstances of this suit, and that Section expressly provides that suits for the recovery of any immoveable property against the mortgagee or his legal representatives can be instituted within 60 years from the date of the original mortgage. The repudiation of the mortgage by the defendant in 1252, therefore, fixes no proper date for calculating the period of limitation. The plaintiff, having brought this suit within 60 years from the date of the original mortgage, is entitled to the benefit of Clause 15, Section 1, Act XIV. of 1859.

For these reasons, we are of opinion that the decree passed by the Lower Appellate Court ought to be affirmed with costs, and it is affirmed accordingly.

The 3rd August 1868.

Present:

The Hon'ble H. V. Bayley and Dwarkanath Mitter, *Judges.*

Purchase by defaulting tenant of his own tenure —Section 105, Act X., 1859—Sections 8 and 11, Regulation VIII., 1819—Benameedar—Right of suit.

Case No. 2365 of 1867.

Special Appeal from a decision passed by the Principal Sudder Ameen of Jessore, dated the 19th June 1867, reversing a decision passed by the Moonsiff of Khoolna, dated the 11th September 1865.

Meheroonissa Bibee (one of the Defendants), *Appellant,*

versus

Hur Churn Bose (Plaintiff) and another (Defendant), *Respondents.*

Baboos Anund Chunder Ghossal for Appellant.

Baboos Kalee Mohun Dass and *Rash Beharee Ghose* for Respondents.

Where a tenant commits default, and purchases the tenure when it is sold in execution of a decree against himself, he cannot claim the benefit of the law relating to auction-purchasers under Section 105, Act X., 1859, and Section 11, Regulation VIII. of 1819, and ask the Court to set aside the title of a third party which had been created by himself. Where he himself has sold to a third party, he is bound to recognize that party's purchase and also all *bonâ-fide* leases under that party.

Where the lease by which a howala-tenure is created does not expressly reserve it for sale for non-payment of rent, the rights of an auction-purchaser cannot arise under Regulation VIII., 1819.

A benameedar has no right to maintain a suit in a Civil Court for property in which he has no beneficial interest.

Mitter, J.—THE facts of the case are shortly these: The plaintiff (now special respondent before us) having failed in his intervention in a suit for arrears of rent instituted by the defendant against certain ryots, brought this action for the purpose of getting his title declared to two beegahs of land alleged by him to appertain to a howala-tenure, which he had purchased at a sale held by the Collector under the provisions of Section 105, Act X. of 1859, on the 16th Bhadro 1270.

The written statement put in by the defendant (now special appellant before us) was to the effect that the plaintiff was a mere benamee-purchaser for one Doorga Pershad, who was the original holder of the howala-tenure; that the said Doorga

Pershad had, in the year 1842, sold a four-annas share of the said howala to one Ooma Churn, who again had granted an ousut talookdaree lease of two annas out of the four annas so purchased by him to the defendant, and that the two beegahs of land in dispute appertained to the ousut howala thus acquired by the defendant.

Both the Lower Courts had, on a former occasion, found as a fact that the plaintiff was a mere benamee holder for the defaulting howaladar, Doorga Pershad. They had also found that the plaintiff had failed to establish his title to the two beegahs of land which he sued for, and the plaintiff's suit was accordingly dismissed by both the Lower Courts.

Against these decrees, the plaintiff preferred a special appeal to this Court, and this Court, on the 30th March 1867, remanded the case to the Lower Appellate Court for the purpose of determining certain questions distinctly set forth in the order of remand, and to which I shall refer specifically in a subsequent part of my judgment.

After remand, the Lower Appellate Court has found as a fact that the lands of the four-annas share purchased by Ooma Churn were not held by him separately from the other lands of the howala. The Lower Court has also found that the howala-tenure in question was one which was liable to be brought to sale by virtue of certain express reservations to that effect contained in the original lease by which it was created, and that, therefore, the plaintiff, as a purchaser of the tenure under the provisions of Section 105, Act X. of 1859, is competent to get rid of all alienations and encumbrances made by the former tenant. A decree has been accordingly passed in favor of the plaintiff.

In special appeal, we are of opinion that the judgment of the Lower Appellate Court must be reversed. I have not the slightest doubt in my own mind that the plaintiff, as a mere benamee purchaser for Doorga Pershad, has no right whatsoever to maintain this action; and I am also of opinion that the benefit of the law relating to auction-purchasers under Section 105, Act X. of 1859, and Section 11, Regulation VIII. of 1819, is one which the defaulting tenant himself cannot claim before a Court of Justice. I cannot for a moment doubt the very great impropriety of allowing a tenant to commit default, and having purchased the tenure in execution of a decree passed against himself, to come forward against a third party whose title had been created by himself, and to ask the Court to set aside that title, merely because he chooses to come in the garb of an auction-purchaser. To allow a man to play such tricks would be really to allow him to commit a fraud upon the Legislature itself.

Suppose, for instance, a putneedar grants a dur-putnee lease to a third party for a valuable consideration. The putneedar then commits default to pay the rent due to the superior landlord; the tenure is put up to sale under Regulation VIII. of 1819, and the defaulter himself purchases it either in his own name (which, however, he cannot do under the law), or in that of another person. Is he to be permitted to come in the garb of an auction-purchaser before a Court of Justice, and to ask the Court to set aside the dur-putnee which he had himself created for a valuable consideration? To allow the defaulting putneedar to come forward before a Court of Justice with a claim like this appears to me to be opposed to all rules of justice, equity, and good conscience.

The learned pleader for the respondent tried to draw a distinction between the present case and the case I have cited for illustration. He argues that, in the case before us, Ooma Churn was merely the purchaser of a fraction of the howala, and that, therefore, his case is quite distinct from that of the dur-putneedar, who is a sub-lessee.

I confess that I am unable to understand the force of this argument. If Section 11, Regulation VIII. of 1819, is the only Section under which the purchaser of a tenure at an auction-sale for arrears of rent can come forward and ask the Court to set aside all incumbrances and alienations made by the former tenant, there can be little doubt that the Section applies as much to a case of sale as to that of a mortgage or sub-lease. The very words of that Section are clear and express on this point, and I need not, therefore, dwell upon it any longer. It is to be remembered, however, that the decree obtained by the zemindar, in execution of which the howala has been sold, was passed against Doorga Pershad alone, and all that Doorga Pershad has done by purchasing the tenure is to satisfy this decree; for every pice that he might have paid over and above the amount of arrears due must have, as a matter of course, gone back to his own pocket as surplus sale-proceeds. How

then can it be said that Doorga Pershad is in a position to plead the privilege of an auction-purchaser in order to get rid of his own alienations, or to set aside the title of those who claim as sub-lessees under his alienees? The zemindar might not have been bound to recognize Ooma Churn's purchase, but Doorga Pershad is clearly bound to recognize it, and he is also bound to recognize the title of all *boná-fide* lessees under Ooma Churn.

It has been said that we are precluded by the order of remand from taking up this point. Speaking for myself, I think, and in this view I am supported by the opinion of my learned colleague, that it was never intended by the order of remand to set at rest any question of fact or of law arising between the parties, and that order, therefore, cannot prevent us from entering into any question the determination of which might appear to us to be necessary for the ends of justice.

With regard to the right of a mere benameedar to maintain an action in the Civil Court for a property in which he has no beneficial interest whatever, I think there can be but one opinion. Suppose for instance the suit is decided against the benameedar, and the party really interested then institutes another suit for the same property against the same defendant. Will the principle of *res judicata* apply to such a suit? The real owner would say "My benameedar had no right to bring the former action, and I never authorized him to do so." But, be this as it may, it is abundantly clear that, because the benamee-usage is permitted by our Courts, it does not follow as a necessary consequence that the real owner should be permitted to keep himself aloof, and to carry on litigation in the name of a person who has no interest whatsoever in that litigation so far as he himself is concerned. The plaintiff in this case filed a verified plaint, alleging that he is the owner of the property in suit. The Lower Courts have found that this allegation is false, and is the Court still to go on and declare that the plaintiff is the owner of the property in suit? Such a contention appears to me too absurd to require any further comments.

But there is another ground upon which the plaintiff's suit ought to be dismissed. I think that, even if we were to look upon this suit as a suit substantially brought by Doorga Pershad himself, and even if we were to hold that Doorga Pershad is competent to get rid of his own incumbrances and alienations by virtue of Section 11, Regulation VIII. of 1819, notwithstanding that he himself was the defaulter; assuming all these facts, I say there is nothing in the original lease by which the howala-tenure was created, to show that the tenure was expressly reserved for sale for non-payment of rent, or, in other words, to show that the tenure is one of the description given in Section 8 of Regulation VIII. of 1819.

We have looked at the original lease itself which has been produced for the first time after the remand-order was passed by this Court, and, after reading it carefully, we are of opinion that there is nothing in it to bring the tenure in question within the purview of Section 11, Regulation VIII. of 1819. It follows, therefore, that the plaintiff is not entitled to the benefit of the Full Bench ruling laid down in page 260 of the Weekly Reporter, Volume VII.

It has been argued on behalf of the respondent that the howaladaree-lease contains a distinct stipulation, to the effect that the howaladar will not be competent to alienate any portion of the howala-tenure without the consent of the zemindar, and that, although the plaintiff might not be entitled to the benefit of the Full Bench ruling above referred, the plaintiff is still competent, by virtue of the conditions above stated, to cancel and avoid all alienations made by the former howaladar.

We are, however, unable to agree in this contention. It is very true that the contract between the zemindar and the former howaladar contains a covenant to the effect that the howaladar would not be competent to alienate any portion of the howala without the consent of the zemindar, but the contract does not provide for the consequences that would arise if the tenant did make any such alienation. Be that as it may, the contract was between the zemindar and the howaladar, and I do not see how the *plaintiff* can come forward and ask for the enforcement of a privilege which was not reserved for his benefit, and which does not, therefore, belong to him. If Doorga Pershad had violated the contract which had been entered into with his zemindar by selling a portion of the howala to Ooma Churn, Doorga Pershad cannot be permitted to take advantage of that violation, merely because he chooses to come forward in the disguise of an auction-purchaser.

On looking to the certificate of purchase produced by the plaintiff, we find that he has

erely purchased the right, title, and interest Doorga Pershad in the howala-tenure question.

Now, assuming even that the zemindar d a right to get rid of any alienations ade by Doorga Pershad, and assuming also t the plaintiff is not a benamee purchaser Doorga Pershad, I am still unable to see w the plaintiff can be permitted to plead rights of an auction-purchaser, if the nre was not expressly reserved for sale der the condition of the lease. The zemin- r did not choose to take any advantage of other clause by which Doorga Pershad s prohibited to make any alienations bout his consent, and in the absence of a ervation for the sale of the tenure for non- yment of rent, the rights of an auction- rchaser cannot arise under the law.

It has been said that this point also was ally decided by this Court on the former casion, but it is admitted that the lease elf was not then before the Court. How n can it be said that this Court gave a al judgment on a point which could arise ly after an examination of the terms and nditions of the lease? On the other hand, appears that, subsequent to the order of mand, a new issue was laid down by the incipal Sudder Ameen, namely, whether not there was any condition in the lease virtue of which the plaintiff was entitled get rid of any alienations or encumbrances eated by his predecessor. If this point d been actually determined by this Court the former occasion, I cannot understand w the plaintiff went to trial on an issue ich has been now for the first time de- ed by the Lower Appellate Court.

As I read the remand-order, it did not nclusively decide any specific point of or of fact. It merely referred certain nts for enquiry to the Principal Sudder neen. Those points have now been de- ed by the Principal Sudder Ameen, and are now in special appeal called upon to whether those points have been correctly termined or not.

It would be clearly unreasonable to hold that this Court, without knowing what the terms and conditions of the lease actually were, had finally decided as to the effect of those conditions, and I feel no hesitation in stating that such was not the intention of this Court.

The Principal Sudder Ameen's judgment will be accordingly reversed with costs in all the Courts.

Bayley, J.—It is needless for me to state the facts so fully set down in the preceding judgment.

I also think that the whole transaction is that of a party trying by means of an alleged auction-purchase of the beneficial interest of another, to get rid of a previous transfer of portion of his own tenure, and to obtain it back by fraud.

The order of remand commences with these words: "The important features of the "plaintiff's case *have not* been enquired into "by the Lower Appellate Court."

Subsequently, when the special appeal came before Mr. Justice Shumbhoonath Pundit and myself, it was then by no means the case now put before us.

Subsequent documents with subsequent details of adjudication have now led to a final determination of the case.

Our remand-order consisted of certain suggestions on certain assumed facts arising from the circumstances of the case *then* put before us. As the case was *then* put, the question of the benamee character of the purchase was taken up no further than in the view of suggesting various points of view in which the case should be considered. But besides this, our remand-order made in the case *then* before us did not preclude the question of *benamee* being tried on the *re-trial*, nor put a restriction as to trying the case upon any entirely new evidence as to the facts which had never been before the High Court in the previous special appeal.

In this view, I cannot think that the remand-order does prevent our present judgment being such as has been given by Mr. Justice Dwarkanath Mitter.

I therefore concur with him.

The 4th August 1868.

Present:

The Hon'ble H. V. Bayley and Dwarkanath Mitter, *Judges.*

Receipt of sale-proceeds—Proceedings—Section 20, Act XIV., 1859—Bona fides—Onus probandi.

Case No. 239 of 1868.

Miscellaneous Appeal from an order passed by the Judge of East Burdwan, dated the 3rd March 1868, affirming an order passed by the Principal Sudder Ameen of that District, dated the 26th September 1867.

Gunga Bishen Chund (Judgment-debtor), *Appellant,*

versus

Maharajah Dhiraj Mahatab Chund Bahadoor (Decree-holder), *Respondent.*

Baboo Rash Beharee Ghose for Appellant.

Baboo Chunder Madhub Ghose for Respondent.

The receipt of the proceeds of a sale in execution of a decree is a proceeding within the meaning of Section 20, Act XIV., 1859. The party who impugns the *bona fides* of a proceeding in execution is bound to furnish proof.

Bayley, J.—THERE is no ground whatever for this appeal.

The decree-holder could not properly obtain the money of his decree until the sale was confirmed, and therefore it was no fault of his that the confirmatory order was delayed, but it was owing to the objection of the special appellant, judgment-debtor. Again, there is not the slightest trace of the decree not being *bonâ fide*, as has been contended by the special appellant. In my opinion, the appeal is altogether vexatious and ill-advised.

The decision quoted from 9 Weekly Reporter, page 10, has no bearing on the circumstances of this case. There it was held that a mere formal confirmation was not a proceeding. But here we have special appellant objecting, his objections set aside, the sale upheld, and then the money taken, which certainly is to my mind a proceeding.

Therefore, I would reject the appeal with costs.

Mitter, J.—I entirely concur with my learned colleague. It is not necessary for us to decide in this case whether a proceeding for the confirmation of a sale held in execution of a decree is a proceeding within the meaning of Section 20, Act XIV. of 1859. The decree-holder received the proceeds of sale subsequent to such a proceeding, and a receipt of sale-proceeds was undoubtedly a proceeding within the meaning of that Section.

The second objection is equally untenable. The decree-holder shows that there was a proceeding within three years next preceding the date of the last application. If the judgment-debtor wanted to question the proceeding, on the ground that it was not *bonâ fide*, it was for him to urge that objection in the Court below, and not only to urge it, but also to prove it in the best manner, he could.

There is no reason why any proceedings taken in execution of a decree duly obtained in a Court of Justice should be presumed as *mala fide*, and in the absence of any such presumption, the *onus* lies upon the party who challenges them as such. The uniform rule of law is that the party who pleads want of *bona fides* has to prove it, but in this case the judgment-debtor neither appears to have taken the objection in the Court below, nor has he attempted to substantiate it by evidence of any kind. I think, therefore, that this objection too must be overruled. The appeal ought to be dismissed with costs.

The 5th August 1868.

Present:

The Hon'ble J. B. Phear and C. Hobhouse, *Judges.*

Powers of Revenue Courts to sell property—Execution—Act X., 1859.

Case No. 911 of 1868.

Special Appeal from a decision passed by the Principal Sudder Ameen of Nuddea, dated the 31st January 1868, reversing a decision passed by the Sudder Ameen of that District, dated the 11th September 1867.

Chunder Kant Bhuttacharjee and others (Plaintiffs), *Appellants,*

versus

Judooputty Chatterjee and others (Defendants), *Respondents.*

Mr. R. E. Twidale and *Baboo Rajendurnath Misser* for Appellants.

Baboos Onookool Chunder Mookerjee

Chunder Madhub Ghose and *Grish Chunder Mookerjee* for Respondents.

A Deputy Collector has only power under Act X. of 1859 to sell in execution of a money-decree such moveable property as is capable of being manually seized, and he can issue process against immoveable property of any kind only when recourse cannot be had to seize the person or to sell such moveable property as is already mentioned.

There is no power under Act X. of 1859 given to the Collector to sell rights of suit *qua* rights of suit alone.

Phear, J.—THE nature of this suit is very clearly and concisely explained in the plaint itself, which runs in the following words: "That your petitioners, as heirs "of their paternal grand-uncle, Rookineenath Bhuttacharjee, since deceased, instituted a suit, No. 140 of 1866, in the Court "of the Sudder Ameen of this Zillah, against "defendants Nos. 2, 3, and 4, and some "other parties, for possession of certain "immoveable property; that, during the "pendency of the said suit, defendants "Nos. 2, 3, and 4 instituted a false suit, "No. 689 of 1866, in the Collectorate of "the said zillah against your petitioners "and the other shareholders for arrears of "rent, and obtained an *ex-parte* decree on "the 24th of February 1866 without the "knowledge of your petitioners, and, in "execution of the said decree, fraudulently "caused your petitioners' right in the said "suit No. 140 to be attached and sold illegally and privately, and purchased in the "*benamee* of their sister's son, defendant "No. 1, on the 2nd April 1866, for a very "small consideration of Rupees 60. This "may give rise to various disputes in future; "and hence the necessity to bring this suit; "and your petitioners, therefore, beg to institute the present suit for confirmation of "their right in reversal of the said fraudulent and illegal sale."

The Lower Appellate Court has treated this as a suit instituted to set aside a decree of the Collector, and holding that this cannot be done by a Civil Court, unless fraud be established in the matter of obtaining the decree, he has accordingly dismissed the plaintiff's suit, upon the ground that he had failed to make out such fraud. It seems to us that the Lower Appellate Court is wrong in the view which it has taken of the scope of the plaint. The plaintiff does not seek by his prayer to get rid of the decree passed by the Collector. He merely says that the *sale* of his rights in suit, which has been pretended to be effected in execution of that decree, is illegal and void; that it is calculated by reason of judicial complexion which it wears to work him serious injury for the future, and he asks to have that sale declared void, and his rights of property, so far as they are threatened by that sale, confirmed.

It seems to me that the Civil Court has complete jurisdiction to entertain a suit of this kind. It is in no way an attempt to interfere with the judicial discretion of the Collector within his jurisdiction. If it were, I should certainly hold that we ought to be guided by the principle involved in the *dictum* of the Chief Justice, which is reported in Volume 5, Weekly Reporter, page 21, and couched in these words: "I agree entirely in the "decision that a suit will not lie in a Civil "Court to annul the decision of a Revenue "Court under Section 151 of Act X. of "1859, or to set aside a sale of a tenure by "order of a Collector in execution of a decree for arrears of rent." Obviously, the decree there referred to, and the sale following thereon, were matters which fell within the range of the Collector's judicial discretion. The Collector has undoubtedly a power to sell a tenure, if it be a tenure of a transferable nature, in execution of a decree passed by him for arrears of rent due in respect of that tenure. The Chief Justice goes on to say: "There is no general power in one "Civil Court to set aside the decree of another Court of competent jurisdiction, upon "the ground of an error or mistake upon "the part of the Court making the decree. "But when a decree of one Court or an "execution of a decree is obtained by fraud, "the fraud gives a right of action to the "party injured by it against the party "guilty of the fraud." In every word of that I entirely concur. But the whole question before us is, whether or not the act of selling the rights of the plaintiff in suit No. 140 was the act of a Court competent to effect such a sale? If it be conceded that the Court was competent to effect the sale, there is nothing left for us to decide. But if the Court had no power, jurisdiction, or competence in regard to selling the rights of the plaintiff which it pretended to sell, it seems to me clear that it is the duty of a Civil Court to vindicate those rights, and to declare them intact on behalf of the plaintiff, just as much, notwithstanding that the danger has come from the act of a Court of Justice, as if his rights were put in peril by the conduct of an individual.

Now, returning more closely to the subject of this suit, the material facts seem

to me to be almost admitted. The way that the plaintiff establishes the allegations of his plaint is by referring to the orders of the Collector attaching and selling certain alleged property of his under a decree for arrears of rent. The translation of the Deputy Collector's order for attachment, which is now before me, is in these words: "According to the prayer of the petition "presented by the decree-holder, it is prayed "that the money of the decree be realized "by the attachment and sale of the rights "which Chundro Kanto and others have "in case No. 140 of 1865 of the Court of "the Sudder Ameen of this zillah, in which "Chundro Kanto Bhuttacharjee and others "are plaintiffs, and Shoorendro Nath Roy "and others are defendants. Therefore, it "is ordered—

"That, together with a copy of this pro-"ceeding, the schedule (*furd*) filed be "transmitted to the Sudder Ameen of this "zillah, in order that, in the event of the "statement of the decree-holder being true, "and there being no objection, the attach-"ment be effected, and information thereof "sent."

This is dated the 26th of February 1866. Following this, on the 12th of March 1866, the Deputy Collector makes this further order: "Whereas the decree-holders have, "for the purpose of realizing the said sum, "presented a petition for execution of decree, "and prayed for the realization of the sums "respectively due to them under their decree "by the sale of the rights and benefits (*labh*) "of their judgment-debtors in the suit No. "140 of 1865 of the Court of the Sudder "Ameen of this zillah, instituted by Chundro "Kant and others, and a proceeding of this "Court of 28th February has been sent to "the Court of the Sudder Ameen directing "the attachment of the said right of suit, "and the Sudder Ameen has, by a proceeding "of the 6th of March, after attaching the "said right of suit, sent information thereof, "therefore, it is ordered—

"That 12 noon of Monday, the 2nd April, "corresponding with the 21st Choitro 1272, "be fixed for the sale of whatever rights "and benefits (*labh*) the judgment-debtors "have in the said suit, and that, together "with a copy of this proceeding, proclama-"tion of sale be transmitted to the Judge of "this zillah, so that, the said proclamation "of sale being published in the Court-house "full fifteen days before the day of sale, in-"formation thereof be sent, and that three "(copies) proclamation be made over to the "Nazir for the purpose of being published "in the Sudder (and) Mofussil." Then follows the schedule exhibiting the subject which is to be sold, and that is described as "suit No. 140 of 1865 of the Court of the "Sudder Ameen of this zillah, plaintiffs "Chundro Kanto Bhuttacharjee and others, "defendants Shoorendro Nath Roy and "others," the names of both parties being given in full.

It seems to me without doubt that what the Deputy Collector attached and sold, so far as he could, was simply the rights and benefits of the judgment-debtors, that is, the present plaintiffs, in the suit No. 140 of 1865. I have had, I must admit, some little difficulty in assuring myself what the Deputy Collector, or any of the parties concerned, intended to represent by those words "rights and benefits in the suit." To take the word "rights"—does it comprehend the original cause of action, that in which the right to bring the suit originated? Does it embrace the right of continuing or compromising the suit, or does it mean something more? *viz.*, does it, by any possibility, mean all the rights, or all the property which may be asserted or recovered as the result of the suit? The difficulty of answering that question is, I think, at once apparent upon reflection. There are suits, and if we except the indirect statement in the plaint, we do not know at all from anything that appears on the record whether this is not one of them, in which the rights of the parties from beginning to end may be perfectly independent of property. Suppose this is—(and there is nothing besides the allusion in the plaint to show to the contrary)—suppose this is a suit for defamation of character, the right of bringing the action, the right of continuing it, the right to obtain vindication of character, are each and all of them perfectly independent of anything which can be said to bear the attributes of property. There may not be a pecuniary award. The judgment may not contain an award of money, and yet it may afford the plaintiff a complete vindication of his character. Or again, for aught I know, although, no doubt, there are several plaintiffs and a good many defendants, the suit may be of the nature of a suit for the restoration of conjugal rights. If it is so, the rights in the suit have no relation whatever to property. Can it be that the Deputy Collector in his sale-order used the words "rights" in a sense which would include the rights of a plaintiff in such an action as one of those which I have just mentioned?

Then we come to the word "benefits." In those cases which I have supposed, although benefits may probably be with correctness said to be conveyed in the award of the Court, they, too, may have nothing to do with property. So that, so far as I can see, "rights and benefits in a suit" generally without specification of what the nature of the suit is, by no means of necessity mean anything which is of the nature of property.

Now, with this little clearing up of the matter, the question suggests itself, has the Deputy Collector power to sell the "rights and benefits" of a party in a suit irrespective of whether these are of the nature of property or not? I refer, therefore, to the powers of sale which are given to the Collector by the provisions of Act X. of 1859. Section 86 is, I think, the first Section that touches on this point, and that Section is couched in very general words for reasons that are easily apparent: "Process of execution may be issued against "either the person or the property of the "judgment-debtor." Nothing is here said as to the particular nature of the property to which recourse is to be had, because the Act presently goes into detail as to the proper mode of execution to be followed with regard to each sort of property which it allows to be taken. The word here used is simply the general term "property." The following Sections, that is, the Sections which immediately follow, are devoted to prescribing how execution against the *moveable* property of the debtor shall be carried into effect, and the latter words of Section 86 lay down that the process of execution in such a case shall be in a particular form given in the schedule. The form is in English. I am not going to read the form, although it is a short one, but I wish to point out that the Nazir is directed by it to carry out the orders of the Court by *seizure* and sale of the moveable property. Consequently, I understand, all the directions of the Act with regard to process of execution against moveable property to have reference solely to such kind of property as is capable of being manually seized. After the Sections which are directed to execution against moveable property follows Section 105, which enables the Collector, if the decree be for an arrear of rent due in respect of an under-tenure which is transferable by sale, to sell that tenure in execution of the decree. And finally comes Section 109, which says that, "if in the execution of any decree for the "payment of money under this Act, not be-"ing money due as arrears of rent of a sale-"able under-tenure, if satisfaction of the "judgment cannot be obtained against the "person or moveable property of the debtor, "the judgment-creditor may apply for exe-"cution against any immoveable property "belonging to such debtor." And then follows Section 110, which regulates the mode in which the sale of such immoveable property on such a contingency shall be effected.

On the whole, it appears to me clear that the Deputy Collector has only power, under Act X. of 1859, to sell in execution of a money-decree such moveable property as is capable of being manually seized, and he can issue process against immoveable property of any kind, only when recourse cannot be had to the person or the moveable property such as I have already mentioned.

After this review of the powers of the Collector, if I return to the case before us, it seems to me that the Collector here has not conformed to the provisions of Act X. of 1859. He has sold the rights and benefits of the plaintiff in a certain suit. To my mind, that subject of sale cannot, by any stretch of words, be made to fall into the class which is designated by moveable property, capable of being manually seized. It may not, in any given case, be property at all, and even when it can be said to be of the nature of property, it is not of the substance; it is merely an incident thereto. I am also very clear that these words, "rights and benefits in the suit," by themselves alone cannot be taken to indicate immoveable property, even when the suit concerns immoveable property. I think I have given reasons for these views.

I may remark, by the way (although, probably, the Civil Court could not inquire into this point), it is not shown to us by anything on the record that the contingency had happened upon which the Deputy Collector was justified in having recourse to immoveable property at all. Still assuming, as we are bound to do, if necessary for the defendant's case, that he was so justified, I do not think that anything which appears upon this record supports the allegation, or gives rise to the presumption that he has in this instance sold immoveable property. I do not desire to lay down judicially that property which is actually the subject of a suit might not be passed, conveyed, or sold under phraseology which would seem

to make the suit itself the most important ingredient in the subject of sale or conveyance. For instance, here, the Collector might, I imagine, have used words in some such way as this, "the rights and interests of the judgment-debtor in the immoveable property, which is the subject-matter of the suit No. 140." He might have used such words as in reason ought to be considered as words indicating the actual immoveable property to recover which the plaintiffs were suing. And if he had done so, and had further followed the rules prescribed for the sale of immoveable property, no doubt (assuming still that the contingency had occurred which would give him jurisdiction to sell immoveable property), he would have sold the immoveable property, and with it the rights of suit. But I cannot by any liberality of construction, upon reading the roobokarees of the Deputy Collector, come to the conclusion that, in this case, he has done anything of the kind. He has, to my mind, distinctly separated the rights of suit from the property in respect of which the suit is brought. There is not, moreover, as I have already said, from beginning to end of his proceeding, a single thing which even suggests to us an idea of what the suit is about. It may be to recover immoveable property. It may be for breach of contract. It may be for vindication of personal rights. There is nothing whatever to show that the rights and benefits which the Deputy Collector pretended to sell was property of any sort or kind, and it appears to me that he intended to sell them as something quite distinct from the property which the suit might in its result affect, and quite independently of whether the suit concerned moveable or immoveable property at all. In short, I can only conclude that he sold them simply as rights of suit, and nothing more, considering them to be, as such, some sort of moveable property with which he could deal. This is to my mind manifestly wrong. I think that there is no power under Act X. of 1859 given to the Collector to sell rights of suit *qua* rights of suit alone. Repeating that, as it appears to me, the Deputy Collector has done this in this case, and nothing else, and desiring again to guard myself against being supposed to express the opinion that the sale could not have been effected by the Deputy Collector in such a way as to pass both the property sued for and the rights of suit, I think that the plaintiff has made out his claim to have the declaration for which he asks. In my opinion, the sale-proceedings of the Collector in no way affected the rights of the plaintiff in the suit No. 140, and I think that the plaintiff is entitled to have a declaration to this effect from the Civil Court. In this view, the appeal must be decreed, the decree of the Lower Appellate Court must be reversed, and it must be declared that the rights and interests of the plaintiff in the suit No. 140 of 1865, and the property which is the subject of that suit, are not affected by the sale which was had in execution of the decree passed by the Deputy Collector. The appellant must have his costs in this Court and in the Lower Appellate Court.

The 5th August 1868.

Present:

The Hon'ble J. B. Phear and C. Hobhouse, *Judges.*

Appellate Court—New evidence—Section 355 Act VIII., 1859.

Case No. 948 of 1868 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of the 24-Pergunnahs, dated the 15th January 1868, reversing a decision passed by the Deputy Collector of that District, dated the 30th May 1867.

Jugobundhoo Deb (Plaintiff), *Appellant,*

versus

Goluck Chunder Holdar (Defendant), *Respondent.*

Mr. G. C. Paul and *Baboos Hem Chunder Banerjee* and *Roopnath Banerjee* for Appellant.

Mr. R. T. Allan and *Baboo Chunder Madhub Ghose* for Respondent.

A Judge who called up a defendant and examined him in appeal, because he had failed to give material evidence which it was in his power to give in the Court below, was held to have acted erroneously; the Privy Council having laid down that Section 355, Act VIII., 1859, does not authorize the Appellate Court to introduce into the record substantially new evidence to mend the case of either party, and that that Court ought, unless some special reason to the contrary occurs, to decide the case on those materials alone which the disputants furnish.

Phear, J.—We think that from beginning to end the course of this case has been unsatisfactory, to say the least of it; and in reference to the judgment of the Lower Appellate Court, it seems to us that the Judge has fallen into several errors. In the first place, we are of opinion that he ought not to have called up the defendant, and examined him in appeal. He has not given

his reasons for taking that step, unless the two or three prefatory lines of his judgment, in which he blames the Deputy Collector, be intended for this purpose, and here he mentions nothing more than in effect this, namely, that the defendant had failed to give material evidence which was in his power to give in the Court below; and, therefore, the Lower Appellate Court has of its own accord called for that evidence without, at the same time, giving, as, indeed, it could not give, unless it converted itself into a Court of first instance, the other side opportunity, if it thought fit, to rebut such evidence. It occurs to us that the representation given by the Judge of the course taken by him amounts very nearly to saying that he, finding he was unable, on the state of the evidence on the record, to give a decision in favor of the defendant, therefore called for the additional evidence of the defendant himself for the purpose of giving him an opportunity of proving the dakhilas on which he relied, and so turning the scale to his side.

It needs no argument to demonstrate that a proceeding of this kind is likely to lead to great injustice. And the Privy Council has laid down, as we understand its late judgment, that Section 355 of Act VIII. of 1859 does not authorize the Appeal Court to introduce into the record substantially new evidence to mend the case of either party, and that that Court ought, unless some special reason to the contrary occurs, to decide the matter in dispute between the litigants on those materials alone which they think proper to furnish. Certainly, in the total absence of any explanation from the Judge, we cannot understand upon what special reason or grounds of equity the defendant in this cause, who had not chosen to give his evidence in the Court of first instance, was called up by the Court of appeal to give testimony in his own favor, on a point wherein his case had proved weak.

It further appears to us that, with regard to many of the dakhilas which the Judge has treated as proved, there is no evidence in the record to show when, or under what circumstance, they were given, or that the person whose signature they respectively bear had authority, at the time of signing, to bind the zemindar by his admission. The Judge ought not, therefore, to have admitted these dakhilas as evidence.

Under these circumstances, we think that there has not been a proper trial in the Lower Appellate Court. We, therefore, remand the case to the Lower Appellate Court for re-trial upon the evidence which is in the record, excluding therefrom the testimony of the defendant given in the Appeal Court, and excluding also all the dakhilas except those which were proved by the testimony of Kristo Pershad Mitter and Chunder Sekhur Dutt.

The costs will abide the result.

The 5th August 1868.

Present:

The Hon'ble Dwarkanath Mitter and C. Hobhouse, *Judges.*

Application for execution—Non-payment of tullubana—Evidence against bona fides—Motion not bona fide—Court's action.

Case No. 24 of 1868.

Application for review of judgment passed by the Hon'ble Justices Mitter and Hobhouse, on the 2nd April 1868, in Regular Appeal No. 633 of 1867.

Bharotee Debea (Decree-holder) (Respondent), *Petitioner,*

versus

Kurroona Moyee Dassia (Judgment-debtor) (Appellant), *Opposite Party.*

Baboo Woomesh Chunder Banerjee for Petitioner.

Baboo Romesh Chunder Mitter for Opposite Party.

Where a party applies for execution, and neglects to deposit *tallubana,* his neglect is evidence to be taken into consideration in deciding whether the application was merely colorable or for the *bonâ-fide* purpose of enforcing the decree.

Where a motion is found not to have been *bonâ fide,* the act done upon it by the Court cannot be considered to be one of which the party moving is entitled to take the benefit.

Mitter, J.—The point taken by the petitioner in this case is, that this Court was in error in dismissing his application for execution on the ground of limitation, inasmuch as the execution-case was restored to the file within three years from the date of the last application for execution; and in support of this plea, the pleader for the petitioner relies upon a decision of this Court reported at page 565, Volume 9 of the Weekly Reporter, in which I expressed an opinion to the effect that a proceeding for the restoration of an execution-case to the file is a proceeding for keeping the decree in force,

and further that such a proceeding being an act of the Court itself, want of *bona fides* could not be imputed to it.

With reference to the first part of my opinion, I still maintain that a proceeding for the restoration of an execution-case to the file is a proceeding within the meaning of Section 20, Act XIV. of 1859. But with reference to the other portion, I think I was in error, and that the error had arisen from my having misconstrued the Full Bench case reported in Volume VI. of the Weekly Reporter, page 99, Miscellaneous Rulings. I thought at that time that the Full Bench had drawn a distinction between an act done by the decree-holder himself and an act done by the Court upon the motion of the decree-holder; and from this assumption I came to the conclusion that, when the proceeding in question is an act of the Court itself, want of *bona fides* could be imputed to it. I now find that I was in error in coming to this conclusion. No such distinction appears to have been drawn in the Full Bench case, which I have now carefully gone over, and it seems to me clear in point of principle that, if an act is done by the Court upon the motion of a particular individual, and if that motion is found not to be *bonâ fide*, the act that was done upon it cannot be considered as one of which the party moving the Court is entitled to take the benefit.

I also find that I was in error in supposing that the subsequent neglect of the judgment-creditor to take effectual steps for the execution of his decree is not to be taken into consideration for the purpose of determining the *bona fides* of an act done either by himself or by the Court upon his motion previous to the occurrence of that neglect. The point was expressly raised in the Full Bench case, and it appears that the Judges were unanimously of opinion that such subsequent neglect ought to be taken into consideration for the purpose of determining the *bona fides* or otherwise of the acts done by the decree-holder.

But, whilst expressing this opinion, I wish it to be distinctly understood that the ordinary way in which execution-cases are struck off in the Mofussil Courts ought not be taken as a correct basis for determining, in all instances, as to whether or not a decree-holder is guilty of *laches*. There is no fixed rule observed by the Mofussil Courts in dealing with execution-cases. These cases are struck off and restored to the file at random without any reference to the negligence or otherwise of the decree-holder. It happens very often that a decree-holder is not in a position to ascertain whether his debtor has got any property which he can avail himself of for the satisfaction of his decree, and in such cases decree-holders are very often obliged to take some sort of formal proceedings for the purpose of keeping their decrees in force. Of course, if execution-cases are to be kept on the file until a particular date of the month, if no dates for the hearing of those cases are to be fixed, no fixed period can be laid down for the deposit of *tullubana*, but the Court is at liberty at any time to strike off those cases in consequence of some supposed neglect or other on the part of the judgment-creditor. Such an order striking off an execution-case passed under such circumstances cannot and ought not to be taken as any sufficient ground whatsoever for arriving at the conclusion that the decree-holder was guilty of neglect in enforcing his decree. In this particular case, however, it appeared to us on the former occasion, after a review of the whole of the evidence on the record, that the negligence on the part of the decree-holder was so gross and so often repeated that we were obliged to come to the conclusion that the proceedings taken by him, whether for enforcing his decree or for keeping his decree in force, were not, and could not, be looked upon as *bonâ-fide* proceedings within the meaning of the Full Bench ruling above referred to. We have now heard the pleader for the petitioner at length, and we see no reason to interfere with our former decision. The application is accordingly rejected with costs.

Hobhouse, J.—I adhere to the opinion which I gave in this case in the former hearing. The case came before us in miscellaneous regular appeal, and we were, therefore, Judges of the facts. The facts were these. Between the 25th of August 1859 and the 21st of July 1862, no proceedings had been taken to keep the decree alive, except a series of proceedings in the shape of applications made for restoration of the case to the file without any *tullubana* paid in to put those applications in force. The case, therefore, came exactly within the meaning of the following words which will be found in the Full Bench decision quoted by Mr. Justice Mitter, page 101. The Judges there said: "If the party were to "make an application to the Court for exe-"cution, and should neglect to lodge the "necessary *tullubana*, his neglect would

"be evidence from which the Court, upon "a subsequent application for execution, "would have to decide whether the former "application were a *bonâ fide* one, or "merely colorable for the purpose of keep-"ing the decree alive. In all these cases, "the Court to which application for exe-"cution is made must decide whether the "former application which is relied upon "was *bonâ fide* or not." As a Court of regular appeal, we did decide that these applications were merely colorable, and were not for the *bonâ-fide* purpose of keeping the decree in force, or enforcing the decree. We are not shown that this decision was wrong in fact, and therefore we are bound to adhere to it. I agree that this application must be dismissed with costs.

The 6th August 1868.

Present:

The Hon'ble J. B. Phear and C. Hobhouse, *Judges.*

Registration—Act XVI., 1864—Parol contract—Possession—Fraud.

Case No. 1022 of 1868.

Special Appeal from a decision passed by the Principal Sudder Ameen of the 24-Pergunnahs, dated the 31st January 1868, affirming a decision passed by the Moonsiff of that District, dated the 28th March 1867.

Boikuntonath Sett (one of the Defendants), *Appellant,*

versus

Russick Loll Burmono (Plaintiff), *Respondent.*

Baboo Ashootosh Chatterjee for Appellant.

Baboos Chunder Madhub Ghose and *Umbika Churn Bose* for Respondent.

Where two parties claimed the same property by conveyance from the owner under registered deeds of sale of 1272, plaintiff's purchase and registration being of anterior date to those of defendant, who, besides being in possession, pleaded that he had previously to plaintiff's purchase, obtained possession under a parol contract of sale, it was—

HELD that plaintiff was entitled to a decree, and that defendant could not set up the parol sale against the plaintiff's registered *kobala* of the same year, in the face of Section 68, Act XVI. of 1864.

HELD that defendant could not be allowed in special appeal to object that the Lower Court had not determined the *bona fides* of plaintiff's purchase, unless he (defendant) had not only alleged fraud, but shown the way in which the fraud was intended to be carried out.

Phear, J.—THIS is a contest between two persons, each of whom claims the property which is the subject of suit by a conveyance from one and the same owner. The defendant is in possession, and his deed of purchase is dated the 23rd of Cheyt 1272, and was registered some five days afterwards. The plaintiff, who is out of possession, supports his title by a deed dated the 16th of Falgoon 1272, and registered the same day. The Principal Sudder Ameen, acting under the provisions of Section 67 of Act XVI. of 1864, has given a decree in favor of the plaintiff, inasmuch as the date both of his deed and of the registration of his deed were anterior to those of the defendant.

It is objected by the defendant now on special appeal that he (the defendant) had, three months previously to the plaintiff's purchase, obtained possession of the property in question under a parol contract of sale, and that the Lower Appellate Court was wrong in not enquiring into that fact, and giving him the benefit of the priority which would have arisen therefrom. But it seems to us clear that he cannot set up the parol sale of Assin 1272 against the registered *kobala* of the plaintiff of the same year, in the face of the express provisions of Section 68 of Act XVI. of 1864, which declares that every instrument, if duly registered, shall have priority to every other instrument relating to the same property. The parol contract cannot rank higher than an "instrument," and it seems to us that, whether possession was had under the first instrument, *viz.*, the first parol contract of sale, or not, is immaterial, so far as regards the operation of the Act. The possession does not affect the title. It only shows that the person had succeeded in obtaining enjoyment of the property under his title. If these views be correct, the defendant's right as against the plaintiff can only date from his registered *kobala*, and run according to its terms. Now, that *kobala* might, no doubt, have given a title from a date antecedent to the date of its registration, even so far back as the previous month of Assin; but it does not do so as we understand, and as the Lower Court has found. Consequently, so far as we can see, there is no objection on the first ground of appeal to the judgment of the Lower Appellate Court.

The second and the only other ground of special appeal is, that the Lower Court has committed an oversight in not determining the *bona fides* of the purchase of the plaintiff. Had the defendant distinctly and in express terms raised an issue as to the nature of the plaintiff's contract of sale, and distinctly

stated, not only that it was fraudulent, but the way in which the fraud was intended to be carried out against him (the defendant), there might have been some force in this objection.

But we have referred to the record, and it appears to us that the allegations of fraud made by the defendant in regard to the plaintiff's purchase are entirely general and such as committed him to nothing. So general indeed are they, that the first Court did not consider it necessary to raise any issue whatever involving the element of fraud. Upon appeal to the Lower Appellate Court, the defendant reiterated his general allegations of fraud, and the Principal Sudder Ameen did lay down as a point for adjudication "whether the plaintiff's or appellant's purchase is *bonâ fide*," but he did not even put that down as a separate issue. It was only a preliminary to the further question "and whose purchase is legally valid." There is no trace of the defendant having attempted in the Lower Appellate Court to establish any specific fraud against the plaintiff, and the Lower Appellate Court has, on this issue, found in general terms that the plaintiff's purchase is valid. The Principal Sudder Ameen has also, no doubt, said that, "inasmuch as it is satisfactorily proved "that the vendor sold the property to the "plaintiff under the plaintiff's registered "*kobala*, the alleged purchase by the de-"fendant becomes invalid, and it is unneces-"sary to see whether the same, that is, the "purchase, is *bonâ fide* or not." If these words are to be taken literally, they would convey that the Principal Sudder Ameen having found that the defendant's purchase was invalid, did not consider it necessary to enquire further whether it, that is, the defendant's purchase, was *bonâ fide* or not. There is not any word in the judgment, as we have read it, to show whether he considered it necessary or unnecessary to enquire into the *bona fides* of the plaintiff's purchase. As that purchase was not impeached, as we have already said, on any specially alleged ground of fraud, and as the Principal Sudder Ameen has found in its favor on the general issue which involves both *bona fides* and the *factum* of purchase, we think there is no ground now for the defendant to object that the Principal Sudder Ameen ought to have investigated whether or not the plaintiff's purchase was tainted with fraud against him (the defendant). We therefore think that, on the whole, this appeal must be dismissed with costs.

The 6th August 1868.

Present:

The Hon'ble J. B. Phear and C. Hobhouse, *Judges.*

Judges' statement.

Case No. 984 of 1868 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of the 24-Pergunnahs, dated the 22nd January 1868, affirming a decision passed by the Deputy Collector of that District, dated the 20th of June 1867.

Debnarain Banerjee (one of the Defendants), *Appellant,*

versus

Banee Madhub Chatterjee (Plaintiff), *Respondent.*

Baboo Nil Monee Sein for Appellant.

Baboo Oopendur Chunder Bose for Respondent.

A Judge's statement must be taken to be accurate until good and substantial ground is given for supposing it to be an error.

Phear, J.—In this case, the Judge says that there is no appeal as to the assessment made by the Lower Court, and he therefore dismissed the appeal. The special appellant objects that this statement of the Judge is incorrect; but he has not furnished us with any materials upon which we could come to a conclusion that the Judge has made an error in his statement of what took place in his own Court. The most that can be urged is that in the grounds of appeal to the Lower Appellate Court there was an objection to the assessment made by the Lower Court; but this is not sufficient to enable us to say that the Judge has committed a mistake in supposing that an appeal was made before him upon that head. It may well be, and it is of every day's experience, that a ground of appeal which is written, and appears on the record, is often passed over by the appealing party, and never urged before the Court. We must take the Judge's statement to be accurate, until we have good and substantial ground, indeed, for supposing that it is an error.

We dismiss the appeal with costs.

The 6th August 1868.

Present:

The Hon'ble J. B. Phear and C. Hobhouse, *Judges.*

Fine for evasion of summons—Witness's right of appeal—Jurisdiction—Sections 159 and 160, Act VIII., 1859.

Case No. 272 of 1868.

Miscellaneous Appeal from an order passed by the Judge of Sarun, dated the 24th March 1868.

Gujadhur Pershad Narain Singh (Petitioner), *Appellant,*

versus

Jugdeo Narain and others (Plaintiffs), *Respondents.*

Baboo Kishen Succa Mookerjee for Appellant.

No one for Respondents.

Section 365, Act VIII. of 1859, gives a right of appeal from an order of a Civil Court fining a person for keeping out of the way to avoid a summons to attend as a witness.

As the law at present stands (*i. e.*, since the repeal of Section 28, Act XIX., 1853, by Act X., 1861), a Judge has no jurisdiction to inflict a fine for the purpose of punishing a witness who absconds or keeps out of the way to avoid service of summons.

Phear, J.—THE appellant in this matter was a person who was desired as a witness by one of the parties in a suit pending in the Judge's Court, and it appears that service of summons could not be effected upon him. In consequence of this, the Judge attached certain properties belonging to him, and also imposed a fine. It was not made very clear to us when the orders for attachment and the order imposing the fine were made, but it seems that they were without result so far as the attendance of the witness was concerned; and, eventually, the Judge passed an order for the sale of the property. What took place afterwards, perhaps, may be best conveyed in the Judge's own words: "The vakeels for petitioner "applied by petition for the sale of the property to be postponed. The order passed "was that the sale could not be stayed, "unless the fine and costs were paid into "Court. The amount was paid in, and the "sale did not take place. The vakeels now "verbally apply that the fine may be remitted, and they produce certain witnesses "who depose that their master had gone to "Juggurnath, and was not at Muksoodpore "when the summons and proclamation were "issued. Besides such evidence being "wholly insufficient to prove the fact, the "verbal applications of vakeels on such a "matter cannot be received. Under Section "168, Act VIII. of 1859, the witness must "appear in person and satisfy the Court that "he did not abscond or keep out of the way "to avoid service of summons, &c. Here "the application is made on the strength of "a general power of attorney, and it is "manifestly quite inadmissible. The application is consequently rejected."

Against this order of the Judge the present appeal is preferred. I had at first some little doubt in my mind, whether or not proceeding by way of appeal was the proper mode of seeking relief from this Court. Section 365 of Act VIII. of 1859 says that "all orders as to fines, or the levying thereof under this Section, shall be subject to appeal;" but there are no provisions in the Act, singularly enough, which in themselves give authority to Civil Courts to impose fines. However, Sections 159 and 160 apply to the case of absconding witnesses, and prescribe the mode in which their attendance is to be compelled, if possible; and the first of these Sections does speak of levying any fine to which the person may be liable under the provisions of the following Sections. Then the following Section, that is, Section 160, says that the Court may defray out of the proceeds of the sale of the property which has been attached the fine which it has the power by any *existing* law to impose. So that, although, strictly speaking, Section 160 does not give a liability to fine, notwithstanding that the last words of the previous Section speak as if it did so, still, under all the circumstances, it seems to me not unreasonable, inasmuch as there is no other way of giving full application to the words of Section 365, to treat Section 160 as if it provided for the making of orders as to fines, as it certainly does provide for the levying of fines. In this way it appears to me, on the whole, that the Legislature must have intended by the words of Section 365 to give the person aggrieved by any order of a Civil Court imposing a fine on him as a punishment for keeping out of the way in order to avoid service of a summons to attend as a witness, whether the order be strictly referable to Section 160 or not, the right of appeal to this Court

The grounds of appeal in this instance are substantially two: *first*, that the Judge had no power to impose a fine upon the witness at all; and the other, that he was wrong in insisting upon the personal presence

of the witness before he would be satisfied as to the causes of his absence. I may as well say at once that it seems to me that this second objection, provided the first is not fatal to the proceedings of the Judge altogether, is without any real force. If the matter which is to be cleared up to the satisfaction of the Judge is the non-attendance according to order of a certain person, I think that the Judge may very well refuse to be satisfied as to the sufficiency of the reasons for the non-attendance of that person merely by the explanation of a vakeel retained to appear as that person's advocate. The Judge is perfectly entitled to insist upon having proper evidence of the facts which led to the non-attendance of the witness, and that evidence could hardly be furnished by the vakeel alone, and in most cases, probably, it might be correctly said that the best evidence could only be afforded by the person whose non-attendance was complained of.

However, after the best consideration which I have been able to give to the Sections of Act VIII. which bear upon this case, I have come to the conclusion that the first objection must prevail. Sections 159 and 160, as I believe, constitute the only enactments which apply to the case. They are both of them taken verbally, I may say, from the corresponding Sections of Act XIX. of 1853, only that certain portions of the original Sections have been omitted in these Sections, and a slight addition has been made in place of the omission; but the result of this conversion is not altogether happy.

Section 159 provides that, if the witness or other person whose attendance is required "absconds or keeps out of the way for the "purpose of avoiding the service of the sum-"mons, the Court may cause a proclamation "requiring the attendance of such person to "give evidence or produce the document," and so on; and "if such person shall "not attend at the time and place named in "such proclamation, the Court may, at the "instance of the party on whose application "the summons was issued, make an order "for the attachment of the moveable and "immoveable property of such person, to "such amount as the Court shall deem rea-"sonable, not being in excess of the amount "of the costs of attachment and of any fine "to which the person may be liable under "the provisions of the following Section." I may remark, by the way, that the original Section in Act XIX. of 1853, namely, Section 27, from which this is copied, stops at the word "reasonable" at the end of the sentence "to such amount as the "Court shall deem reasonable." In this Section, a limitation is put to the amount of the property which is to be attached, by prescribing that it shall not be more than sufficient to cover the costs of attachment and any fine to which the witness may be liable under the provisions of the following Section.

Then the following Section (160) enacts that, "if such witness or other person shall "not appear, or appearing shall fail to "satisfy the Court that he did not ab-"scond or keep out of the way to avoid "service of summons, and that he had not "such a notice of the proclamation as afore-"said, it shall be lawful for the Court to "order the property attached, or any part "thereof, to be sold for the purpose of "satisfying all costs incurred in consequence "of such attachment, together with the "amount of any fine which the Court may "impose upon such witness or other person, "under the provisions of any law for the "time being in force for the punishment of "a witness who may abscond or keep out of "the way in order to avoid service of sum-"mons." Therefore, when the property is attached, and yet the person fails to come in as required by the Court, the property may be sold for the double purpose of meeting the costs of attachment, and the amount of the fine which has been legally imposed.

The original Section, namely, Section 28, Act XIX. of 1853, which corresponds to Section 160, gave a very much larger purpose to the attachment. All that has been omitted in this Section, with the exception of discharging the amount of the fine, and in substitution for that which has been omitted, has been inserted the costs of the attachment. According to the original enactment of 1853, as I understand it, the attachment was the principal object in view of the Legislature. It was to be the machinery by which the attendance of the person should be ensured, by causing him, in the alternative, through distraint and sale of his property, to pay very considerable charges, and to make good any loss which the party desiring his presence might incur by reason of his non-attendance. The meeting the amount of the fine was, as I think, subordinate to the other purposes of the attachment. But here, by reason of the alteration which has been effected in the wording of the Sections, it seems to me that the only

al purpose of the attachment is the providing of funds for discharging the fine; because appears to me obvious that the costs of the tachment, if it is the costs alone of the tachment for which the attahment is made, really a very trivial matter. Indeed, I n hardly think that it occurred to the Legislature, when it enacted the provisions of this ction, that it thereby enabled the Court to tach just so much property as would meet e costs of that attachment, and nothing e if the Court so thought fit with no other rpose in view. At the time that Act VIII. 1859 was passed, there was a law which abled the Court to impose a fine upon a tness who might abscond or keep out of e way in order to avoid service of summons, and that was the Act to which I have ready referred, namely, Act XIX. of 1853, ction 28. A portion of Section 28, which as omitted when Section 160 was formed om it, gave the power to the Court to impose a fine for the punishment of a witness who might abscond or keep out of the way, but that Section has been repealed by Act X. of 1861, and the consequence is that the Civil Court has now no power of imposing a fine for the purpose of punishing a witness who might abscond or keep out of the way in order to avoid service of summons. This being so, it seems to me that the whole of the purpose of Section 159 of Act VIII. is gone, for at the most, the only end which that attachment can now be directed to is the sale of just so much property as will be sufficient to cover the costs of the attachment itself.

The words of Section 160 do not enable the Court to levy any other fine out of the proceeds of the sale of the property attached, than the fine for the punishment of a witness who might abscond or keep out of the way in order to avoid service of the summons, and therefore, although, as is probably the case, every Civil Court of competent jurisdiction has power to punish for contempt of its authority, and, perhaps, to inflict the punishment in the shape of a fine—still a fine inflicted in exercise of such a jurisdiction and for such a purpose is, obviously, not a fine within the meaning of the words of Section 160 of Act VIII. It seems to me that a person who has successfully kept out of the way of all orders of Court, and all service of process, can scarcely be said to have committed a contempt of Court, for which he could, within the ordinary powers of the Court, be punished by fine or otherwise. Indeed, it was for the purpose of reaching such a case as that, and because the Court could not otherwise do it, that the complicated machinery of Sections 159 and 160 was, as I suppose, first devised. With these views, I think that Judge had no jurisdiction to inflict the fine in this case, and that, consequently, the fine must be remitted, and paid back to the applicant.

I have gone perhaps somewhat further into the inquiry as to the operations of these Sections than the case calls for, or than I at first intended, and I have said that the conclusion which I draw from them is that a Judge of a Civil Court has now no longer any authority even to attach, but I desire that this expression of opinion should not be taken as a part of my present decision. The application which, according to the grounds of appeal, is before us (and it was the same in the Court below) is simply that the fine be remitted, and therefore it is enough for the judicial determination of the case for me to say that I think this appeal must be decreed, on the ground that the fine in question was imposed without jurisdiction, and consequently the Judge must be ordered to cause it to be repaid to the petitioner.

Hobhouse, J.—I do not go so far as Mr. Justice Phear, in reading the provisions of Sections 159 and 160 of Act VIII. of 1859 as to say, and this I understand him to say, that, in fact, the whole of the provisions of these Sections have become a nullity. The question is not before us, and, therefore, I do not think, I am compelled to give my opinion as to whether or not the Judge had the power to make an order for the attachment of moveable and immoveable property of the appellant in this case to such an amount as he should deem reasonable, not being in excess of the amount of the costs of attachment. But I entirely go with Mr. Justice Phear that the Judge had not the power, as the law at present stands, to go further, and to inflict a fine. That fine could only have been inflicted under the provisions of Section 28, Act XIX. of 1853, and the provisions of that Section have been repealed, as to proceedings under Act VIII. of 1859, by Act X. of 1861. It follows, therefore, that, as the Judge had no power to inflict the fine, we must direct that that fine be remitted.

The 7th August 1868.

Present :

The Hon'ble J. B. Phear and C. Hobhouse, *Judges.*

Witnesses—Evidence.

Case No. 1086 of 1868 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of the 24-Pergunnahs, dated the 14th March 1868, modifying a decision passed by the Deputy Collector of that District, dated the 3rd July 1867.

Rajah Prosonno Narain Deb (Plaintiff), *Appellant,*

versus

Romonee Dossee (Defendant), *Respondent.*

Baboo Annund Chunder Ghossal for Appellant.

Baboos Ashootosh Dhur and *Khetter Mohun Mookerjee* for Respondent.

The evidence of one witness, if believed, is sufficient, according to the law of this country, to establish any fact to which the witness speaks directly.

Phear, J.—If the Judge of the Lower Appellate Court, upon the evidence before him, has come judicially to the conclusion of fact that the notice of enhancement was not served, then there is an end of the case; the plaintiff's suit ought to be dismissed, and there is no necessity for us to go into the other matters of objection which have been raised against the decision of the Judge. It is true that the Judge uses these words: "I find that the notice was not served;" but these follow after a discussion of the amount of evidence, which is, in the opinion of the Judge, requisite to prove service of a notice of this sort; and in the course of this discussion, he seems to lay down for himself a rule to the effect that the evidence of the serving officer and the person who accompanied him on behalf of the plaintiff is not sufficient to establish the fact of service of notice. If he has laid down this rule, and if his finding that the notice was not served is simply the result of the guidance of this rule, we think that he has clearly made a mistake. The evidence of one witness, if believed, is sufficient, according to the law of this country, to establish any fact to which the witness speaks directly. If, therefore, the Judge believes the peon and the man who went with him, or either of them, he ought to find that the notice was served, and it is only in the event of his not believing them, for which he ought to have reasonable grounds, that he can, with propriety, come to the judicial conclusion that the notice was not served.

With these remarks we shall refer back the judgment to the Judge, with a request that he will explain whether or not his finding, that notice was not served, was intended to be a judicial finding after a consideration of the evidence of the two witnesses who spoke to the actual service of the notice. We feel the more bound to make this reference, because the first Court, we observe, which had the witnesses before it, believed their testimony, and the Judge neither says that he disbelieves them, nor gives any reason why they should not be believed. The record will also be sent back to the Judge, as he may desire to refer to it; but we do not ask for any re-adjudication of the case.

The 7th August 1868.

Present :

The Hon'ble J. B. Phear and C. Hobhouse, *Judges.*

Remand—Evidence taken on commission—Powers of Deputy Collector.

Case No. 1140 of 1868 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of the 24-Pergunnahs, dated the 16th April 1868, affirming a decision passed by the Deputy Collector of that District, dated the 28th September 1867.

Ram Chand Mookerjee and others (Defendants), *Appellants,*

versus

Kameenee Debea (Plaintiff), *Respondent.*

Baboos Nil Madhub Sein and *Thakoor Doss Mookerjee* for Appellants.

Baboo Hem Chunder Banerjee for Respondent.

In remanding a case to a Court of first instance for the trial of an issue which that Court had been directed

d

to try, but had not tried, a Judge was held to have acted with strict propriety and in conformity with the provisions of Sections 351 and 352, Act VIII., 1859.

That the evidence was given in the absence of the other side is not enough to make the deposition of a witness taken on commission inadmissible.

A Deputy Collector is competent to depute an officer of his Court to take evidence on commission if the place where the witness is examined is within his jurisdiction.

Phear, J.—THE only ground of appeal with which we have felt ourselves pressed in this case is the first, namely, "that the "Judge below was not justified in remanding the case several times to the Lower "Court except under the provisions laid "down in Sections 351 and 352, Act VIII. "of 1859." We may observe, by the way, that even this ground of appeal is so vaguely worded that, if we adhere strictly to rule, we should have done right in disregarding it altogether. The truth is that the special appellant, under cover of this objection, maintains that a certain order of remand was made by the Judge upon a ground other than one of those provided for by Sections 151 and 152 of the Civil Procedure Code, and consequently was not justified in law. But we have considered the order of remand itself, the date of which was the 5th of July 1867, and it seems to us, from the terms of the order and the ground therein disclosed, that it was made with strict propriety and in conformity with the provisions of the Sections referred to. The Judge in his order shows very distinctly that the first Court had omitted to try properly the single issue which it had been directed to try, namely, the issue relative to the validity of the pottah which was set up by the plaintiff. If we take the facts from the order of remand of the Judge, it seems to us that he was quite right in saying that the first Court had not properly tried it. That Court had determined that question as on default of the plaintiff, whereas, as the Judge very rightly points out, the plaintiff had not been guilty of any default under the circumstances of the case. We, therefore, think that there is no reason now on special appeal for us to reverse the order of remand which we have mentioned, namely, of the 5th July 1867.

The two other grounds of appeal, we think, have entirely failed. It is not enough to make the deposition of the witness taken on commission inadmissible, that the evidence should have been given in the absence of the other side, and there is nothing else in this case that can be urged to make the deposition of Khetturmonee inadmissible as evidence in the trial of the matter in issue in this suit. It was attempted to be shown that the evidence was taken by some one not duly authorized to do so; but the pleader for the special appellant was unable to make out in truth by whom the evidence actually was taken. We wish to say that, as far as we can see, the deposition was perfectly good on the face of it. The return seems to have been made by an officer of the Deputy Collector's Court, and the place where the lady was examined was within the jurisdiction of the Deputy Collector within the meaning of Section 15, Act VIII. of 1859, so that the Deputy Collector could have deputed an officer of his Court to have taken the evidence, and the special appellant does not suggest that the officer who actually took the evidence was not so deputed.

* * * * * * *
* * * * * * *

The 8th August 1868.

Present:

The Hon'ble J. B. Phear and F. A. Glover, *Judges.*

Documents—Necessity for proof—Onus probandi—Pleader's oral statement.

Case No. 1289 of 1868.

Special Appeal from a decision passed by the Second Principal Sudder Ameen of the 24-Pergunnahs, dated the 17th February 1868, reversing a decision passed by the Moonsiff of that District, dated the 27th May 1867.

Fazil Sirdar (one of the Defendants), *Appellant,*

versus

Chenum Biswas and others (Plaintiffs), *Respondents.*

Baboo Dwarka Nath Sein for Appellant.

Baboo Nil Madhub Sein for Respondents.

The fact of a pottah being more than 30 years old was held not to do away with the necessity of proof before it could be used as evidence.

Where a plaintiff in a suit files documents relating to lands which are not identified with the land in dispute, the mere fact of his filing them does not throw the *onus* on the defendant.

On the reason of the absence of certain documents being challenged, an oral statement of a pleader before a Court of Justice is not sufficient in law to satisfy the Judge, acting as a Judge of fact, that the documents themselves were beyond the power of the parties who wished to use them as evidence.

Phear, J.—THE Court of first instance dismissed the plaintiff's suit in a judgment which is on the face of it justified by very good reasons. The Lower Appellate Court has reversed the decree of the first Court on several grounds, none of which appear to us capable of being supported by the evidence on the record. In the first place, the Principal Sudder Ameen considers that the pottah of the plaintiffs is proved, or rather that it is unnecessary that it should be proved because it is more than 30 years old. We need hardly remark in this Court that the fact of a document being very old does not do away with the necessity of proof before it can be used as evidence. It only alters the character of the proof which is available. In this instance, it does not appear that any one pledged his oath to the pottah, or deposed in any way to its recent custody. Moreover, it has been pointed out to us by the pleader for the special appellant that this pottah does not specify the land to which it applied; that, at any rate, there is nothing on the record to show that it covers the lands which are the subject of suit.

Secondly, the decision of the District Court, dated the 27th of September 1864, which, in the opinion of the Principal Sudder Ameen, proves that the plaintiffs were tenants holding lands under the zemindar, is obviously not evidence between the parties at all. And, if it were so, it would be perfectly useless in this case, from the fact that the lands of which the plaintiffs were thereby declared to be tenants are not in any way identified with the lands which are now in litigation.

Thirdly, the written statement filed before the Deputy Collector, although it might be used as a statement made by the defendants on an occasion antecedent to this trial (supposing it to be relevant to the matter in suit), according to the showing of the Principal Sudder Ameen himself, is not in any way connected with the lands in respect of which the plaintiff asks to have his title confirmed. The Principal Sudder Ameen appears to think this want of identification of the land, in respect of which the present enquiry is made, with the lands to which these different items of evidence refer is quite unimportant so far as the plaintiff is concerned, because he considers that these documents have the effect of throwing the *onus* from the plaintiff's shoulders to the defendant's. This is clearly an entire mistake. It is incumbent upon the plaintiff to prove his title, and if his documents or other evidence do not point to the lands in question, it is so much the worse for him. He fails to establish that which he comes into Court to make out. The Principal Sudder Ameen remarks that the Moonsiff is wrong in holding that the plaintiffs have not accounted for the non-production of the rent-receipts and the *kubooleut* which they have said that they received from the defendants; for he goes on to say, these documents were filed in certain rent-suits before the Deputy Collector, and had been petitioned for by the plaintiffs, but the records of these cases have not been sent up. We observe that the Court of first instance states, not only that the absence of these documents was not accounted for, but further that the plaintiff's pleader was unable to say what had become of them. The Principal Sudder Ameen could have had no other materials before him to account for the absence of these documents than were sent up with the record by the Court of first instance, and he was in error if he supposed that an oral statement of the pleader before him was sufficient in law to satisfy him, acting as a Judge of fact in a Court of Justice on the reason for the absence of these documents being challenged, that the documents themselves were beyond the power of the parties who wished to use them as evidence. Before he could properly come to that conclusion, he was bound to have evidence before him as in the case of the determination of any other disputed fact.

It seems to us that the decision of the Lower Appellate Court cannot be supported in any respect by the evidence to which the Principal Sudder Ameen alludes, and as we are satisfied from the consideration of the record which the arguments of Counsel have enabled us to have, that there is no other evidence which would justify the Lower Appellate Court in reversing the decision of the first Court, we think that it is useless to remand the case to the Lower Appellate Court for a re-trial. Under these circumstances, we reverse the decision of the Lower Appellate Court, and confirm that of the Moonsiff. The defendant must have his costs in this Court and in the Lower Appellate Court.

f

The 8th August 1868.

Present:

The Hon'ble H. V. Bayley and A. G. Macpherson, *Judges.*

Title—Possession—Limitation—Copies of English judgments—Translations of decrees.

Case No. 2605 of 1868.

Special Appeal from a decision passed by the Judge of Beerbhoom, dated the 10th July 1866, reversing a decision passed by the Principal Sudder Ameen of that District, dated the 16th February 1866.

Kedar Nath Mahatah (Defendant), *Appellant,*

versus

Kadumbinee Debea (Plaintiff), *Respondent.*

Baboo Kishen Succa Mookerjee for Appellant.

Baboos Rajendro Nath Bose and *Nilmonee Sein* for Respondent.

In a suit for immoveable property under a *kobala* more than 12 years old, where defendant pleads that plaintiff was only a benameedar, and was never in possession, plaintiff must prove, not only title, but also possession within 12 years of the filing of the suit.

Copies, and not translations, must be tendered where parties wish to put in evidence judgments delivered in English; but there is no law which declares that Bengalee copies of formal decrees of a Zillah Court are inadmissible.

Macpherson, J.—We think that it is clear that the Judge has not fully or properly carried out the order of remand.

The plaintiff sues for possession, and rests her title on a *kobala* dated the 2nd Joistee 1260, by which the property in dispute was sold to her. The defendant Rassmony (and the present appellant who claims through her), while admitting the *factum* of the *kobala*, pleads that the purchase was really her's, though made by her in the name of the plaintiff who was a mere *benameedar*; she also pleads that the plaintiff never was in possession.

In the order of remand, this Court declared (among other things) that careful inquiry into the facts as to possession was most important.

In special appeal, it is contended that the re-trial in the Court below is defective, inasmuch as the Court did not inquire or decide whether the plaintiff ever at any time really had possession, and inasmuch as the Court improperly rejected certain most important evidence adduced by the defendants, in order to prove that they were in possession.

We are of opinion that both these objections are well founded. The Judge does not decide whether the plaintiff ever has had possession at all. The defendants having from the first pleaded that the plaintiff never had actual possession, they were entitled to a distinct decision upon this point; for the *kobala* under which the plaintiff claims bears date more than 12 years prior to the institution of this suit, and she cannot get a decree unless she proves, not only her title, but also that she has been in possession within 12 years of the filing of her plaint.

The evidence, the rejection of which is complained of by the appellant, is a Bengalee copy of a decree of the Judge of Moorshedabad, which the Judge has rejected, because it is in Bengalee. The rejection of this document for such a reason is quite wrong. When judgments have been originally delivered in English, copies of these English judgments, and not translations of them into Bengalee, must be tendered if parties wish to put the judgment in evidence. But there is no law which declares that Bengalee copies of formal decrees of a Zillah Court are inadmissible. The Judge will admit the decree, which was rejected by him on the former occasion, and will re-consider and pass a fresh judgment upon the whole evidence bearing upon the issue as to the defendants' possession, finding, as a matter of fact, whether the defendants have or have not ever at any time had possession.

If the Judge shall be of opinion that the plaintiff proves her possession, the Judge will state distinctly during what time the possession lasted, and what was the precise nature of the possession.

The case is remanded to be re-tried with reference to the above remarks, and is to be taken up at once and decided with as little delay as possible.

The costs of this appeal will follow the result of the re-trial.

The 8th August 1868.

Present:

The Hon'ble F. B. Kemp and E. Jackson, *Judges.*

Proceeding to keep alive a decree—Dispute between purchaser and third party—Section 20, Act XIV., 1859.

Case No. 229 of 1868.

Special Appeal from a decision passed by the Officiating Judge of Mymensing, dated the 18th March 1868, affirming a decision passed by the Sudder Ameen of that District, dated the 23rd February 1867.

Narain Acharjee Chowdhry (Judgment-debtor), *Appellant,*

versus

Mohamaya Debia Chowdhrain (Decree-holder), *Respondent.*

Baboo Nuleet Chunder Sein for Appellant.

Baboo Onookool Chunder Mookerjee for Respondent.

A dispute between the purchaser of a decree and a third party, and the proceedings connected therewith, cannot be taken to be proceedings within the purview of Section 20, Act XIV., 1859.

Kemp, J.—THIS is an appeal on the part of a judgment-debtor, who contends that no proceeding to enforce the decree or to keep the same in force within three years next preceding the application for execution has been taken out by the decree-holder, and that therefore the decree cannot be executed. The Judge says that he would deduct the time during which certain proceedings lasted, or from June 1863 to February 1864, and that making this deduction the application was not beyond time. It is clear that no deduction of any kind can be made except under the provisions of Section 14 of Act XIV. of 1859, and it is also clear that that Section does not apply in any way to the circumstances of the present case. It appears that, in June 1863, the original decree was purchased by the respondent, and, on her going to take out execution, a third party contested her right to do so, on the allegation that he had obtained a decree of the Privy Council against the assets of the original decree-holder. The Sudder Ameen, instead of passing orders under Section 208 of Act VIII. of 1859, the only Section respecting the transfer by assignment of a decree or assets, and which vests him with the discretion to admit the decree-holder to take out execution or not, allowed the case to remain on his file from June 1863 till February 1864. The purchaser, after obtaining an order permitting him to execute, allowed the case to be struck off in February 1864, and took no further steps until the 27th of July 1866. The dispute between the purchaser of a decree and a third part, and the proceedings connected therewith, cannot be taken to be proceedings taken to enforce the decree within the purview of Section 20 of Act XIV. of 1859. We, therefore, hold that the right to execute the decree is barred by lapse of time. We reverse the decision of the Judge, and decree this appeal with costs of all the Courts.

The 8th August 1868.

Present:

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice,* and the Hon'ble Dwarkanath Mitter, *Judge.*

Jurisdiction—Suit against a wife.

Reference to the High Court by the Ex-officio Judge of the Small Cause Court at Darjeeling, dated the 11th July 1868.

Bowman, *Plaintiff,*

versus

Mrs. Shawe, *Defendant.*

A suit against a woman living under the protection of her husband is not cognizable in a Small Cause Court, if, at the time of the commencement of the suit, the husband does not dwell, nor personally or through a servant or agent carry on business, or work for gain, within the local limits of the jurisdiction of the Court.

Case.—PLAINTIFF sued defendant for the costs of board and lodging.

Defendant pleaded, and plaintiff admitted, that she was living under the protection of her husband, who, at the commencement of the suit, did not dwell, nor *personally, or through a servant or agent, carry on business or work for gain* within the local limits of the jurisdiction of this Court.

I returned the plaint, under Section 13 of Act XI. of 1865 and Section 33 of Act VIII. of 1859, to the plaintiff, with orders to present the same in the proper Court.

I have made my order subject to this reference.

The point on which I wish to make a reference is: Is the suit against the husband of defendant cognizable by this Court? If it is, the plaint could be amended by making the defendant's husband a party to the suit, which could then proceed.

I am of opinion that the suit is not cognizable by this Court, and my reason for thinking so is, that, even with the plaint amended, Mrs. Shawe cannot be considered as one of two defendants living within the limits of separate jurisdictions.

The suit with the plaint amended would be really against the defendant's husband alone, and must, I believe, be instituted before the Court within the limits of whose jurisdiction he is living.

Judgment of the High Court :—

Peacock, C. J.—We are of opinion that the Judge of the Small Cause Court is correct.

The 10th August 1868.

Present :

The Hon'ble F. B. Kemp and E. Jackson, *Judges.*

Deed of sale—Conveyance of rights and interests.

Case No. 753 of 1868.

Special Appeal from a decision passed by the Judge of West Burdwan, dated the 22nd January 1868, affirming a decision of the Moonsiff of Kolutpore, dated the 16th July 1867.

Netye Roy (Plaintiff), *Appellant,*

versus

Odeet Roy and others (Defendants), *Respondents.*

Baboo Romesh Chunder Mitter for Appellant.

Baboo Ashootosh Chatterjee for Respondents.

Where property belonging to three brothers, one of whom was a minor, was sold for an ancestral debt on which execution proceedings had been taken, the rights and interests of the two elder brothers alone being advertised for sale, and the deed of sale making no mention of the minor's rights and interests—HELD that the minor's rights and interests were not conveyed to the purchaser.

Jackson, J.—THE facts of this case are as follows: The plaintiff in the year 1274 sued to recover 5 beegahs odd cottahs of land from the defendant, the said land having been sold to the defendant by the plaintiff's two brothers in the year 1263, and having been then taken possession of by the defendant. The plaintiff gives no explanation in his plaint as to how his rights and interests were transferred by his brothers to the defendant without his consent; nor does he explain why for so many years he has remained silent. On the other hand, the defendant's statement is that the plaintiff was then a minor, and that the brothers acting as his guardians sold not only their rights and interests in the ancestral property, but their minor brother's rights and interests also. The Appellate Court has found that the plaintiff was a minor, and that as his guardians the plaintiff's brothers had sold these lands to the defendant for an ancestral debt, in which execution proceedings had been taken; and that that sale therefore, in preserving the property, was a benefit to the minor.

On special appeal the legal point is taken that as in the deed of sale it is nowhere stated that the plaintiff's rights and interests were conveyed to the defendant, his interests did not pass; that the defendant has no right or title to them; and that the plaintiff is entitled to recover.

I think that, looking at the defendant's account of the transaction, and admitting all the facts stated by him to be correct, the defendant was bound to see that the rights and interests of the alleged minor were conveyed to them. If he neglected to have his deed of sale properly drawn up as conveying the rights and interests of all parties in the land, he has only himself to blame. If the rights and interests of this minor, which defendant says were conveyed to him, are not set down in the deed as so conveyed, it follows that they are not conveyed, and therefore on the defendant's own showing the plaintiff will be entitled to recover. Looking also to the plaintiff's case and to the plaintiff's statement of facts, I think also that he is entitled to recover. Although the plaintiff does not explain in his plaint how it happened that his brothers sold the whole of this land while the plaintiff had a share in it, his witnesses to explain it and depose that they wished to sell, and that he objected to it; that he was then quite a young boy of 16 or 17, and notwithstanding his objections his brothers sold, and the defendant got possession. The witnesses also give a reason for his objecting to the sale, namely, the inadequacy of price. Taking this to be the plaintiff's explanation as to how the property came to be sold by his brothers, there is no doubt that even upon that statement the plaintiff is entitled to recover. Whether I take the account of the plaintiff or the account of the defendant, I think that the plaintiff is entitled to recover this property.

I would therefore reverse the decision of the Lower Court, and decree the property to the plaintiff; and as it appears that there is also a claim for division of the property, the Lower Court on execution of the decree will make that division, and give the plaintiff the one-third share to which he is entitled.

Kemp, J.—I entirely concur in this judgment, to which I wish to add a few remarks. The Judge has laid great stress on the benefit to the plaintiff. For my part I can see no benefit which accrued to the plaintiff by the sale.

In the execution of the decree which the defendants held, only the rights and interests of the two elder brothers were advertised for sale; and even if a sale had taken place, the younger brother's share would not have passed by that sale. In the deed of sale which is signed by two of the brothers, these words occur: "We are willing to sell." This corroborates the statement of the plaintiff's witnesses that the plaintiff objected to the sale, and therefore the defendants purchased with their eyes open.

The 10th August 1868.

Present:

The Hon'ble J. B. Phear and C. Hobhouse, *Judges.*

Stamps—Procedure—Appellate Court.

Case No. 1387 of 1868 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of the 24-Pergunnahs, dated the 3rd April 1868, reversing a decision passed by the Deputy Collector of that District, dated the 17th August 1867.

Bulo Ram Sircar and others (Plaintiffs), *Appellants,*

versus

Ram Narain Banerjee (Defendant) and another (Objector), *Respondents.*

Baboo Romesh Chunder Mitter for Appellant.

Where an appeal on paper insufficiently stamped is admitted and heard, the Court is bound to deal with it on its merits, and cannot limit its relief to so much of the subject in suit as seems to be covered by the amount in respect of which the stamp was given.

Phear, J.—We think that no grounds of appeal are made out against the judgment of the Lower Court. The question before that Court was a very simple one, namely, whether or not the defendant was liable to the plaintiff, as tenant, for the amount of rent which the plaintiff claimed. The defendant said that he was only liable for a less amount, and that he had paid it. The Judge has believed the testimony of the defendant himself, which seems to have been very clear and distinct upon the point, and the other evidence which bore in his favor; and every one of the objections which have been taken before us against the decision of the Lower Appellate Court lie entirely outside of this matter of belief. If the Judge did believe the evidence of the defendant there really is an end of the case.

The last objection as to the insufficiency of the stamp might have been good as against the admission of the appeal at all; but when the appeal was admitted and heard by the Court, the Court was bound to deal with it on its merits as they were disclosed by the grounds of appeal, and would not have been right in limiting its relief to so much of the subject in suit as seemed to it to be covered by the amount of the sum in respect of which the stamp was given. We think that this appeal must be dismissed, but without costs, as no one appears on the other side.

The 10th August 1868.

Present:

The Hon'ble J. B. Phear and C. Hobhouse, *Judges.*

Cause of action (one alleged, another established).

Case No. 1540 of 1868.

Special Appeal from a decision passed by the Principal Sudder Ameen of Nuddea, dated the 24th February 1868, reversing a decision passed by the Sudder Ameen of that District, dated the 9th September 1867.

Mudhoosooddun Gossamee and another (Plaintiffs), *Appellants,*

versus

Mr. A. Hills and another (Defendants), *Respondents.*

Baboo Luckee Churn Bose for Appellants.

Mr. J. S. Rochfort and *Baboo Bhowanee Churn Dutt* for Respondent.

Where a plaintiff sues on one cause of action, and in support thereof gives evidence which, if it establishes anything, establishes a different cause of action, the Court acts properly in dismissing the suit.

Phear, J.—It seems that the plaintiff in this case has sued upon one cause of action, and in support thereof has given evidence which, if it establishes anything, establishes a totally different cause of action. The Lower Appellate Court, on this state of things, has dismissed the plaintiff's suit; and we think the Lower Appellate Court is right. It has been said before us that the Lower Appellate Court ought to have taken the cause of action as it was disclosed by the evidence of the plaintiff in preference to that which was given in the plaint. We certainly know no grounds for supporting a doctrine of that kind. The provisions of Act VIII. with regard to setting out the cause of action in the plaint are very clear and precise. There are, no doubt, other provisions in Act VIII., which say that the Court, in framing issues upon which the cause of action alleged in the plaint is to finally depend, may take the facts from oral statements of the parties different from facts which are given by the written statements of the parties; but it nowhere, so far as we know, says that the Court may try a different cause of action from that which is set out in the plaint.

This case is certainly to our mind extreme in its kind. The plaintiff, by his plaint, sought to make the defendant liable as a trespasser; but in his own evidence on oath, he discloses that there was an arrangement between him and the plaintiff for the occupation of this land at (according to his version) a fixed rent. It would, we think, be a monstrous perversion of proceedings of a Court of Justice if a plaintiff should be allowed to succeed under circumstances like those. The moment that he showed, by his own admission, that the defendant was his tenant, or had occupied by his permission, there was an end of the accusation of trespass and claim for damages appendant thereto.

We think there is no reason whatever in law for impeaching the decision at which the Lower Appellate Court has arrived. We dismiss the appeal with costs.

The 10th August 1868.

Present:

The Hon'ble H. V. Bayley and A. G. Macpherson, *Judges.*

Joint Hindoo family—Alteration of claim.

Case No. 2626 of 1867.

Special Appeal from a decision passed by the Principal Sudder Ameen of Bhaugulpore, dated the 23rd July 1867, reversing a decision passed by the Sudder Ameen of that District, dated the 17th March 1866.

Gour Beharee Ram Bhuggut (one of the Plaintiffs), *Appellant,*

versus

Sheo Ruttun Koonwar and others (Defendants), *Respondents.*

Baboo Romesh Chunder Mitter for Appellant.

Mr. R. E. Twidale and *Baboo Chunder Madhub Ghose* for Respondents.

When a plaintiff, who claims property on the allegation that he purchased it from a person to whom it exclusively belonged, fails to prove that the property was the separate property of his vendor, he cannot have a decree for the share of the property to which his vendor was entitled as a member of a joint-family.

Macpherson, J.—I think, on the whole, this appeal ought to be dismissed. The judgment of the Lower Appellate Court is, no doubt, somewhat superficial and unsatisfactory; but the Court has substantially carried out the order of remand.

The Principal Sudder Ameen has found as a fact that the plaintiff, who sues upon the ground that the house was the separate property of Gopee, has failed to prove it was so, and that there was evidence to show that it was not so.

The appellant contends that, even although the plaintiff is not entitled to the whole house, he is at least entitled to that which represents Gopee's share in it. But putting aside the fact that, according to the current of decisions of this Court up to the present time regarding alienations such as this one is alleged to have been, such an alienation by one member of a joint Hindoo family without the assent of the other members is not under the Mitakshara Law good even for the share of the alienor himself (the soundness of which decisions are at present under the consideration of a Full Bench), I think that the plaintiff is not entitled to the relief he seeks.

The plaintiff sued for the whole house, basing his claim exclusively upon his purchase from Gopee of that which belonged to Gopee alone. This case is not one where a person avowedly purchases joint-family property from one member of the family, but is a case in which the plaintiff says he purchased certain property from a person to whom it exclusively belonged. The suit being framed thus, I do not think the plaintiff can now turn round, and at this stage, failing to prove that the property was the separate property of Gopee, ask the Court to give him a decree for the share to which Gopee was entitled as a member of the joint family.

The appeal will be dismissed with costs.

Bayley, J.—I concur.

The 10th July 1868.

Present:

The Hon'ble J. P. Norman and Dwarkanath Mitter, *Judges.*

Remand—Fresh evidence—Section 354, Act VIII., 1859.

Regular Appeal from a decision passed by the Judge of Tirhoot, dated the 3rd March 1866.

Abdool Khyrat (one of the Defendants), *Appellant,*

versus

Jumalooddeen Hossein (Plaintiff) and others (Defendants), *Respondents.*

Mr. R. E. Twidale for Appellant.

Baboos Chunder Madhub Ghose, Unnoda Pershad Banerjee, and *Grish Chunder Ghose* for Respondents.

The object of a remand under Section 354, Act VIII., 1859, is not that the Judge should try the issues on the evidence already taken, because that the Court sitting in regular appeal can do for itself; but that he should take such evidence as the parties may have to offer for the determination of the issues.

Norman, J.—This is a suit by the plaintiff, Bibee Nusseebun, who claimed as purchaser from Juti Khabooddeen Hossein certain shares held by him in some landed property in Torowl, Monoobad, and other mouzahs.

The defendant, now appellant, Syud Abdool Khyrat, defended the suit, alleging that the plaintiff's *kobala* or deed of sale was invalid, and got up in collusion with the defendants Juti Khabooddeen and Jumalooddeen; that the defendant No. 4. Jumalooddeen, was never in possession of the property; and that, prior to the existence of the fictitious pottah to Jumalooddeen and the *kobala* set up by the plaintiff, Juti Khabooddeen had sold to the defendant the share in the mouzahs in suit.

On the first trial of the case, the Judge of Tirhoot fixed two issues only; namely, whether the sale to Abdool Khyrat was a genuine transaction or not; secondly, whether the property was purchased by the vendor Juti Khabooddeen and his five brothers, or by Muneerooddeen, their father.

The case came up to this Court on appeal, when it was perfectly evident that a great number of issues material to the decision of the case had not been raised or tried; and this Court, not feeling that it was in a position to know whether it had all the evidence before it which could have been adduced by the several parties if the issues had been properly fixed, remanded the case under Section 354 of Act VIII. of 1859, raising ten issues, which were specifically set out in our judgment.

It is evident that the object of a remand under Section 354 is not that the Judge should try the issues on the evidence already taken, because that is a matter on which the Court sitting in regular appeal can do for itself without the assistance of the Judge. The Section in question empowers the Appellate Court, "if the Lower Court shall "have omitted to raise or try any issues, or "to determine any question of fact, which "shall appear to the Appellate Court essen-"tial to the right determination of the suit "upon the merits, *and the evidence upon* "*the record is not sufficient* to enable the "Appellate Court to determine such issue "or question of fact," to "frame an issue "or issues for trial by the Lower Court," and "refer the same to the Lower Court "for trial. Thereupon the Lower Court "shall proceed to try such issue or issues, "and shall return to the Appellate Court "its finding thereon, *together with the* "*evidence.* Such finding *and evidence* "*shall become part of the record in the* "*suit,*" &c. Therefore, the very power that we possess is contingent upon the fact that the evidence upon the record is not sufficient to enable the Court to decide the case. And the Lower Court is directed, when a case is referred to it under the Section above quoted, to try the issue, and return to the Appellate Court its finding thereon, together with the evidence,

d "*such finding and evidence shall be-ome part of the record of the suit.*"

It is perfectly clear that in all *ordinary* ts, and probably we might safely say in cases in which this Court remands a case the Lower Court under Section 354, it the duty of the Court to take such evi-nce as the parties may have to offer for determination of the issues.

Some difficulty seems to have suggested elf to Mr. Elliot, the Officiating Judge of rhoot, and in a letter, dated the 7th ugust 1867, he pointed out what he felt be the *necessity* for taking fresh evidence.

In the letter from the Deputy Registrar, itten under the order of Mr. Justice ton-Karr and myself, the Judge was in-rmed that he was "at liberty to take all he evidence on both sides that may be ne-cessary to a full and satisfactory judg-ment."

On the 23rd of November 1867, a petition as presented by Abdool Khyrat, the now ppellant, to the present Judge, Mr. Pearson, ating that he had previously filed an issum-nvissee, or list of witnesses, in order to ove his *kobala* and his possession under and in that petition the appellant distinct-pointed out that, inasmuch as new issues ere framed in order to prove his case on me of these issues, it was necessary for m to examine certain witnesses, and he ayed for summonses on them to attend.

Upon that, the Judge, notwithstanding the reply of this Court to the question pro-pounded to it by Mr. Elliot, passed an order that, "as the decree of the High Court con "tains no direction *authorizing* me to take "fresh evidence, I reject the petition." If the Judge had decided that the only evidence sought to be adduced was evidence which might have been adduced under the issues originally raised in the Lower Court, it might possibly have been a different matter.

The appellant has objected in the mode pointed out by the 354th Section to the deci-sion of the Judge on his petition of the 23rd November. It is quite clear that, in fram-ing the order complained of, the Judge was in error, not only in misunderstanding the 354th Section, but in disregarding the plain direction contained in the letter from this Court after his predecessor's reference.

The result is that the case must be again remanded, in order that the evidence of the witnesses mentioned in the petition of the 23rd of November may be taken, and any documents to be produced put in and proved. The respondent must be allowed to call any witnesses in reply, if he thinks fit.

The 13th August 1868.

Present:

The Hon'ble H. V. Bayley and F. B. Kemp, *Judges.*

Enhancement of rent—Talookdaree and ryotwaree rates.

Case No. 3256 of 1867 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of Mymensing, dated the 31st August 1867, affirming a decision passed by the Deputy Collector of that District, dated the 16th March 1866.

Muneekurnika Chowdhry (Defendant), *Appellant,*

versus

Annund Moyee Chowdhry (Plaintiff), *Respondent.*

Baboo Romesh Chunder Mitter for Appellant.

Baboo Luckhee Churn Bose for Respondent.

Where a notice of enhancement treats the party served with it as a talookdar, the Court should not assess ryotwaree rates upon him.

Kemp, J.—THE only admissible point taken in special appeal is that, as the plaint-iff, the special respondent, issued a notice of enhancement treating the special appel-lant as a talookdar, the Lower Appellate Court is wrong in assessing ryotwaree rates upon the special appellant.

We think this contention is good, and the case must be remanded to the Lower Appellate Court to fix the proper rates as paid by talookdars of the same description as the special appellant, and holding land of the same quality and with similar advan-tages in the neighbourhood.

The 13th August 1868.

Present:

The Hon'ble J. B. Phear and C. Hobhouse, *Judges.*

Mahomedan Law—Pre-emption.

Case No. 1032 of 1868.

Special Appeal from a decision passed by the Officiating Principal Sudder Ameen of Sarun, dated the 6th February 1868, reversing a decision passed by the Sudder Ameen of that District, dated the 3rd May 1867.

Mussamut Soondur Kooer (one of the Defendants), *Appellant,*

versus

Lalla Rughoobur Dyal and another (Plaintiffs), *Respondents.*

Baboos Onookool Chunder Mookerjee and *Romesh Chunder Mitter* for Appellant.

Baboo Hem Chunder Banerjee for Respondents.

Under Mahomedan law, the right of pre-emption does not arise until the seller's right of property has been completely extinguished.

Phear, J.—THIS is a suit brought by the plaintiff to enforce his alleged right of pre-emption. Mr. Baillie, in his Digest of the Mahomedan Law, in a statement of that law, which has been approved of by a decision of a Full Bench of this Court reported in Volume II., Weekly Reporter, page 215, Civil Rulings, says that the right of pre-emption does not arise until the seller's right of property has been completely extinguished. Mr. Baillie's own words are: "There must also be an entire cessation of all right on the part of the seller;" and, indeed, that this is the foundation of the plaintiff's suit, is obvious when the terms of his plaint are looked at, for he asks to have possession of the property itself delivered over to him.

Now, the suit in this case was instituted on the 4th of January 1867, and at that time it seems to us that the seller had not lost all rights of property. Whatever might have been the motive for the arrangement between the mortgagor and mortgagee which took place after the expiration of the ordinary period of foreclosure, it seems to us from the facts found by both the Lower Courts that the mortgagor was, on the 4th of January 1867, undoubtedly entitled to recover all rights of property in the land in question, upon payment of the mortgage-money. The possession itself had not even passed from the mortgagor's hands at that time. That is a fact which was assumed in the first issue laid down between the parties by the fi Court. It seems to us even possible on t facts found by both Courts that the right the female defendant was even higher th that of a mortgagor. It may possibly that her own story is true, and that she the owner in the name of Dilsinger, the nameedar; but, however this may be, we peat that it seems to us, on the findings of Lower Court, to be indisputable that representative of the original mortga had, on the 4th of January 1867, some rig of property in this land, and therefore, at t date, the plaintiff could not claim to h possession of the property delivered o to him by virtue of a right of pre-emption

How the question of costs might depe upon the conduct of the parties to the is a matter which we are not now cal upon by any of the grounds of appeal bef us to decide. It is enough for us to that we think that, when the plaint was fil the plaintiff had no cause of suit. With th views, it seems to us that the judgm of the Lower Appellate Court is wrong, must be reversed, the appeal be decreed, the plaintiff's suit dismissed. The spec appellant must have his costs in this Co and in the Lower Appellate Court.

The 13th August 1868.

Present:

The Hon'ble G. Loch and F. A. Glover, *Judges.*

Evidence — Recital in a judgment — Abatem of rent—Presumption of uniform payment Section 4, Act X., 1859.

Special Appeal from a decision passed the Officiating Judge of Purneah, dat the 12th September 1867, reversing decision passed by the Deputy Collect of that District, dated the 30th Decemb 1865.

Case No. 189 of 1868.

Mussamut Reazoonissa (Plaintiff), *Appellan*

versus

Tookun Jha (Defendant), *Respondent.*

Mr. R. E. Twidale and *Moonshee Mahome Eusuff* for Appellant.

f

Baboo Debendro Narain Bose for Respondent.

nd the Cross-appeal No. 190 of 1868.

here certain amounts of rent are recited in a judg- as proved to have been paid in certain years, recital is evidence as between the parties to uit.

abatement of rent by order of a Civil Court in quence of diluvion does not prove alteration of ate of rent, or affect a ryot's claim to the benefit e presumption arising under Section 4, Act 59.

Glover, J.—THIS was a suit for arrears ent at enhanced rates after notice. The was originally decreed in favor of the ntiff, but on appeal the Judge reversed order, holding that the rent had been at a fixed rate for more than 20 years.

n special appeal to this Court, the indar objected to the Judge's decision o the fixity of the rent, and the case was anded (29th January 1867, Trevor and ver, JJ.) "to try the point whether or t the ryot had in support of his mokur- ree claim, proved payment of rent at a niform rate for 20 years preceding the it, and would in consequence, and in e absence of contradictory evidence, be ntitled to the benefit of the presumption rising under Section 4, Act X. of 1859."

he Judge has now found it proved that, n the year 1244 M. S. up to 1263, the r in which the plaintiff sued his landlord abatement of rent on account of diluvion, uniform rate of rent, *viz.*, Rupees 38-7, always been paid by the tenant, and that, ilst that suit was going on, the rate of t was the same; in other words, that from year 1244 to the year before this suit instituted, nothing in excess of one liform rate of rent had ever been paid.

The Judge, therefore, gave the defendant benefit of the presumption under Sec- 4, and declared his tenure not liable to hancement.

The landlord again appeals specially, urg- that there was no evidence before the lge to show that the same rate of rent been paid up to the date of suit, the onsiff's decision in the abatement-case not ng receivable as evidence, and that the re fact of a ryot succeeding in getting an tement of his rent does away with any im to have held at a mokurruree rent, that the presumption under Section 4 es not arise.

This objection appears to me untenable. The decision of the Civil Court in the abatement-case would not be any evidence as to the rate of rent due on the ryot's holding, because that was not the point decided in that case; but if it were proved in it that certain amounts of rent were paid during certain years, and those payments were recited in the judgment as proved, that would be evidence as between the parties to that suit that in certain specified years certain sums were paid as rent, and the Judge has, it appears to me, taken it as evidence of this, and no more.

But, admitting for the sake of argument that, from 1263 M. S., the rent has not been paid at the old rates, but at the new rates after abatement, that would not, in my opinion, destroy the ryot's title to avail himself of Section 4.

From 1244 to 1263, it is proved that the ryot paid the same rent, and if that rent was from the year 1263 changed by order of a Civil Court in consequence of a portion of the land having been lost by diluvion, can it fairly be said that the ryot's rent has been changed? The words of Section 4 appear to me to refer to the rate of rent as well as to the amount of rent; and where a proportionate amount of a tenant's rent is remitted in consequence of a certain amount of land being lost, the rent is still levied at the same rate as before, and the ryot's position is so far unchanged.

It would be a monstrous injustice to take away a ryot's privilege of holding at mokurruree rates because diluvion had swept away a part of his holding, and because he had got an abatement of his rent in consequence.

So that, whether we take the Judge's finding as it stands, that the same rate of rent has been paid from the year 1244 till the date of this suit, or the special appellant's statement, that from the date of the abatement the rent has varied, the special respondent is, it seems to me, clearly entitled to the benefit of the presumption, and the special appellant must, on the facts found in this case, fail.

I would dismiss his appeal with costs.

The ryot also appeals specially (No. 190) with regard to the excess land in his possession. He alleges that the Judge has not carried out the order of remand, and has not adjudicated the point.

This is a mistake of fact. The remand-order does not contain any directions to adjudicate as to the alleged excess. On the contrary, it is expressly stated therein that the portion of the Judge's decree which had reference to the excess land, not being appealed against, should stand.

This special appeal must, therefore, be dismissed with costs.

Loch, J.—I concur in the judgment. It is very improbable that, when litigation commenced, the ryot should have paid or offered to pay rent at a higher rate than in past years, and indeed the finding of the Deputy Collector on this point at the end of his judgment appears to me to support the view taken by the Judge as to the uniformity of the rent. The judgment now passed by the Judge refers only to that part of the case which was then before him, and not to the excess lands, and therefore his order dismissing the claim must be considered limited to the question he had to try on remand, *viz.*, the uniformity of jumma. The decree previously given regarding the excess lands must stand good, as no appeal was preferred concerning them.

The 14th August 1868.

Present:

The Hon'ble J. B. Phear and C. Hobhouse, *Judges.*

Proceedings to keep alive a decree—Section 20, Act XIV., 1859.

Cases Nos. 197 to 199 of 1868.

Miscellaneous Appeals from an order passed by the Judge of Cuttack, dated the 26th February 1868, affirming an order passed by the Principal Sudder Ameen of that District, dated the 7th December 1867.

Kalee Kishore Bose (one of the Decree-holders), *Appellant,*

versus

Prosunno Chunder Roy and others (Judgment-debtors), *Respondents.*

Baboos Romesh Chunder Mitter, Otool Chunder Mookerjee, and *Chunder Madhub Ghose* for Appellant.

Baboos Ashootosh Chatterjee and *Annund Chunder Ghossal* for Respondents.

HELD that the decision of the Full Bench (reported at p. 98 of Volume VI. of the Weekly Reporter), that any thing of whatever kind which can be fairly denominated a proceeding taken *bonâ fide* by the judgment-creditor is sufficient to satisfy the words of Section 20, Act XIV., 1859, applies to any *bonâ-fide* proceeding, whether it is successful or not.

Resistance to legal proceedings taken by another person will count as a proceeding for the purposes of Section 20.

Phear, J.—WE think that the Judge is not right in holding that, because the proceedings of the present petitioner in the suit brought against him by Kalee Prosunno were unsuccessful, they were, for that reason alone, insufficient to keep the decree alive. No doubt, in the case which is referred to by him and reported in Volume VI. of the Weekly Reporter, page 48, Miscellaneous Rulings, a Division Bench of this Court held that the prosecution of an unnecessary *and* unsuccessful suit by the decree-holder was, under the circumstances of the case, not a sufficient proceeding to keep the decree alive. But a decision of a Full Bench which was pronounced some two or three months later, and it is reported in p. 98 of the same Volume of the Weekly Reporter, Miscellaneous Rulings, very distinctly lays down that anything of whatever kind, which can be fairly denominated a proceeding taken *bonâ fide* by the judgment-creditor, is sufficient to satisfy the words of Section 20, Act XIV. of 1859. In our view, this decision of the Full Bench applies to any *bonâ-fide* proceeding whether it is successful or not, and we are confirmed in this view by the decision which was passed by a Division Bench of this Court in the case reported in Volume VIII., Weekly Reporter, page 98, Civil Rulings. Of course, the fact that the proceeding is not successful, and that the order of a competent Court has declared that it ought not to have been taken, if an order of that kind has been made, affords strong evidence against the *bona fides* of the judgment-creditor in

regard to taking the proceeding. But we do not think that the mere non-success is in itself decisive upon this point. I may mention that resistance to legal proceedings taken by another person will count as a proceeding for the purposes of Section 20 of Act XIV., 1859, just as effectually as proceedings actually initiated by the judgment-creditor himself. This was decided in the case reported in Volume VII., Weekly Reporter, page 54.

Under these circumstances we think that the decision of the Judge must be reversed, and the case must be remanded to him to determine, in the first place, whether or not the conduct of the judgment-creditor in resisting Kalee Prosunno's suit instituted in 1860 was a *bonâ-fide* effort made in furtherance of the execution of his decree. If he should decide this question in the negative, he ought to dismiss the plaintiff's application for execution; but if he should decide it in the affirmative, then, we think, he ought to enquire whether the steps taken by the judgment-creditor in June 1866, and which were terminated by the order of the Principal Sudder Ameen of 12th June of the same year, were *bonâ-fide* proceedings, *viz.*, *bonâ fide* taken with the view to obtain immediate execution of his decree; and, in judging of this point, we think that he ought to pay due consideration to the terms of the order of the Principal Sudder Ameen, as being the order of a competent Court, which was passed on the 12th June 1866. If he should think that these proceedings or any portion of them, as far as concerns the judgment-creditor, were *bonâ fide* taken with the view of obtaining execution of his decree, then he should grant the present application, as it will have been made within three years from the 12th of June, the time when that application was dismissed. But if he should think that these proceedings were not made in good faith with the purpose of obtaining execution of the decree, then again he ought to dismiss the present application of the plaintiff. Costs will abide the event.

The 14th August 1868.

Present :

The Hon'ble G. Loch and F. A. Glover,
Judges.

Limitation—Suit—Settlement-proceedings.

Cases Nos. 679 and 680 of 1868.

Special Appeals from a decision passed by the Principal Sudder Ameen of Bhaugulpore, dated the 23rd December 1867, affirming a decision passed by the Moonsiff of Soorujgurrah, dated the 1st April 1867.

Moula Buksh Khan and others (Defendants), *Appellants,*

versus

Koshoram Pandey and another (Plaintiffs), *Respondents.*

Baboo Lukhee Churn Bose for Appellants.

Baboo Debendro Narain Bose for Respondents.

Parties claiming as heirs of property sold without their consent held by the purchaser in adverse possession are bound to appear and press their title within the period prescribed by law; the mere fact that, by some proceedings of the settlement-officers, they obtained a settlement of the estate cannot give them a right which they have lost by limitation.

Loch, J.—THE facts found by the Lower Court on the evidence are that the plaintiff purchased this property from Moula Buksh, Allahee Buksh, and Bheekoo, on the 24th of January 1843, and that he retained possession till he was dispossessed by a settlement-proceeding, bearing date the 26th of July 1866; that, having held possession for upwards of 20 years, he is entitled to recover possession, notwithstanding the proceeding of the Collector; and that the defendants, other than the descendants of the vendor, as their claim is barred by limitation, cannot resist the plaintiff's right of re-entry.

On this finding, we think that the heirs of Allahee Buksh and the heirs of Bheekoo can have no standing in Court. We find also that the claim of Mussummat Tekroo was dismissed in a separate suit, and we have only to deal with the cases of Moula Buksh,

Khetoo Khan, and Santi Khan, the sons of Khoda Buksh, one of the sons of Murdun Khan, from whom it is said that the property is derived. It is stated by Moula Buksh that, at the time the sale was made, he was a minor; and that Allahee Buksh had no power as his guardian to sell his share of the property; but we find that he stood by for 23 years, and made no objection to plaintiff's possession under that purchase. We, therefore, think that he cannot resist the plaintiff's claim Khetoo and Santi Khan, the other sons of Khoda Buksh, were, it is true, no parties to the sale, but they never objected for 23 years to plaintiff's possession; and had they any real title, they were bound to appear and press their title within the period prescribed by law. The mere fact that, by some proceedings of the settlement-officers, they obtained a settlement of the mehal cannot give them a right which they have lost by limitation. We think, therefore, that the order of the Lower Court must be confirmed, and the special appeals dismissed with costs.

The 14th August 1868.

Present:

The Hon'ble H. V. Bayley and A. G. Macpherson, *Judges.*

Fraudulent alteration in a deed.

Case No. 3411 of 1867.

Special Appeal from a decision passed by the Principal Sudder Ameen of Dacca, dated the 21st September 1867, modifying a decision passed by the Moonsiff of Manickgunge, dated the 20th July 1863.

Kalee Coomar Roy (Plaintiff), *Appellant,*

versus

Gunga Narain Dutt Roy and others (Defendants), *Respondents.*

Baboo Annund Chunder Ghossal for Appellant.

Baboo Bhugobutty Churn Ghose for Respondents.

An alteration made in a deed without the consent of the parties who originally executed the deed, and with the fraudulent view of benefiting him who propounds it, vitiates the deed wholly. The materiality or otherwise of the alteration does not affect this rule of law.

Bayley, J.—In this case the plaintiff sued under a deed of conditional sale for possession of one-anna share in Mouzahs "*Gopalpore*" and "*Poorbo Shalka,*" alleging that they had been mortgaged to the plaintiff's mother by Hurry Narain Dutt and Raj Narain Roy.

The defendants Juggudessuree, Gunga Narain Dutt, and Mohendra Narain Dutt, pleaded payment of the sum due under that conditional deed of sale, but alleged that the mortgage was for one-anna share of "*Gopalpore*" and "*Bistoopore.*"

Gunga Narain further pleaded that Raj Narain had no power to mortgage his (Gunga Narain's) and Mohendro Narain's share.

The case was at first decided on the point of limitation. On special appeal, the case was remanded to the Lower Appellate Court to be tried on its merits. Having been so tried again the case came here in special appeal, and again it was remanded with this specific order: "The simple issue "is whether the *deed* propounded by plaint-"iff is a *genuine one or not*, and, if it be, "whether the nature of the transaction as "between the parties in suit was a *sale or* "*a mortgage.* The Judge will give the "parties opportunity for filing any evidence "they may wish to put in, and having "attentively considered their counter-alle-"gations and the proofs by which they are "supported, pass whatever orders seem just "and proper."

Upon this remand, the Lower Appellate Court has held that, although a deed of mortgage has been executed, yet the word "*Bistoopore*" has been fraudulently erased and "*Poorbo Shalka*" interpolated in the deed. The Court then finds that a *second* deed of 13th Magh 1247, put in by the plaintiff to support his case, was false. The Lower Appellate Court next proceeds to remark that Rajendro Narain had two brothers, Gunga Narain and Mohendro Narain, and he (Rajendro) had no authority to mortgage their shares. The Court adds that Mohendro Narain was proved to have pre-deceased Gunga Narain, and that Mohendro Narain's share was obtained by Gunga Narain. The Lower Appellate Court, therefore, gives the plaintiff possession of a *half-anna* share of Hur Narain Roy in Gopaulpore only, and 3 gundas 1 cowrie 1 krant share of Raj Narain in that same property, deducting 6 gundas 3 cowries 2 krants as the share of Gunga Narain and Mohendro Narain Roy.

From this decision the plaintiff appeals specially, and urges, *first*, that, as no issue was raised in the first Court as to the legal effect of Raj Narain's mortgage on Gunga

Narain and Mohendro Narain, in respect to how far it bound these last, and the remand-order of this Court restricted the Lower Court's action to finding the real nature of the transaction, *i. e.*, whether it was a sale or not, the Lower Appellate Court erred in law in going beyond the point to which it was directly limited; and, *secondly*, that Gunga Narain and Mohendro Narain, by their conduct, that is to say, having pleaded payment under the admitted conditional sale, could not now raise the question of Raj Narain having exceeded his authority in mortgaging the property.

Gunga Narain is a respondent in this Court. He takes an objection under Section 348, Act VIII. of 1859, that, whereas the deed upon which the plaintiff bases his action has been found to have been fraudulently tampered with for the benefit of the plaintiff, by the substitution of a more valuable property for a less valuable property, no such deed can be allowed to support the plaintiff's claim.

I am of opinion that, although it might perhaps be contended that the Lower Appellate Court did go beyond the order of remand in trying how far Raj Narain had authority to mortgage the shares of Gunga Narain and Mohendro Narain, inasmuch as that plea throughout the whole litigation only appeared in the original written statement of Gunga Narain, and was never re-produced or urged at any other stage, still, under the facts of this case, it is needless to go into this matter, because the objection taken by the respondent under Section 348 is, I think, fatal to the plaintiff's case.

It has been strongly pressed on the other side that, as the decree of the Lower Appellate Court was only for Raj Narain's share, and Raj Narain's daughter admitted the plaintiff's claim, it is not in the power of Gunga Narain to raise the objection under Section 348. But without going further than the actual words of the Section, I think that the respondent Gunga Narain is entitled to raise the objection.

The words of Section 348 are few and short, and include Gunga Narain's position as respondent. The words are: "Upon the "hearing of the appeal the *respondent* may "take any objection to the decision of the "Lower Court which he might have taken "if he had preferred a separate appeal from "such decision."

Although Gunga Narain was dismissed from the suit, and in that sense had no decision against him, yet the sole plea taken by the special appellant here, *viz.*, that the share of Gunga Narain was also liable to be decreed, would, if successful, have converted the decree into a decree against Gunga Narain; and I do not think he can be barred (when he is made a respondent, and the object of this special appeal is to obtain a decree actually against him) from taking the objection.

Then as to the objection itself. It is clearly found as a fact (which we must accept in special appeal) that the word "*Bistoopore*" was erased and "*Poorbo Shalka*" interpolated in plaintiff's deed with a fraudulent desire to benefit the plaintiff.

I think the authority cited from Section 1207 of Taylor on Evidence and the general rules of evidence clearly lay down that, so long as an alteration is made without the consent of the parties, and with a fraudulent view of benefiting him who propounds the deed, such a deed is not any evidence to support the claim of the party who propounds it, and the materiality or otherwise of the alteration does not affect this broad rule of law.

In this view, I would dismiss this special appeal with costs.

Macpherson, J.—I desire to add that, as the main question raised by this appeal is whether the deed which was executed by Raj Narain is binding on Gunga Narain or not, and whether there ought not to be a decree against him for his share of the property, the subject of the suit, it is perfectly competent to Gunga Narain now to argue that the deed is entirely vitiated, and is not binding in any event upon him, by reason of the fraudulent alteration which is found by the Lower Appellate Court to have been made in the deed subsequent to its execu-

tion. I think that the alteration vitiate the deed, and that this appeal ought to be dismissed with costs.

The 14th August 1868.

Present:

The Hon'ble F. B. Kemp and E. Jackson, *Judges.*

Registration—Bond pledging land—Section 13, Act XVI., 1864.

Case No. 880 of 1868.

Special Appeal from a decision passed by the Additional Judge of Tirhoot, dated the 20th December 1868, reversing a decision passed by the Sudder Ameen of that District, dated the 28th June 1866.

Gopal Pershad (Plaintiff), *Appellant,*

versus

Mussamut Nuzzeranee and others (Defendants), *Respondents.*

Baboo Bama Churn Banerjee for Appellant.

Baboo Kalee Kishen Sein for Respondents.

The registration of a bond for the re-payment of money in which land is pledged as collateral security is not compulsory under Section 13, Act XVI., 1864.

Jackson, J.—THE Lower Appellate Court has dismissed the plaintiff's suit, which was to recover a certain sum of money due upon a bond, on the ground that this bond ought to have been registered, and that it was not registered. The bond appears to have stated, not only that the money would be re-paid, but also that certain lands should be held to be pledged for the re-payment of the loan in case it was not paid. The question at issue is whether a bond of this description, under Section 13 of Act XVI. of 1864, must be registered or not. There is a precedent published at page 111, Weekly Reporter, Volume IX., where it was held that the registration of such a bond was not compulsory. It appears to us also that this document does not directly create, decree, transfer, or extinguish any right or title in immoveable property. The land is mentioned in the bond as collateral security. But the bond goes no further. It follows that the registration of the bond was not compulsory. Holding this opinion, we think that the Judge should have proceeded to try the questions raised by the plaintiff on the merits. We, therefore, remand this case to the Lower Appellate Court for trial on the merits and a fresh decision.

The 14th August 1868.

Present:

The Hon'ble F. B. Kemp and E. Jackson, *Judges.*

Damages—Procedure of Appellate Court.

Case No. 1480 of 1868.

Special Appeal from a decision passed by the Judge of Tirhoot, dated the 30th December 1868, reversing a decision passed by the Sudder Ameen of that District, dated the 10th June 1867.

Kheedao Roy and others (Defendants), *Appellants,*

versus

Hurro Pershad Sing (Plaintiff). *Respondent.*

Baboo Debendro Narain Bose for Appellants.

Baboo Kishen Succa Mookerjee for Respondent.

In a suit to recover the value of crops alleged to have been plundered by defendants, where, on the intervention of a third party, the Court of first instance dismissed the suit—HELD that the Judge in appeal, who believed the plaintiff's witnesses, and decreed the full amount claimed, was bound to have ascertained upon evidence whether the crop and damages had really been as extensive as alleged, even if no evidence had been recorded on this issue by the first Court.

Kemp, J.—WE think that this case must be remanded to the Judge for a decision. The suit was for the value of crops which, it is alleged, had been plundered by the defendants Nos. 1 and 2. A third defendant intervened, and was made a defendant. He alleged that the crops belonged to him. The first Court, finding that the crops belonged to the intervening defendant, dismissed the suit. The Judge, on appeal, was of opinion that the intervening defendant has not proved that the lands belonged to him, and therefore he believed the plaintiff's witnesses, and looking to the record of a criminal case of plunder in which the defendants Nos. 1 and 2 had been punished, he held that to be conclusive evidence that the defendants had plundered the crops, and he decreed against them the full amount which the plaintiff had claimed. This, as usual in such cases, appears to have been an excessive amount, and the defendants had specially pleaded that it was an excessive amount. The Judge, therefore, was bound, before he decreed that amount, to have ascertained upon evidence whether the alleged extent of damages had really been incurred, and

the crop, which it is said was plundered, had been as extensive as the plaintiff stated. Even if it is the case that upon this issue no evidence was recorded by the first Court, because that Court decided upon a preliminary point, still the Appellate Court was bound to allow evidence on this issue to be given before passing its decision.

As the case must be remanded to try this point, we think that the Judge should also, at the same time, re-consider his decision as to whether the plaintiff had proved his title in the land. The question, as we understand it, was whether the plaintiff held these lands, or whether the defendant Seeta held the land. There appears to have been a butwarra of the village, and the plaintiff sent for the butwarra-papers to prove his case. The judgment, however, does not state that the butwarra-papers show that he held any land in the village. On the other hand, the butwarra-papers appear to have proved the defendant's statement, that one Ramoo held the lands at the time of the butwarra, after whom the defendant Seeta stated that he had succeeded. As far then as these papers proceeded, they seem to support the defendant's statement, and not the plaintiff's. But because the witnesses stated that Ramoo held these lands only until the butwarra was completed, and the defendant Seeta showed a receipt previous to the completion of the butwarra, the Judge is of opinion that Seeta's claim is altogether false. We think that, even if a witness made a mistake on this point, that hardly warrants the conclusion at which the Judge has arrived. It is, in fact, for the plaintiff first to prove his case. Does his own evidence, namely, the butwarra-papers, prove that he ever held these lands? The Judge has given no opinion upon this point, and we think that he ought to do so. It is for the plaintiff to prove his case quite independent of the fact whether the defendant's title is good or bad.

It seems to us also that the Judge has considered the decision of the Magistrate to be conclusive evidence, while it is not so, because the Judge has not gone into the acts and conduct of the parties, and has not given his opinion as to whether the plunder really took place, and why the defendants Nos. 1 and 2, who, for all that was stated in the judgment, had nothing whatever to do with the land, should have plundered the plaintiff's crops.

We reverse the decision of the Judge, and remand the case to him to re-consider the whole case, and pass a fresh decision with reference to the above remarks.

The 14th August 1868.

Present:

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble Dwarkanath Mitter, *Judge*.

Right of occupancy—Limitation—Absence in transportation.

Case No. 289 of 1868.

Special Appeal from a decision passed by the Principal Sudder Ameen of Chittagong, dated the 28th January 1868, affirming a decision of the Moonsiff of that District, dated the 25th June 1867.

Domun and others (Defendants), *Appellants*,

versus

Shubul Koolall and others (Plaintiffs), *Respondents*.

Mr. R. E. Twidale for Appellants.

Baboo Sreenath Banerjee for Respondents.

By adverse holding for more than 12 years, a tenant gains a right of occupancy as against his predecessor, even if the latter's absence has been involuntary in consequence of transportation, there being no exception in the Limitation Act with regard to plaintiff's absence from such cause.

Peacock, C. J.—THERE is no exception in the Limitation Act with regard to plaintiffs who are beyond sea, whether voluntarily or involuntarily in consequence of transportation. It appears that, during the plaintiff's absence in imprisonment and in transportation, the defendant took possession of land which previously belonged to him as a tenant, and the landlord allowed the defendant to hold as his tenant. This lasted for a period exceeding 12 years. The plaintiff, on his return after that period, seeks to turn the defendant out of possession, and to resume his former holding; and the landlord is willing to allow him to do so. The tenant, being unwilling to allow the plaintiff to return to the possession of the land, refused to relinquish his holding, and consequently the plaintiff sues him and the landlord to recover possession. The landlord does not plead limitation, but the other defendant does.

It appears to me that the other defendant gained a right as against the plaintiff by adverse holding for more than 12 years, and, under Section 6 of Act X. of 1859, he obtained a right of occupancy as against the landlord. Under these circumstances, the tenant (defendant) is entitled to a decree. The landlord also is entitled to a decree because he has not turned the plaintiff out of possession. The decision of both the Lower Courts will be reversed, and a decree given for the defendants, with costs in all the Courts for the tenant (defendant).

The 14th August 1868.

Present:

The Hon'ble L. S. Jackson and Dwarkanath Mitter, *Judges.*

Cause of action—Errors in map.

Case No. 793 of 1868.

Special Appeal from a decision passed by the Judge of Dinagepore, dated the 20th December 1867, affirming a decision passed by the Principal Sudder Ameen of that District, dated the 29th August 1867.

Gobindnath Roy Chowdhry (Defendant), *Appellant,*

versus

Kishen Kant Roy (Plaintiff), *Respondent.*

Baboo Mohinee Mohun Roy for Appellant.

Baboo Nil Monee Sein for Respondent.

Where plaintiff had purchased and obtained possession of one of two mehals belonging to defendant, the other remaining in the latter's possession: HELD that an error in a map of the revenue-survey, which represented part of the purchased mehal as included within the other, being in no way prejudicial to plaintiff, afforded him no cause of action against the defendant.

Jackson, J.—IT appears to us in this case that plaintiff had no cause of action; that the suit ought to have been dismissed, and, in fact, the plaint ought to have been rejected on presentation, because, on the face of it, it disclosed no cause of action whatever.

Plaintiff purchased one of two mehals previously belonging to the defendant. The other mehal still remained in defendant's possession, and it appears that, on the making of the revenue-survey, the survey-map had been so prepared as to represent part of the land belonging to the plaintiff's purchased mehal as included within the other. But on plaintiff's own showing, so far was the defendant from making any use of the error in the survey-map, that he actually pointed out the land as part of plaintiff's mehal, and assisted him to obtain possession. Possession being thus with the plaintiff, the fact of such error in the survey-map was in no way prejudicial to him, and afforded him no cause of action against the defendant. In this decision we follow a case which has been decided by a Division Bench of this Court, which is on all fours with the present case, and which is reported in 9 Weekly Reporter, page 325.

The special appeal is decreed, and the judgment of the Lower Courts reversed with costs.

The 14th August 1868.

Present:

The Hon'ble L. S. Jackson and F. A. Glover, *Judges.*

Agreement—Grant of putnee.

Case No. 756 of 1868.

Special Appeal from a decision passed by the Officiating Judge of Moorshedabad, dated the 31st December 1867, modifying a decision passed by the Principal Sudder Ameen of that District, dated the 26th July 1867.

Komul Lochun Dass (one of the Defendants), *Appellant,*

versus

Dwarkanath Chowdhry (Plaintiff) and others (Defendants), *Respondents.*

Baboos Onookool Chunder Mookerjee and *Gopeenath Mookerjee* for Appellant.

Baboos Sreenath Doss and *Obenash Chunder Banerjee* for Respondents.

Where the proprietors of a mehal had agreed with an ijaradar that, in the event of their granting a putnee to any body, he should have the refusal, and notwithstanding their agreement, gave a putnee to another ijaradar: HELD that the latter, having been no party to the stipulation, was not bound thereby, and that the putnee granted to him cannot be set aside.

Jackson, J.—IT appears to us that the decision of the Lower Appellate Court is erroneous. It states that plaintiff and defendant Komul Lochun have separate ijarahs, each of 8-annas share of the Mehal Ali Lushkurpore; and it appears to have been further arranged that, on the expiration of the existing ijarahs, the parties should take a joint-ijarah of the whole 16-annas. A further agreement is said to have been entered into between the plaintiff and the pro-

prietors that, in the event of their granting a putnee to any body during the term of the ijarah, plaintiff should have the refusal. Notwithstanding this agreement, the proprietors, it seems, afterwards gave a putnee to the defendant Komul Lochun, and the plaintiff sued to have the putnee set aside, and to compel the proprietors to execute a fresh putnee to him. The Lower Appellate Court has held that, under the contract, plaintiff was entitled to maintain this suit.

It seems to us clear that whatever stipulations were made between the plaintiff and the zemindars, Komul Lochun being no party thereto was not bound, and the putnee granted to him cannot be set aside. The zemindars had not deprived themselves of the power to grant the putnee, but they have agreed to grant it in preference to the plaintiff. It may be, although we do not decide the question, that plaintiff may be entitled to damages by reason of the breach of the contract they made.

We think that the suit to set aside the putnee cannot be maintained; consequently, the judgment of the Lower Courts must be set aside with costs.

The 14th August 1868.

Present:

The Hon'ble L. S. Jackson and F. A. Glover, *Judges.*

Right of action—Arrears of rent due by former jagheerdar—Service-tenures.

Case No. 870 of 1868.

Special Appeal from a decision passed by the Judicial Commissioner of Chota Nagpore, dated the 8th January 1868, modifying a decision passed by the Assistant Commissioner of Manbhoom, dated the 5th June 1867.

Rajah Nilmonee Singh (Plaintiff), *Appellant,*

versus

Bukronath Singh (Defendant), *Respondent.*

Mr. R. T. Allan and *Baboo Bama Churn Banerjee* for Appellant.

Baboos Mohinee Mohun Roy and *Taruck-nath Sein* for Respondent.

A suit will not lie against a jagheerdar holding a service-tenure on account of arrears of rent unpaid by his predecessor.

Jackson, J.—This is a suit against a jagheerdar to recover arrears of rent accruing in the time of the defendant's predecessor in the jagheer. The Lower Appellate Court, on the authority of a decision found in Marshall's Reports, page 308, has declared that the defendant is liable for no more than one year's arrears, and the plaintiff appeals specially, seeking to show that the defendant, present jagheerdar, is liable for the whole arrears of three years.

It appears to me that the case from Marshall's Reports is not precisely in point; but there is a case which has been referred to in the argument from 7 Weekly Reporter, page 178, which seems to have an important bearing on the question. That, it is true, was a case connected with the ghatwalee-tenure of Beerbhoom, and was decided with reference to the provisions of Regulation XXIX. of 1814, but I think that the considerations which influenced the Court's decision in that case are exactly applicable to the present case.

The tenure on which the arrears accrued was a service-tenure, and the rent payable by the holder is, we may assume, so calculated as to remunerate the holder for service which he is to perform, and also to provide for his maintenance and necessary expenses.

If the landlord neglected to realize the rent from the former incumbent year by year, and should seek to recover the arrears of several years at once from the new jagheerdar, he will be necessarily deprived of the funds which will enable him to perform the service, and to support himself as originally contemplated.

It appears to me, therefore, that the suit against the jagheerdar on account of arrears unpaid by the predecessor ought to fail. Plaintiff, it should be observed, has not sued the defendant as the legal representative of the late jagheerdar, as to make him liable to satisfy the arrears out of any assets other than the tenure which may have come to the defendant, but sues him simply as jagheerdar.

In my opinion, the special appeal should be dismissed with costs.

Glover, J.—I concur.

The 15th August 1868.

Present:

The Hon'ble J. B. Phear and C. Hobhouse, *Judges.*

Uniform payment of rent for 20 years—Evidence.

Case No. 425 of 1868 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of Dacca, dated the 7th December 1867, affirming a decision passed by the Deputy Collector of that District, dated the 24th May 1867.

Bungo Chunder Chuckerbutty (one of the Plaintiffs), *Appellant,*

versus

Ram Kanye Bhawal and others (Defendants), *Respondents.*

Baboo Motee Lall Mookerjee for Appellant.

Baboo Sreenath Banerjee for Respondents.

To establish a holding of 20 years at an unchanged rent, the evidence must go back that distance at least, and be such as reasonably to support the conclusion.

Phear, J.—THE plaintiff in this suit claimed of the defendant a kubooleut at an enhanced rate of rent. The defendant resisted this claim on the allegation that the land in suit had been held for a period of 20 years immediately preceding suit at an unchanged rent, and therefore he was entitled to the presumption prescribed by Section 4 of Act X. of 1859.

The Judge has arrived at the conclusion that this defence is made out in the following way. I give his own words, in order that there may be no mistake as to his meaning due to me. He says: "I think that the "former decision of a competent Court "should be ample evidence of the jumma "at that time, and it must be presumed "that the respondent has not con-"sented to pay more since that time." As far as I can understand from this sentence, the Judge has relied solely upon one item of evidence, namely, the decision of a competent Court, which, it appears, was given in the year 1851. But the fact which was in issue between the parties, and which he could not properly find except upon legal evidence, was that the defendant had held the land for 20 years immediately preceding suit at a uniform rent. That fact ought to have been proved by legal evidence, like any other fact disputed in the contest between the parties. Evidence of the amount of rent in one year out of the 20 is obviously insufficient to do this, and it is not allowable to supplement this evidence by a presumption drawn from it. Otherwise the presumption which is provided for by Section 4, would rest upon a presumption not provided for by any enactment whatever. And it has been ruled repeatedly by this Court that the evidence necessary to establish a holding of 20 years at an unchanged rent must cover, at least, the whole of the period commencing with the institution of the suit, and go backwards to the distance of 20 years at least. It is not necessary, of course, that there should be evidence of the payment of rent in each one of the successive years, but there must be such evidence as will reasonably support the conclusion that the land has, in fact, been held for the whole 20 years at a uniform rate of rent.

We think that the Judge was entirely miscarried in his trial of this case. We, therefore, reverse his decision, and remand the suit to the Lower Appellate Court for re-trial upon the evidence which is on the record. Costs will follow the event.

The 15th August 1868.

Present:

The Hon'ble H. V. Bayley and A. G. Macpherson, *Judges.*

Evidence.

Case No. 199 of 1868.

Application for review of judgment passed by the Hon'ble Justices H. V. Bayley and A. G. Macpherson, on the 25th April 1868, in special appeal No. 1531 of 1867.

Thomas Oman, Plaintiff (Appellant), *Petitioner,*

versus

Coomar Promothonath Roy and others, Defendants (Respondents), *Opposite Party.*

Mr. R. T. Allan and *Baboo Bhowanee Churn Dutt* for Petitioner.

Baboo Kishen Kishore Ghose for Opposite Party.

When a document is tendered in evidence, the Court has no right, without distinctly deciding whether it is or is not proved to be genuine, to decline to receive it for the mere general reason that it may possibly or probably be a forgery.

Macpherson, J.—ON further consideration, it appears to us that we ought to have

set aside the judgment of the Lower Appellate Court, and remanded this case for re-trial.

One great point of contention between the parties has been the reception in evidence of certain measurement-chittahs or a certain chittah on which the plaintiff relied very much. The Lower Appellate Court does not say distinctly whether, on the whole evidence before it, it does or does not consider the chittahs to be genuine, but merely in a vague and general manner declares that it is not safe to act on such chittahs, upon the general principle that they are often untrustworthy, because prepared by an Ameen who has been bribed by one or other of the parties interested. It may be that sometimes such chittahs are worthless and untrue, because prepared by Ameens who have been bribed; and it is quite proper that the Court, before receiving and acting upon chittahs, should see whether the particular chittahs relied on are genuine. But the Court is bound to arrive at a conclusion upon the question of the genuineness of the chittahs, on a due consideration of all the evidence before it, and the Court has no right, without distinctly deciding whether the particular chittah tendered in evidence is or is not proved to be genuine, to decline to receive it for the mere general reason that it may possibly be false, as the Ameen who prepared it very likely was bribed.

A chittah may be good evidence, or it may not; but the Court must decide distinctly whether it is or is not, and should give its reasons for rejecting it, if it does reject it.

Further, it is evident upon the face of the judgment of the first Court that there was an enhancement-suit brought by the zemindar against the lessor of the plaintiff. But the decree in that suit does not appear to be on the record, and it is impossible to decide the case properly, without knowing precisely what that decree is, and the bearing which it has upon the respective positions of the parties.

We must know, too, whether the lands to which that decree relates correspond with those which are the subject of the present suit.

In re-trying the case, an opportunity should be given to the plaintiff of putting in the decree and proceedings in the enhancement-suit referred to by the Court of first instance; and the Court must decide the case after re-considering all the evidence on the record.

The 16th August 1868.

Present:

The Hon'ble L. S. Jackson and F. A. Glover, *Judges.*

Jurisdiction — Cesses — Rent-suits — Ex-parte judgments—Evidence.

Case No. 2399 of 1867 under Act X. of 1859.

Special Appeal from a decision passed by the Judicial Commissioner of Chota Nagpore, dated the 22nd July 1867, affirming a decision passed by the Assistant Commissioner of that District, dated the 22nd February 1867.

Orjoon Sahoo (Plaintiff), *Appellant,*

versus

Anund Singh and another (Defendants), *Respondents.*

Baboo Khetter Mohun Mookerjee for Appellant.

No one for Respondents.

Act X. of 1859 gives Revenue Courts no jurisdiction in suits to recover cesses over and above the rent.

A judgment adduced as evidence is not to be rejected merely on the ground of its having been *ex-parte.*

A tenant adjudged to pay a particular cess or demand in a particular year is not, therefore, compelled to pay it for ever.

Jackson, J.—THIS special appeal is by the plaintiff in an Act X. suit. His objection is that the Courts below have refused to allow him certain cesses called Bukoomat, which he included in his plaint over and above the rent from the ryot. He complains that the evidence which he adduced has been rejected by the Lower Appellate Court on insufficient grounds. It appears to me that whatever evidence the plaintiff might have produced in this case, he ought not to have been allowed to recover the cess in question. The suit is under Act X. of 1859. That Act gives the Revenue Courts jurisdiction

in suits for arrears of rent, not in suits to recover additional cesses. Moreover, I am at a loss to know how the plaintiff could be entitled to recover from the ryot anything beyond his rent, except on the ground of some express contract to pay it. The judgment which the plaintiff adduced, and which the Judicial Commissioner rejected on the ground that it is an *ex-parte* decision, is, no doubt, not to be impugned on that ground; but it is certainly no conclusive evidence as to the defendant's liability to pay the cesses claimed in the present suit. It does not follow that, because the defendant had been adjudged to pay a particular cess or other demand in a particular year, he should, therefore, be compellable to pay it for ever.

The special appeal is dismissed.

Glover, J.—I am quite of the same opinion.

The 17th August 1868.

Present:

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble Dwarkanath Mitter, *Judge*.

Jurisdiction — Suit to recover huts or their value.

Reference to the High Court by the Judge of the Small Cause Court at Jessore.

Rohiny Kant Ghose, *Plaintiff*,

versus

Mahabharuth Nag and others, *Defendants*.

Where a judgment-creditor purchases huts sold in execution of his decree, and, not being allowed to remove them, sues to recover the huts or their value, his suit is not cognizable by a Small Cause Court.

Case.—THIS is an action brought by the plaintiff as auction-purchaser to recover from the defendants the thatched huts purchased by him or their value, under the circumstances mentioned in the plaint, which run as follows:—

"This is a suit for the recovery of Rupees "30, which is due to plaintiff on account of "the huts as the price thereof, purchased by "him at an auction-sale. Plaintiff, in execu-"tion of decree No. 1311 of 1866 of this "Court against Mahabharuth Nag and others, "caused attachment of the three huts as per "schedule annexed at foot of the plaint, and "having purchased them at the auction held "of the huts on the 14th Joist 1274, for "Rupees 19-12, by giving credit of this sum "in the amount of the decree, went to break "and bring away the huts on the 20th Joist, "when the defendants did not allow him to do "so; and as the huts remained in the de-"fendants' occupancy, the plaintiff now seeks "to recover the huts or the value thereof."

One of the defendants, as regards one of the huts, pleads property in himself, and as regards the other two huts not guilty; and the two other defendants plead not guilty.

Although no question was raised that this suit was cognizable by this Court, I, of my own motion, took the objection, as it appeared to me that the suit did not fall within the definition of personal property in the sense in which that term is used in Section 6, Act XI. of 1865. I, therefore, did not enter into the merits of the case, but as it is urged by the plaintiff's pleader that actions like the present have been entertained by my predecessors, I think it proper to refer the question for the decision of the High Court.

For the title of chattels personal, Sir Edward Coke gives the choice of two reasons: "Because for the most part they "belong to the person of man, or else for "that they are to be recovered by personal "actions," and the *books* point out that chattels personal or moveable consist first of inanimate things, as goods, plate, money, jewels, implements of wear, garments, and the like, or vegetable productions, as the fruit or other parts of a plant when severed from the body of it, or the whole plant of itself when severed from the ground; and under the same division of moveables are also arranged such animals as are domestic, as horses, kine, sheep, poultry, and the like.

There are, however, some kinds of choses in possession which form exceptions to the general rule. These consist of certain chattels so closely connected with the land that they partake of its nature, pass along with it whenever it is disposed of, and descend along with it, when undisposed of, to the heir of the deceased owner. The chattels which thus form exceptions are title-deeds, heirlooms, fixtures, chattels, vegetable, and animals *feræ naturæ*.

By the rules of the common law of England, no larceny could be committed of

things that adhere to the freehold, as corn, grass, trees, and the like, or lead upon a house, but the severance of them was merely a trespass. These things were parcel of the real estate, and therefore, when they continued so, could not, by any possibility, be the subject of theft, being absolutely fixed and immoveable, and if they were severed by violence, so as to be changed into moveables, and at the same time by one and the same continued act carried off by the person who severed them, they could never be said to be taken from the proprietor in this their newly-acquired state of mobility, which is essential to the nature of larceny, being never, as such, in the actual or constructive possession of any one but him who committed the trespass. He could not in strictness be said to have taken what at that time were the personal goods of another, since the very act of taking was what turned them into personal goods. But if the thief severs them at one time, whereby the trespass is completed, and they are converted into personal chattels in the constructive possession of him on whose soil they are left or laid, and comes again at another time when they are so turned into personalty, and takes them away, it is larceny at the common law; and so it is, if the owner or any one else has severed them.—Stephens' Commentaries, 2nd edition, pp. 180 and 181.

Similarly, theft in the Indian Penal Code is defined as follows :—

Section 378.—"Whoever, intending to "take dishonestly any moveable property "out of the possession of any person without "that person's consent, moves that property "in order to such taking, is said to commit "theft.

"*Explanation 1.*—A thing, so long as it "is attached to the earth not being moveable "property, is not the subject of theft, but it "becomes capable of being the subject "of theft as soon as it is severed from the "earth.

"*Explanation 2.*—A moving effected by "the same act which effects the severance "may be a theft."

And Section 22nd of the said Code gives a definition of moveable property as follows:—

"The words 'moveable property' are in-"tended to include corporeal property of "every description, except land and things "attached to the earth or permanently "fastened to anything which is attached "to the earth."

I find that, in the case of George Meares *vs.* Ekobur Sheikh, page 29, Sutherland's Rulings on References from Small Cause Courts, Bayley and Morgan, JJ., held that mat huts of ryots in this country are, according to law, moveable property, but the question whether such huts were, *in fact*, moveable or immoveable, was not a question referred to their Lordships. As regards execution, this may be true, as Atkinson on his work on Sheriff Law, speaking of what can be seized under a *fieri facias*, says at page 173: "Again of chattels, some go to the executor, "and some to the heir. As regards execu-"tion, this would seem to be a mere nomin-"al division: the distinction would seem to "be not between such as go to the executor "and such as go to the heir, but between "such as are capable of sale and such as are "not so."

It appears to have been at one time the practice in the Calcutta Court of Small Causes to seize tiled and thatched huts, but it is not now the practice to do so, probably owing to the word "goods" only having been introduced in Section 69 of Act IX. of 1850.—See Temple's Practice, p. 116.

In the case of Thakoor Chunder Pramanic and others *versus* Ram Dhone Bhuttacharjee, page 229, W. R., Vol. 6, it was held by my Lord the Chief Justice, delivering the judgment of the Full Bench, that the maxim *qui quid plantatur solo tolo cedit* has no application in India. His Lordship said: "We "think it clear that, according to the usages "and customs of this country, buildings and "other such improvements made on land do "not, by the mere accident of their attachment "to the soil, become the property of the owner "of the soil; and we think it should be laid "down as a general rule that, if he who makes "the improvement is not a mere trespasser, "but is in possession under any *bonâ fide* "title or claim of title, he is entitled either "to remove the materials, restoring the land "to the state in which it was before the im-"provement was made, or to obtain compen-"sation for the value of the building, if it is "allowed to remain for the benefit of the "owner of the soil—the option of taking "the building or allowing the removal of the "material remaining with the owner of the "land in those cases in which the building is

"not taken down by the builder during the "continuance of any estate he may possess."

It is alleged in the plaint that defendants will not allow the plaintiff to break and bring away the huts; it, therefore, becomes necessary to enquire what is the proper form of action to be adopted for the recovery of the huts or their value, and whether the suit, as laid in the plaint, is maintainable in a Small Cause Court, or in the ordinary Civil Court.

It cannot be contended that trover or detinue is maintainable, as the former is confined to the conversion of goods or personal chattels, and it does not lie for fixtures *eo nomine;* and the latter is the only remedy by suit at law for the recovery of a personal chattel in specie; nor can it be said that trespass is maintainable, as there has been no unlawful taking or injury to the huts; and if the huts are not considered personal property, trespass likewise is not maintainable, as the plaint shows that the plaintiff never had actual or constructive possession of the huts. I, therefore, think that the plaintiff's remedy is by action of ejectment in the ordinary Civil Courts, as it appears to me that Section 6 of Act XI. of 1865, when speaking of personal property, contemplates goods and chattels for which personal actions will lie, and does not contemplate things attached to the earth or permanently fastened to anything which is attached to the earth. The plaintiff's suit has accordingly been dismissed, subject to the opinion of the Hon'ble the Judges of the High Court.

The judgment of the High Court was delivered as follows:—

Peacock, C. J.—We think that the Small Cause Court Judge properly held that the suit, as laid, did not appear to fall within the cognizance of the Small Cause Court. It was brought for not allowing the plaintiff to remove the huts, in consequence of which the plaintiff sought to recover the huts or the value. If the huts belonged to the judgment-debtor, and were in his possession, and the plaintiff was put into possession of them by the officers of the Court, and the defendant afterward, without any right, took possession, and forcibly prevented the plaintiff from pulling them down, he might be liable to an action for damages. Nothing of the sort, however, was stated in the plaint.

The 17th August 1868.

Present:

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice*, and the Hon'ble Dwarkanath Mitter, *Judge.*

A tehsildar not a servant—Clause 2, Section 1, Act XIV., 1859.

Reference to the High Court by the Judge of the Small Cause Court at Midnapore.

Oroon Chunder Mundul, *Plaintiff.*

versus

Romanath Rukheet, *Defendant.*

No one for Plaintiff.

Baboo Ashootosh Dhur for Defendant.

A tehsildar is not a "servant" within the meaning of Clause 2, Section 1 of Act XIV. of 1859.

Case.—THIS suit was brought to recover arrears of salary, &c., due to the plaintiff on engagement, dated 22nd Kartick 1273, by which defendant employed him as a tehsildar or collector of rents with special powers, and with the stipulation for payment of a salary of Rupees 7 and a contingent allowance of eight annas per mensem.

Plaint stated that plaintiff was employed as tehsildar for the period of one year 10 months and 24 days, commencing from the 22nd Kartick 1273 (corresponding with the 5th November 1865), and ending with the 15th Ashar 1275 (which corresponds with the 28th September 1867), after which date plaintiff gave up his post, because his salary, &c., were not paid regularly; and that he has received only Rupees 78-2 out of Rupees 171 due at the stipulated rate of the full service, wherefore he sues for the arrears, Rupees 92-14.

The engagement of the 22nd Kartick 1273, executed by defendant in exchange for plaintiff's kubooleut, was to the following effect:—

"In compliance with your request, you "are hereby appointed tehsildar of Monseks "Dhunmapal, &c., in Pergunnah Jambonee, "in the place of the dismissed tehsildar "Bindabun Chunder Kuran. You are directed to perform your duties according to the "terms of your kubooleut; you will do no-"thing that is unlawful against an order. "Whenever necessary, you will, with our "permission, bring actions, &c., against the

"ryots, and recover the rents due from them. "You will receive a salary of Rupees 7, "and a contingent allowance of 8 annas per "mensem on account of tobacco, light, and "other charges."

Plaintiff, when examined by me, added that the arrears claimed were due for the period of one year and 10 days from the 4th Assin 1275, or 28th September 1867, so that, this suit having been preferred on the 15th May 1868, the portion of the claim for the 7 months and 27 days, from 18th September 1866 to 15th May 1867, falls beyond the term of one year from date of institution of the suit, and the remainder (for the 4 months and 13 days subsequent to the 15th May 1867) falls within one year, whilst the whole claim comes within three years computed from the same date.

It was objected in defence that this action is one to recover the wages of a servant to which Clause 2, Section 1, Act XIV. of 1859, should apply, and that, consequently, that portion of the claim which falls beyond one year calculated from the date of institution of the suit is barred by lapse of time.

The question on which I solicit the Hon'ble Court's opinion is: "Whether the limitation of one year prescribed in Clause 2, or that of 3 years under Clause 9 or 10, Section 1 of Act XIV. of 1859, is applicable to this suit."

In support of his argument, defendant's pleader cited the Hon'ble Court's decisions of the 23rd February 1866, on the reference by the Judge of the Small Cause Court of Kooshteah in the case of Nobin Chunder Mojoomdar *versus* Mr. F. J. Kenny,* Wyman's Reporter, Vol. I., Part V., page 15; but the circumstances of that case do not seem to me to be analogous to those of the present, inasmuch as there was no such engagement with the plaintiff in that case as there was with the present plaintiff; and considering the terms of that engagement and the responsibility thereby imposed on plaintiff, I cannot persuade myself to believe that he belonged to that class of domestic or menial servants to whom evidently the term "servant" in Clause 2, Section 1, Act XIV., refers, coupled as that term is with the words "*artizans* or laborers." Indeed, a similar view of the Clause in question was pronounced to be correct by His Lordship the Chief Justice, in the later ruling of the Hon'ble Court, dated 25th August 1866, on the reference by the Judge of the Small Cause Court of Santipore, in the case of Nitto Gopaul Ghose, a mooktear, *versus* Mr. A. B. Mackintosh,† Wyman's Reporter, Volume II., Part V., page 16, and this last ruling is, in my opinion, applicable to the present suit.

There is, it is true, more or less distinction or difference between the position or office of a mooktear and the position or office of a tehsildar, but there was a written engagement with the plaintiff in this case similar to the engagement with the plaintiff in the other, and though the engagement with the present plaintiff was executed on plain paper, that defect has been remedied by the payment of the prescribed duty and penalty, and the deed must be held to be as good a written contract as that in the case of the mooktear, whilst in both the engagements there was the same distinct contract or stipulation for the payment of a final rate of salary per month.

Finding, therefore, that the limitation of 3 years under Clause 9 or 10, Section 1, Act XIV. of 1859, is applicable to this suit, I have awarded a decree in full of plaintiff's claim, contingent on the decision of the Hon'ble Court on this reference, which is made on the application of defendant's pleader.

Judgment of the High Court.

Peacock, C. J.—It appears to us that a tehsildar is not a servant within the meaning of Clause 2, Section 1 of Act XIV. of 1859, and that, consequently, the suit is not barred.

The 17th August 1868.

Present:

The Hon'ble J. B. Phear and C. Hobhouse, *Judges.*

Joint claims — Limitation — Evidence of defendant—Evidence to execution of a document.

Case No. 426 of 1868.

Special Appeal from a decision passed by the Principal Sudder Ameen of Chittagong, dated the 7th December 1867, reversing a decision passed by the Moonsiff of Seetakoond, dated the 15th June 1867.

* *See* 5 W. R., S. C. Court Ref., p. 3.

† *See* 6 W. R., S. C. Court Ref., p. 11.

Ram Comul Chuckerbutty (one of the Defendants), *Appellant*,

versus

Nund Ram Coolal and another (Plaintiffs), *Respondents*.

Baboo Kishen Succa Mookerjee for Appellant.

Baboo Bama Churn Banerjee for Respondents.

Where the plaintiffs in a suit put forward a joint claim, it is not enough that one of them makes out his title; the suit should be dismissed unless the *joint* claim is established.

Similarly, when the question of limitation is raised in such a case, the plaintiffs must satisfy the Court that there has been *joint* enjoyment of the property by themselves or their respective predecessors within the period of limitation.

There is no rule of law prohibiting a Court of justice from receiving the evidence of a defendant in favor of his co-defendant.

The best evidence in support of a deed of gift are the witnesses to its execution or its custody; it is not necessary to support it by documentary evidence.

Phear, J.—We think that there has been an entire mis-trial of this case in the Lower Appellate Court. In the first place, it is clear that the question of limitation was raised before the Principal Sudder Ameen, for he deals with it and decides it; but in so doing, he undoubtedly has neglected to enquire fully into matters necessarily involved in that issue. He ought not to have confined his attention to the date of the alleged deed of gift to the defendants; he ought also to have satisfied himself whether, before that deed of gift, supposing it to be genuine, there had been *joint* enjoyment by Soodharam and Ramdyal within a period of 12 years antecedent to the institution of the suit.

Again, with regard to the *chittah* which the Principal Sudder Ameen has treated as if it were the title-deed of the plaintiffs, he has contented himself with relying upon evidence as to its authenticity, which really is quite insufficient for the purpose. Whether or not there is better evidence on the record, we have not been informed.

Further, the Principal Sudder Ameen appears to us to have committed very grievous error in the way in which he has dealt with the testimony given by the co-defendants of the special appellant. He seems to think that, because these persons are, as he says, in the category of defendants in the case, therefore their evidence is necessarily suspicious, and ought not to be taken in favor of their co-defendant. Now, no mistake can be really much greater than this. If any rule of practice of this kind obtained, it would be in the power of the plaintiff in any case to entirely destroy all the oral testimony which the defendant could bring forward, by the simple device of making all his witnesses defendants in the case, and it might be well worth the plaintiff's while to do so even at the risk of having his suit dismissed with costs as against all these. But, in truth, there is no such rule. Possibly the Principal Sudder Ameen had in his mind, when he wrote this judgment, that the written statement of one of the defendants, while it is very good evidence against himself, could not be used either for or against a co-defendant. But this is a very different thing from saying that the evidence of the man himself given upon oath or solemn affirmation is not to be received in a Court of justice for as much as it is intrinsically worth, relative to the merits of the case, merely because he is a defendant in the case.

The Principal Sudder Ameen also laid down that it was incumbent upon the defendant, in order to prove his deed of gift, to produce some other documentary evidence in support of it. And he complains that instead of documents the defendant has only brought to support it six witnesses! We are quite unable to understand this reasoning. If every document, in order to be available as evidence in a Civil Court, requires to be supported by another document, it is obvious that the series would be never-ending, for we suppose this second document must again, for the same reason, be supported by another document, and so on, *ad infinitum*. Really a proposition of this kind is almost too absurd to be put forward with any degree of seriousness, and we repeat that we are quite unable to understand what was passing in the mind of the Principal Sudder Ameen when he refused to listen to the very best evidence which the defendant could in truth give in support of his deed of gift, namely, the witnesses who could speak to its execution or its custody, solely on the ground that there was no document to support it.

On the whole, it seems to us that this judgment of the Lower Appellate Court is so defective, both as regards the investigation of the issues which lay before the Court, and also as regards the observance of the principles which ought to govern a Court of justice in such an investigation, that we feel obliged to reverse the decision of the Principal Sudder Ameen, and to remand the case to him for re-trial upon the

evidence which is on the record. In re-trying the case, he ought to bear in mind that the suit puts forward a joint claim, and should be dismissed unless that joint claim is established. It is not enough that one of the two plaintiffs should make out title to the tank. And, similarly, in enquiring into the issue of limitation, he must satisfy himself whether or not there has been joint enjoyment by the plaintiffs or their respective predecessors within the period of limitation. And if he should think, after giving this point consideration, that the suit is not barred, he should look very carefully at the chittah which is put forward by the plaintiff; he ought not to allow it to be evidence in the case, unless it is proved either by witnesses who saw it executed, or, if none such are available, by witnesses who can speak to its custody. Above all, he ought to see whether it is really a title-deed giving a right of property, or whether it is nothing more than a mere license authorizing an act to be done upon the lands which otherwise would be an act of trespass.

The two issues which the Court will have before it will be, *first*, the issue of limitation; and, *secondly*, whether the plaintiffs have made out a joint title to the tank and its banks, which are the subject of the suit. Costs will abide the event.

The 17th August 1868.

Present:

The Hon'ble J. B. Phear and C. Hobhouse, *Judges.*

Joinder of causes of action.

Case No. 377 of 1868.

Special Appeal from a decision passed by the Officiating Judge of Shahabad, dated the 9th December 1867, affirming a decision passed by the Principal Sudder Ameen of that District, dated the 16th July 1867.

Habeel Beparee (one of the Defendants), *Appellant,*

versus

Choalmun Mah (Plaintiff) and another (Defendant), *Respondents.*

Mr. C. Gregory and *Baboo Annund Chunder Ghossal* for Appellant.

Baboos Romesh Chunder Mitter and *Shib Chunder Chatterjee* for Respondents.

Where the payer of a hoondee in a suit to recover the amount of the same made four persons defendants, *viz.*, the drawer and the acceptor of the hoondee, his own endorsee, and a party whom plaintiff alleged to be the principal, whose agent was the drawer, the suit was held to be a combination of four suits in one, not to be allowed by the Civil Courts.

Phear, J.—THIS is a suit brought by the payer of a hoondee to recover the amount of the same, and he makes the following four persons, defendants—the drawer of the hoondee Koran Manjee, the acceptor of the hoondee Kartick Hazra, Kunhya Loll, his own endorsee of this hoondee, *viz.*, the person to whom he had endorsed it, but who afterwards re-conveyed it to him, and, finally, the person who has been treated as the principal defendant, Habeel Beparee, but whose name does not appear upon the document at all. However, the plaintiff says that Koran Manjee did not draw the hoondee on his own account, but acted in the matter solely as agent of Habeel Beparee, and that he is, therefore, entitled to treat Habeel Beparee as actual drawer.

We think that we ought not to proceed to give our decision in this case without remarking that the combination of four distinct suits in one is an occurrence that ought not to have been allowed to take place by either of the Lower Courts, and it is observable that if the plaintiff's case be a correct one, two out of the four defendants are persons against whom he has no cause of action at all. If Habeel Beparee, whom he now treats as the principal defendant, and who, indeed, is the only person that appears before us on appeal, is liable to him on the hoondee, then Koran Manjee is not liable, because he must have acted as agent only. And it is so obvious as hardly to need being pointed out, that Kunhya Loll, the plaintiff's own endorsee, could not with propriety be made the defendant in a suit by the plaintiff on the very hoondee which he himself endorsed to Kunhya Loll, unless, of course, the endorsement to him by Kunhya was a re-endorsement in the way of business, and such as made Kunhya Loll liable to pay the plaintiff the amount of the hoondee. But this is not suggested for a moment. In this case, Kunhya Loll simply endorsed back to the plaintiff, in order that the plaintiff might sue upon the hoondee.

* * * * * * *
* * * * * * *

The 19th August 1868.

Present:

The Hon'ble L. S. Jackson and Dwarkanath Mitter, *Judges.*

Limitation — Adverse possession — Joint family property.

Case No. 393 of 1868.

Special Appeal from a decision passed by the Principal Sudder Ameen of Beerbhoom, dated the 29th November 1867, reversing a decision passed by the Moonsiff of that District, dated the 27th November 1866.

Brokobhanoo Dossia (Plaintiff), *Appellant,*

versus

Huro Soonduree Dossia and others (Defendants), *Respondents.*

Baboo Khettur Mohun Mookerjee for Appellant.

Baboo Luckhee Churn Bose for Respondents.

A Hindoo widow was held to be barred by limitation in a suit to recover the undivided half of her husband's estate, of which she had allowed the defendant to remain in possession for more than 12 years.

Jackson, J.—THE one point which is decisive in this case is that the plaintiff's suit is barred by limitation. She, having been in the enjoyment of an undivided half of her husband's estate since the death of her husband, has allowed the defendant to remain in the enjoyment of the other undivided half, and a period of more than 12 years has expired. It is quite clear that the suit now to recover possession of the half which has been allowed to remain in the defendant's hand, upon the ground that the plaintiff was entitled to the exclusive possession, must be too late. That being so, there can be no other point in this case. The decision of the Lower Appellate Court must be affirmed, and the special appeal dismissed with costs. We cannot help saying that the plaintiff has been extremely ill-advised in this litigation throughout.

The 19th August 1868.

Present:

The Hon'ble H. V. Bayley and A. G. Macpherson, *Judges.*

Attachment—Sections 235, 239, and 240, Act VIII., 1859—Service of process—Laches of Court's officers.

Case No. 145 of 1867.

Regular Appeal from a decision passed by the Principal Sudder Ameen of Rajshahye, dated the 29th March 1867.

Indro Chunder Baboo and another (Plaintiffs), *Appellants,*

versus

Mr. Hamilton Grant Dunlop, Manager on behalf of the Agra and Masterman's Bank, and others (Defendants), *Respondents.*

Mr. Lowe and *Baboo Kishen Kishore Ghose* for Appellants.

Mr. R. T. Allan and *Baboo Bhowanee Churn Dutt* for Respondents.

To render an attachment of land or any interest in land effectual so as to render a subsequent alienation void (with reference to Sections 235, 239, and 240 of Act VIII. of 1859), the several processes prescribed in Section 239 must be gone through, *i. e.*, (1) the written order of attachment issued under Section 235 must be read aloud at some place on or adjacent to the land or property attached; (2) the written order must be fixed up in some conspicuous part of the Court-house; and (3) the written order must be fixed up in the office of the Collector of the zillah in which the land is situated.

Macpherson, J.—I DO not think it is necessary to call upon the respondents to support the judgment of the Court below, because it is impossible, upon the evidence, to hold that the attachment was made in the manner prescribed by law so as to be an attachment within the meaning of Section 240 of Act VIII. of 1859. It is clear that this property was not attached so as to make a subsequent alienation of it *void.* Section 235 of the Act says: "Where the property "shall consist of lands, houses, or other im-"moveable property, the attachment shall "be made by a written order prohibiting "the defendant from alienating the property "by sale, gift, or in any other way, and all

"persons from receiving the same by pur-"chase, gift, or otherwise."

Section 239 says: "In the case of lands, "houses, or other immoveable property, "the written order shall be read aloud at "some place on or adjacent to such lands, "houses, or other property, and shall be "fixed up in some conspicuous part of the "Court-house, and when the property is "land or any interest in land, the written "order shall also be fixed up in the office of "the Collector of the zillah in which the "land may be situated." And then Section 240 says: "After any attachment shall have "been made by actual seizure or by written "order as aforesaid, and in the case of an "attachment by written order *after it shall "have been duly intimated and made known "in manner aforesaid*, any private alienation "of the property attached, whether by sale, "gift, or otherwise, and any payment of the "debt or debts, or dividends or shares to the "defendant during the continuance of the "attachment, shall be null and void."

The appellants in this case contend that, before the mortgage to the Agra Bank, they had attached the property, and that the mortgage is consequently void. There is evidence that a written order prohibiting the alienation of the property was issued; and we may take it to be proved that that order was read aloud at some place on or adjacent to the lands, houses, or other property to which the order related. But it is not proved that the order was fixed up in the Court-house or in the office of the Collector of the zillah; on the contrary, there is the positive evidence of the nazir and of the decree-jaree mohurrir that the order was never fixed up either in the Court-house or in the Collectorate. Under these circumstances, it appears to me that the property was not duly attached.

The objection is by no means a technical objection. The affixing the notice in the Court-house and in the office of the Collector is a far more certain means of giving information to the parties immediately interested, than is the process of reading the notice aloud on the land or on some place adjacent to it. A man can always arrange so as to keep himself acquainted with all notices fixed up in the Court of the Judge or the Collector of a District. But there can be no certainty that he will happen to hear or to be made acquainted with orders which are merely read aloud on his land or on some place adjacent to it In the case before us, it is not proved that the judgment-debtor was in personal possession of the lands which were the subject of attachment, and there is nothing whatever to show or to lead to the presumption that he was acquainted with the fact of the order of attachment having been read aloud by the peon who was sent to attach the property. The probability of the judgment-debtors having known that the attachment had been issued would have been far stronger if the order had been fixed up in the Court-house or in the office of the Collector.

Section 240 says that alienations after attachment are to be void, if the attachment or the written order "shall have been duly intimated and made known in manner aforesaid." The words "manner aforesaid" relate to the provisions of Section 239, and when two out of the three methods prescribed by that Section for intimating and making known attachments have been wholly omitted, it cannot possibly be said that the order of attachment was duly intimated and made known within the meaning of Section 240.

The fact that the attachment was not duly intimated or made known has not been shown to us to have been owing to the *laches* or default of the appellant; for the process having once been put into the hands of the officers of the Court for execution, the responsibility of carrying out the details properly clearly rested with them, except in so far as the appellants may have been bound to point out the particular parcels of land which they wished to attach, and to render any other reasonable aid which was in their power to the officers who had to execute the process. Section 222 of Act VIII. of 1859 enacts that "every warrant for the execution "of a decree shall bear the date of the day on "which it is issued, and shall be signed by "the Judge and sealed with the seal of the "Court, and delivered to the nazir or other "proper officer of the Court. A day shall "be specified in the warrant on or before "which it must be executed, and the nazir or "other proper officer shall endorse upon the "warrant the day and the manner in which it "was executed, or, if it was not executed, the "reason why it was not executed, and shall "return it with such endorsement to the "Court from which it issued."

We have it from the mouth of the nazir of the Court of the Judge of Rajshahye, not only that two out of the three forms necessary to be gone through to perfect an attachment were omitted in this case, but that it used to

be the practice of the officers of the Court systematically to omit these forms in all cases. We have seen that Section 222 directs that every warrant for the execution of a decree, when signed by the Judge, shall be delivered to the nazir for execution. The nazir, however, seems from his evidence to consider himself only partially responsible for seeing that the execution is properly carried out. He says: "If any notice" (I read from the Judge's notes) "has to be affixed in the Collector's "office, the custom always is to send it to the "Collector with a roobocaree. The roobo-"caree does not go through my hands. The "decree-jaree mohurrir would know whether a "roobocaree was sent." Further on, the nazir says: "*I cannot say what is the proper "way, according to the law, for attaching "houses and lands.* No written order was "fixed up in the Court-house regarding the "attached property. For the last two years, "notices of non-interference have been issued. "*Before that, the custom was to attach, as "has been done in this case.*" The decree-jaree mohurrir alluded to was also examined as a witness, and he declared that it was not the custom in the office to cause notices of attachment of land to be fixed up in the Court-house, and that no notice regarding the attachment in this case was sent to the Collector's office. We have, on the one hand, the express directions of Section 239 perfectly clear and distinct, so that any man who reads the words can understand their meaning; on the other hand, we have the practice or custom of the Court of the Judge of Rajshahye.

It is quite inconceivable that the nazir of the Court should venture openly to say he does not know what the provisions of the law are as to the mode of attaching property. If the nazir of the Court does not know how property is to be attached, he is not fit for the office he holds. If it is not the nazir's business to know how to attach property in execution of a decree, the question arises, whose business is it? Without answering that question decisively at present, or expressing any opinion as to who is the individual specially to blame in this case, I shall merely observe that one who undertakes the office of nazir, or any other important executive office in the Court of a Zillah Judge, ought to bear in mind that, by accepting the post, he also accepts certain responsibilities, and that it is quite possible that he may make himself personally liable for any sums of money which ought to have been realized through him, but which, by reason of his culpable ignorance or indifference or neglect, are not realized by him under a warrant which has been entrusted to him for execution. The nazir says that giving notice to the Collector's office was not his duty, but that of the decree-jaree mohurrir. What the precise position of the decree-jaree mohurrir may be in the Court of the Zillah Judge, I am not prepared to say. But I am quite prepared to say this, that, if parties get proper orders of attachment under Section 235, and pay the necessary fees, and those orders are made over in the ordinary course of business to the proper officers of the Court for execution, and if the execution proves fruitless, through no default on the part of the decree-holder, but merely through the gross neglect of the officers of the Court, those officers are personally liable, and can be compelled to make good to the decree-holder that which might have been recovered but for their negligence, if the neglect can be brought home to them. It is, in truth, a perfect scandal that we should have before us the evidence (taken within the last few weeks) of a nazir and a decree-jaree mohurrir of an important district like Rajshahye, the one of whom says he does not know in what manner the law directs property to be attached in execution of a decree, and the other of whom seemingly ignores the existence of such a thing as Act VIII. of 1859, and says it was not, till recently, his custom to fix up the notices of attachment in the Collector's office. The proceedings connected with the execution of decrees are worse conducted and more productive of abuses than any other proceedings in our Courts. It is not to be wondered at that such should be the case when the chief executive officers of a Zillah Judge's Court are found coming forward and openly professing themselves as ignorant and negligent, as the nazir and decree-jaree mohurrir in this case themselves say they were.

The omission and neglect of duty which have occurred, whoever is responsible for them, are fatal to the attachment, and, therefore, I think this appeal must be dismissed with costs. The appellant's Counsel urged that, even supposing the mortgage to the Agra Bank to be good, still the equity of redemption remains liable to be attached and sold. But this suit is not one framed with reference to the equity of redemption; and our decision in this suit does not affect any ques-

on which may arise as to the equity of redemption.

Bayley, J.—With reference to Sections 235, 239, and 240 of the Code of Civil Procedure, I am of opinion that the *three* processes, *viz.*, (1) the reading aloud of the proclamation in some conspicuous part or place adjacent to the lands attached; (2) the fixing of notice in the Collector's office; and (3) affixing the notice in the Court-house, must be all three done in order to render an attachment effectual as an injunction against alienation.

It is quite clear from the evidence of the officers of the Rajshahye Court in this case that the rules prescribed by the Procedure Code for the attachment of property in execution of decree have not been observed, and that legally there has been no attachment.

I would remark that it is no less the duty of the presiding officer than of his subordinates to observe, and cause the observance of these rules, and that the provisions of the Sections above cited should have been strictly followed.

I would add in this case that, although no claim for equity of redemption, which the plaintiff may have, can be now decreed, because it was not for that that this suit has been brought, still this decision will be no bar to such a claim.

The appeal is dismissed with costs.

The 19th August 1868.

Present:

The Hon'ble H. V. Bayley and A. G. Macpherson, *Judges.*

Documentary evidence (copies and originals)—House-rent—Purchaser at sale in execution.

Case No. 2886 of 1867.

Special Appeal from a decision passed by the Judge of East Burdwan, dated the 24th July 1867, reversing a decision passed by the Principal Sudder Ameen of that District, dated the 14th February 1867.

James Fegredo (Defendant), *Appellant,*

versus

Mahomed Moddessur and others (Plaintiffs), *Respondents.*

Messrs. G. C. Paul and *C. Gregory* and *Baboo Taruck Nath Sein* for Appellant.

Baboos Onookool Chunder Mookerjee, Otool Chunder Mookerjee, and *Anund Chunder Ghossal* for Respondents.

Though a copy of a document should not be put in as evidence when the original itself is available, yet in a case in which a copy of a letter was filed without objection in the Court of first instance, and the writer of the letter (one of the defendants) was cross-examined as to it, the Lower Appellate Court was held not to be justified in refusing to consider that the copy was evidence of the letter.

Where the right, title, and interest of the owner of a house are purchased at a sale in execution, and the purchaser find the house in the occupation of a lessee at a fixed rent, his giving the lessee notice that, after a certain date, he intends to charge him at a particular rate, does not give him a right to rent at that rate. If not content with the rate fixed in the lease, he can only get such sum as the Court finds to be a fair and reasonable rent.

Macpherson, J.—The plaintiffs, who are respondents in this appeal, sued the appellant for rent of a house known as "Captain Saheb's Kootee" in the station of Burdwan.

The plaintiffs, in February 1864, purchased the property at a sale in execution of a decree against Dad Ali and Mahomed Ali; and they allege that the house was the joint property of Dad Ali and Mahomed Ali, who were interested in it in equal shares, and that the plaintiffs, having purchased the right, title, and interests of Dad Ali and Mahomed Ali and their representatives, are entitled to the whole property.

The plaintiffs, on the 14th August 1865, served the appellant with notice to quit, the notice adding that, if he did not quit, he would be charged with rent at the rate of Rupees 100 per month in lieu of Rupees 40, which was the rent paid by him up to that time.

The appellant's defence is that he holds a lease of the house from Akburunnissa and Nujmunnissa, the two widows of Dad Ali, and that that gives him a good title as against the plaintiffs. His case is that Mahomed Ali and his representatives had, at the date of the attachment under which the plaintiffs purchased, no interest whatever in this house; and that the lease granted him by the widows is prior in date to the attachment.

It is admitted by all parties that the house originally belonged to Khyrat Ali, the father of Dad Ali and Mahomed Ali. The appellant alleges that Khyrat Ali made a will by which he left one-third of this property to each of his sons, and gave the remaining one-third to be held by Dad Ali alone as *wuqf;*

that subsequently Mahomed Ali gave up all his interest in the one third which had been left to him, and thereupon Dad Ali made the whole property *wuqf*, and eventually died, leaving a will by which he gave the estate as *wuqf* to his two widows, in the proportion of 10 annas to Nujmunnissa and 6 annas to Akburunnissa. The appellant contends that, in this manner, the lease given to him by the widows is not affected by the sale at which the plaintiffs purchased.

The appellant, on the 4th of Bhadro 1269, obtained a lease of this house, but it was executed by Akburunnissa only. The house was attached in execution of the decree under which it was subsequently sold to the plaintiffs on the 29th Magh of the same year; but prior to that (on the 12th Aghran) the appellant alleges he got a letter from Nujmunnissa ratifying and confirming the lease which Akburunnissa had granted. In Assin 1270, Nujmunnissa executed a formal lease of her share in this house and other properties to the appellant.

The appellant, besides denying the plaintiff's right *in toto*, pleaded further that he had spent a large sum in repairing the house, and that the widows agreed to allow him 2,000 rupees for the repairs, with interest at 5 per cent., and had consented to Rupees 10 per mensem being deducted from the rent in re-payment of the amount so expended by appellant; and he claimed the benefit of this arrangement as against the plaintiffs, if liable to them at all.

The Principal Sudder Ameen was of opinion that it had already in another suit, referred to as No. 26 of 1858, been decided that the supposed will of Khyrat Ali was a forgery; and he held that it was not proved that the property was left as *wuqf* by Dad Ali; that it appeared that, on the death of Khyrat, his sons Dad and Mahomed succeeded to the property in equal shares; that Mahomed relinquished and gave up his share to Dad, who consequently died proprietor of the whole; and that Dad left a will by which he gave the whole 16 annas to his widows in the proportion of 10 annas to Nujmunnissa and 6 annas to Akburunnissa. The Principal Sudder Ameen also found that it had been already decided in certain suits, known as Nos. 7 and 8 of 1864, that the widows did not possess any rights (as against the plaintiffs) in the property; that the lease which had been granted prior to the plaintiffs' purchase could not be set aside by the plaintiffs, but that the plaintiffs were entitled to the rent due under it; and that the appellant could not claim from the plaintiffs any deduction on account of repairs or under the agreement entered into between him and the widows. The Principal Sudder Ameen gave the plaintiffs a decree for rent at the rate fixed by the lease, namely, Rupees 40 per month.

An appeal was preferred by the plaintiffs to the Judge, and by way of cross-appeal the defendant Fegredo objected to the first Court's decision as to the sum of 2,000 rupees claimed for repairs done by him.

The Judge held that the lease was granted by Akburunnissa *bonâ fide*, but that the alleged ratification by Nujmunnissa by letter prior to the attachment was not proved, because the letter produced by the defendant was a copy, and the lady, although examined as a witness in the suit, had not been questioned as to this letter—and further because, although the original document was, when the appeal was before the Judge, produced from the record of another case, it appeared that its genuineness was not distinctly established or adjudicated upon in that case—and lastly because the defendant Fegredo had not deposed on oath to the circumstances under which Nujmunnissa gave him the letter. The Judge also held that Nujmunnissa's formal lease was given after the attachment, though before sale, and that, although Akburunnissa's lease was good as to the 6 annas to which the Principal Sudder Ameen had declared her to be entitled under Dad Ali's will, the plaintiffs could set the lease aside as to the other 10 annas, as to which the lease was in no way binding upon them.

The Judge, however, thought that Fegredo was entitled to a fair sum for repairs done, as such repairs were requisite; and he remanded the case for further investigation as to the amount due for repairs. A decree was given to the plaintiffs for rent at the rate of 100 rupees per month for the 10-annas share from the date of the plaintiffs' notice to quit or pay the higher rent, but subject to a deduction for what might be found due for repairs.

The material questions raised by the appellant in his special appeal to this Court are:—

I.—That, as the Judge accepts as genuine, and acts upon the will of Dad Ali, so far as it gives this house to his widows in the pro-

portion of 6 annas and 10 annas, he ought to have accepted the will as genuine, and to have acted upon it so far as it declared the house to be *wuqf*, and treated it and left it to his widows as such.

II.—That the Judge has rejected the evidence in support of Nujmunnissa's letter of ratification on no legal grounds, as it was not for the defendant to cross-examine Nujmunnissa as to her ratification, that lady having deposed that she did as a matter of fact give it, and it being for the opposite party to cross-examine her on that point.

III.—That the former decisions relied on do not prove the property not to be *wuqf*.

IV.—That the lease granted by Akburunnissa being undoubtedly good for her share, and Nujmunnissa having stood by and allowed the defendant to take the lease and enter on possession and make extensive repairs, the plaintiffs cannot now avoid the lease.

V.—That the Judge was wrong in considering 100 rupees per mensem to be due for the 10 annas share, when plaintiffs themselves claim only 100 rupees per mensem as for the whole 16 annas.

VI.—That the mere giving notice that, after a certain date, defendant was to be charged at the rate of 100 a month, does not entitle plaintiffs to a decree at that rate, unless they prove that the sum named in the notice was a reasonable and proper rent, looking at all the circumstances.

By way of cross-appeal, the plaintiffs urge that the order of remand was wrong, and that they were in no way liable to the defendant in respect of repairs done.

The reasons given by the Judge for considering the alleged confirmation by Nujmunnissa not to be proved are quite insufficient and based upon a mistake as to the evidence given by Nujmunnissa when she was examined.

He says: "With regard to the evidence "regarding the pottah by which the defendant is in possession, the Court concurs "with the Principal Sudder Ameen in finding that the pottah of Akburunnissa is a "*bonâ-fide* lease; but it considers that the "alleged confirmation of the said pottah by "the other widow Nujmunnissa has been "considered established without sufficient "proof of the same having been adduced, "for only a copy of the letter said to have "been written by her to this effect was produced in the Lower Court; and though the "deposition of that lady was taken, she was "not questioned with regard to that letter. "The original has been produced to-day by "the defendant, and the record in which it "was previously filed has been inspected at "the request of the appellant, and it is "found that in that case the Moonsiff did "not decide as to the genuineness of the "document, and that the Judge in appeal "did not mention it at all. Under these "circumstances, the Court is of opinion that "the said confirmation of the lease granted "by Akburunnissa has not been established "in evidence."

Now, we do not mean to say that the letter in question was put before the Court in a regular manner. But the copy of the letter having, without objection on the part of the plaintiffs, been put in evidence in the Court of first instance, the reasons given by the Judge do not justify his reversing the Principal Sudder Ameen's decision which accepted this copy as evidence. No doubt, it was wrong to put in merely a copy when the original itself was available, which it was, although filed in another suit. Yet not only was no objection taken in the Principal Sudder Ameen's Court on the ground of its being only a copy, but the plaintiffs' pleader (the original not being then before the Court) cross-examined Nujmunnissa as to this letter. It appears from the deposition on the record that in her examination-in-chief (on behalf of the defendant), Nujmunnissa was asked in effect: "Did you grant a *roka* (or letter) sanctioning the settlement made by Akburunnissa on the 4th Bhadro 1269 for the Captain Sahib's house," &c. To this she replied: "I have given my consent to the settlement made of this house on the 4th Bhadro," &c. In cross-examination, the plaintiffs' pleader asked her: "When "and where did you grant this *roka* just "now attested by you, and who wrote the "same?" The answer is: "It was written "by my mooktear at my house in," &c.

Reading her deposition as a whole, it is clear that the Judge is wrong in saying that Nujmunnissa was not questioned as to that letter. She was asked as to the letter, and she spoke to it or "attested it"; and it was to this letter that she referred when she said she had given her consent to the settlement. It is true that defendant did not ask her particularly on what date she gave her consent; and that the plaintiffs, although they asked the question, did not get any answer to it. But we are of opinion, bearing in mind the

circumstances under which, and the manner in which, such examinations are usually conducted in the mofussil, that on the whole, this witness did (supposing her evidence was to be believed, which is a matter for the Judge, and not for us to decide) *primâ facie* prove the letter of confirmation. If the plaintiffs really meant to contend that the letter was not written on the day on which it purports to have been written, they should have insisted on an answer to their question on this point. The original was produced before the Judge; and if the Judge thought he could not look at the copy because it was only a copy, he should have given the parties an opportunity of proving the original, even at that stage of the proceedings. It is a very great hardship on a suitor to be allowed without objection to put in a copy as evidence in the Court of first instance, and to be thrown out by the Appellate Court on the ground that the copy was not in strictness admissible. Still more is it a hardship on him when he is able, as in this case, when before the Appellate Court, to produce the original, but it is rejected without his being called on to prove that it is what it purports to be. Why the Judge did reject the original we do not exactly know; for the fact that another Court did not in another suit decide whether the letter was or was not genuine could be no possible reason why the Judge should in this case declare it not to be genuine.

No issue was raised or tried in the Court of first instance as to the date on which Nujmunnissa first confirmed the lease to the appellant; and we think it necessary that the issue should now be properly tried and decided, fresh evidence being gone into for this purpose. Both the appellant himself and Nujmunnissa should be examined strictly as to the exact date on which, and circumstances under which, the letter of confirmation was given.

These premises are no doubt treated by Dad Ali in his will as *wuqf*, at the same time that they are left in the proportion of 6 annas and 10 annas to his widows. The Judge adopts and acts upon the gifts to the widows, but does not recognize or give effect to so much of the will as treats this property as *wuqf*. Now, it may be, as the Principal Sudder Ameen says, that the will of Khyrat Ali has been declared by a competent Court to be a forgery, and that this house never came as *wuqf* into the hands of Dad Ali and Mahomed Ali. But when the Judge finds as a fact that before he died, the whole of these premises vested absolutely in Dad Ali, it is matter for consideration whether there is any thing to prevent Dad Ali from himself making them *wuqf*, and leaving them as such to his widows. If the question as to this house being in the hands of the widows as *wuqf* has been determined by a judicial decision which is conclusive against the parties in this suit, of course there is an end of the matter. But the case has been so badly tried, and the record before us is in such a state of confusion, that we cannot find out that there really is any decision of this point which is binding. The decisions in cases Nos. 7 and 8, which are referred to by the Principal Sudder Ameen have been long since reversed, and new judgments have (it is stated at the Bar) been passed in those cases. If this be so, the Lower Appellate Court's judgment (so far as this matter is concerned) is clearly based on no substantial ground. The issue as to whether the lands came to the hands of the widows as *wuqf*, and was *wuqf* at the time the lease was given by Akburunnissa to the appellant, has not been properly or fully tried, and it must be tried again on the remand. As already said, it is possible that the property may be *wuqf* of the creation of Dad Ali, even though it was not made *wuqf* either by Khyrat Ali or by Mahomed Ali. This question must now be distinctly disposed of. The Judge must consider and state with precision in his judgment what particular decisions, if any, still unreversed, relating to the matters in issue in this suit are in evidence, and are binding on the parties.

When we say that this property was possibly made *wuqf* by Dad Ali, we do not forget that though Dad Ali may have intended to make it *wuqf*, he may not have succeeded in doing so. That is one of the points which the Lower Court has to decide. If the dedication of the property for religious purposes was not *bonâ fide*, but was merely nominal, it would not be valid *wuqf* as against the plaintiffs.

There is another important point in which the judgment of the Lower Appellate Court is wrong. If the appellant's case is eventually held to be good as to a 6-annas share, but bad as to the remaining 10-annas share, it may be that the plaintiffs are entitled to eject the appellant, and it may be that they are entitled to recover from him rent for the 10-annas share at a

fair and reasonable rate. But the mere fact of the plaintiffs having given him notice that they, after a certain date, intended to charge him at a particular rate does not give them any right to a decree for rent at that rate. If they are not content with rent at the rate fixed in the lease, they can get only such a sum as the Court finds is, under all the circumstances of the case, a fair and reasonable rent for the use and occupation by the defendant of the 10-annas share. No inquiry has yet been made by the Lower Courts on this head; and this inquiry must now be made, if the Court shall, on re-hearing the case, still be of opinion that the plaintiffs are entitled to any rent at all from the appellant. In deciding what is a fair and equitable rate for the defendant to pay, the state of the house when he entered upon the occupation, and the reasonable and necessary repairs executed by him since his entry, may properly be taken into consideration.

The appellant is also right in saying that the plaintiffs claimed only 100 rupees a month as for the whole house; and the Judge is wrong in giving them that sum for only a 10-annas share of it.

I do not think there is any thing in the point made by the appellant that the lease of the 10-annas share, as well as of the 6-annas share, should be held to be binding upon the plaintiffs, because Nujmunnissa—even supposing her not to have in the first instance and before the attachment, confirmed and ratified the lease given by Akburunnissa—stood by and allowed the appellant to enter under the lease and to expend money in the repairs of the house. There is no evidence to show that Nujmunnissa in any way (save so far as the confirmation which has been pleaded extends) by her conduct induced the appellant to take the lease, or did anything which would have prevented her from at any time saying that the lease was bad so far as her 10-annas share was concerned.

As regards the cross-appeal of the plaintiffs, it is clear that their liability to the deduction claimed for repairs depends entirely on the date of the agreement to allow such deduction entered into by the widows. If it was entered into before the attachment, it is binding on the plaintiffs exactly in the same degree as the lease. If it was entered into after the attachment, it cannot in any way bind the plaintiffs.

The Judge finds that the agreement, so far as Nujmunnissa was concerned, was subsequent to the attachment. But the letter of Nujmunnissa relied on by the appellant (on the question of repairs) on the face of it bears date anterior to the attachment, and the Judge does not state why he declares it to be subsequent—which he ought to have done, if he considers the letter to which I allude to be a genuine document—and he has not found expressly that it is not so. It seems to me that this matter also requires to be considered, and that there must be an express decision as to whether or not Nujmunnissa entered into the agreement as to repairs, on which the appellant relies, and entered into it at the time the appellant says it was entered into.

The case is really a very difficult one, involving many very complicated and intricate questions, and the consideration of the effect of various previous decisions, the effect of which it is not easy to ascertain accurately. Moreover, the case has been put very badly, and in the most confused manner possible, before the Lower Courts. But it is impossible to discover and declare the true relative positions of the parties without going with the utmost precision and accuracy into all the details of what has occurred, both in the results of previous litigation as to this property, and in the course of the dealings between the appellant and the widows in relation to the giving the lease to the appellant and subsequent thereto. The judgment of the Lower Appellate Court is reversed with costs, and the case is remanded that it may be re-tried *de novo* with reference to the above remarks.

As to the issues on which evidence has not yet been taken, the Judge may perhaps consider it necessary to refer them (under Section 354 of the Civil Procedure Code) to the Court of first instance, in order that additional evidence may be taken. But whatever Court takes the further evidence must take it carefully and properly; and if Nujmunnissa and the appellant are re-examined, their examination must be a strict and practical one, such as is likely to throw some light on the questions in dispute, and not a mere formal or nominal examination, such as that to which Nujmunnissa was in the first instance subjected.

Bayley, J.—I concur.

The 19th August 1868.

Present:

The Hon'ble L. S. Jackson and Dwarkanath Mitter, *Judges.*

Procedure—Damages—Stamp—Section 27, Act XXIII., 1861.

Case No. 405 of 1868.

Special Appeal from a decision passed by the Principal Sudder Ameen of Beerbhoom, dated the 13th December 1867, affirming a decision passed by the Moonsiff of Gopalpore, dated the 30th November 1866.

Ram Dyal Gangooly and others (Defendants), *Appellants,*

versus

Huro Soonduree Dossia and others (Plaintiffs), *Respondents.*

Baboo Kishen Succa Mookerjee for Appellants.

Baboo Bama Churn Banerjee for Respondents.

In a suit to recover damages on account of the value of crop cut and carried away, where defendant denied plaintiff's title to the land, and an adjudication on this point became necessary to enable the Court to decide the claim for damages, HELD that the Moonsiff's order was erroneous by which he compelled the plaintiff to put in an additional stamp to represent the value of the land, and that the character of the suit was not changed by the payment of the additional stamp-duty.

Jackson, J.—IN this case the plaintiff sued to recover from the defendant damages on account of the defendant having cut and carried away the plaintiff's crop. The suit was valued at the amount of damages stated by the plaintiff. The defendant in his written statement denied the plaintiff's title to the land, and thereupon the Moonsiff seemed to have ordered that the plaintiff should put in an additional stamp representing the value of the land itself. This was done, and the suit was tried. The decretal order, however, was that the plaintiff obtain his decree, and receive from the defendant the amount of damages claimed. The Principal Sudder Ameen affirmed this decree, and added a declaration that this decree will not affect the right of any party. The defendant now appeals specially, but on the face of the decree appealed from the objection arises that the special appeal is barred by Section 27, Act XXIII. of 1861. The special appellant contends that the appeal is not barred, inasmuch as by the plaintiff's request an adjudication of her title to the land was made. There was not, however, any adjudication on this point further than was necessary to enable the plaintiff to recover damages. The order by which the plaintiff was compelled to pay the additional stamp-duty was clearly erroneous. The character of the suit, however, was in no respect changed by the payment. The suit and decree were simply for damages below Rupees 500. We think the special appeal is clearly barred. The special appeal is dismissed with costs.

The 19th August 1868.

Present:

The Hon'ble H. V. Bayley and A. G. Macpherson, *Judges.*

Alluvion—Possession—Title.

Case No. 322 of 1867.

Regular Appeal from a decision passed by the Judge of Tipperah, dated the 28th August 1867.

Nobeen Kishore Roy (Plaintiff), *Appellant,*

versus

Jogesh Prokash Gangooly (Defendant), *Respondent.*

Baboos Romesh Chunder Mitter and *Kalee Mohun Doss* for Appellant.

Baboos Onookool Chunder Mookerjee, Sreenath Doss, Ashoolosh Chatterjee, and *Tarucknath Dutt* for Respondents.

Land cannot be legally proved to be an accretion to a talook, or a re-formation of diluviated land of that talook on its original site, where the stream between the land in question and the talook is found to be an unfordable stream; nor can possession under such circumstances give a plaintiff a right to a declaration of his title.

Bayley, J.—THIS appeal must be dismissed with costs.

The plaintiff sues upon an allegation that the land in suit is a re-formation of his diluviated lands on their original site, and is also an accretion to his *chur Balamara* in talook No. 1480 of the Collector's rent-roll.

The defendant's answer was that the land in suit belonged to the *chur Abalil alias Pangshia*, and that the plaintiff's land *chur Baboo* alleged to be in his talook No. 1480 is separated from the land in suit by an unfordable stream.

The Lower Appellate Court finds as a fact that the plaintiff has failed to establish his right according to his allegation; and that the stream lying between the plaintiff's estate and the lands in suit is an unfordable one.

The plaintiff appeals, and urges that, although he is not in a position to contend that the Lower Court was wrong in finding as a fact that the stream between his land, *chur Balamara*, talook No. 1480, and the lands in suit, is an unfordable one, still, as he can show possession from 1852, this raises a presumption of his title sufficient to justify his obtaining a decree of his title, but, if not, at any rate, for being maintained in possession and for the rectification of the survey-map, so as to demarcate the land in suit to appertain to his talook 1480.

It is the *plaintiff* who alleges that he has a right for a declaration of his title, which he says is a good one, because the land in suit is an accretion to his talook 1480 or a re-formation of the diluviated land of that talook on its original site; but, in my opinion, until the *plaintiff* can show that the stream between his talook 1480 and the land in suit is *not* an unfordable stream, he cannot have any such declaration, nor can he be said legally to prove his allegation that the land in suit is a re-formation of his diluviated lands on their original site, or an accretion to his original talook 1480.

I would, therefore, dismiss this appeal with costs.

I also agree with the Lower Court that this suit, being for a bare declaration of title when there is a distinct allegation of an undisputed possession, is one which, according to the recent precedents of this Court, will not lie; but as the valuation of the suit brings it within the jurisdiction of the Privy Council, and their Lordships in the Judicial Committee have observed that, in cases appealable to that tribunal, it is advisable that this Court should decide both on the points of law and on the merits, my opinion is given on both the matters accordingly.

Macpherson, J.—I concur.

The 19th August 1868.

Present:

The Hon'ble L. S. Jackson and Dwarkanath Mitter, *Judges.*

Hindoo law — Joint Hindoo family — Partition.

Case No. 23 of 1868.

Miscellaneous Appeal from an order passed by the Judge of Patna, dated the 4th January 1868.

Mussamut Deo Bunseé Koper, *Appellant,*

versus

Dwarkanath and others, *Respondents.*

Mr. R. T. Allan and *Baboos Kishen Succa Mookerjee* and *Debendro Narain Bose* for Appellant.

Mr. C. Gregory and *Baboo Kishen Kishore Ghose* for Respondents.

Following a ruling of the Privy Council, it was held that separate appropriation, as well as separate holding and enjoyment of distinct shares, are all that is necessary under the Hindoo law of the Benares School to constitute a legal partition for a joint estate.

A partition can take place notwithstanding the majority of some of the co-parceners, and it is not necessary for the application of this rule that there should be more than one adult member in the family, or that they should be brothers only. The law of partition applies equally to all joint families, whatever the number of the members or the nature of their relationship.

Every member of a joint undivided family has an indefeasible right to demand a partition of his own share.

Mitter, J.—The question to be determined in this case is whether or not the deceased Munnoo Lall, the husband of the appellant, was, at the time of his death, joint in estate with his minor nephew (the respondent), who is represented before us by a manager appointed by the Collector under the provisions of Section 12, Act XL. of 1858. I am of opinion that this question ought to be answered in the affirmative.

I think that a valid and binding separation between the two branches of the family has been caused by the mode in which the shares respectively belonging to them have been dealt with since the date when the property of the respondent was placed in the charge of the Collector under the provisions of that Section. It is admitted that from that date down to the present moment, the 8 annas share which belongs to the respondent has been separately held and managed by the Collector, solely and exclusively on his behalf and for his benefit. It is also admitted that the other 8-annas share which belonged to Munnoo Lall was held and managed by him in a similar manner from

that very date down to the moment of his decease. These facts are sufficient, in my opinion, to constitute a legal partition. There was a separate appropriation, as well as a separate holding and enjoyment of distinct shares, which is, according to a recent ruling of the Privy Council, all that is necessary for that purpose under the Hindoo law administered in the Benares School. It is wholly immaterial that the respondent was incompetent by his age to exercise his own discretion in the matter. That a partition can take place notwithstanding the minority of some of the co-parceners is expressly sanctioned by the Hindoo law. Verse 9, Section 6, Chapter I. of the Mitakshara provides for the allotment of a share to a co-parcener who is born after a partition effected between the other members of the family. It is true that this verse refers to the case of co-parceners, the pregnancy of whose mother is not known at the time of the partition; but verse 12 of the same Section distinctly states that, where the pregnancy is known, the partition is only to be deferred till the time of delivery.

It should not be supposed, however, that the existence of more than one adult member in the family is in any way necessary for the application of this rule; or that it refers to a partition between brothers only. With reference to the first objection, it is sufficient to say that the result would be precisely the same whether the number of adult co-parceners is one or more, and if two or more adult co-parceners can effect a partition between themselves and an infant co-sharer, there seems to be no reason whatever why the same rule should not apply to a family which consists of two members only—one of whom is a major and the other a minor. The utmost that can be said is that the interest of the minor must be represented by somebody before a partition can be made, but this plea is by no means available to the respondent, as I will presently show.

The second objection is equally untenable. It is true that the verse quoted above ostensibly relates to partition between brothers, but verse 11 of the same Section extends the rule to the case of a partition between uncles and nephews. Indeed, the law of partition is one and the same, and it applies equally to all joint families, whatever might be the number of the members, and whatever might be the nature of the relationship existing between them. In the very definition of partition given in Verse 5, Section 1, Chapter 1, it is distinctly stated that the word *paternal* used in the text of Nareda implies "any relation which is the cause of property," and that the word *son* also used in that text indicates *propinquity in general.* In short, there is but one chapter of the work which relates to the law of partition, and the particular cases cited therein are merely used for the purpose of illustrating the general principles upon which that law is founded. It is clear, therefore, that the minority of the respondent was by itself no bar to the accomplishment of a partition.

It remains now to see that the partition relied upon by the appellant has been effected in a legal way. Now, it is a settled doctrine of the Hindoo law that every member of a joint undivided family has an indefeasible right to demand a partition of his own share. The other members of the family must submit to it whether they like it or not. According to the Mitakshara, a son is competent even to compel his own father to divide the family-estate when that estate is joint and ancestral. There can be no question, therefore, that Munnoo Lall, if he had liked it, could have effected a partition between himself and the respondent, provided there was some one to represent the interests of the latter. In the present instance, however, the converse case had happened; but this circumstance cannot make the slightest difference in the result. The respondent was fully represented by the *Civil Court,* and it was at the instance of that Court that the partition was effected. Section 2, Act XL. of 1858, expressly vests the Civil Courts with full and ample jurisdiction over the properties and persons of all minors not subject to the Court of Wards. It was in the discretion of the Civil Court, it is true, to place the estate of the respondent in the hands of the Collector or not; but this discretion has been already exercised on his behalf, and it is no longer open to him to repudiate the consequences that have inevitably resulted from it.

Suppose for instance that this identical state of things had been brought about by a decree passed by a Court of competent jurisdiction in a suit instituted by some one as the next friend or well-wisher of the respondent. It may be said that such a decree would not be passed, if the effect of it would be to deprive the respondent of his right by survivorship. Suppose, however, that the well-wisher or next friend had clearly made out a necessity for the interference of the Court by showing that Munnoo Lall had been playing

false with the interests of the minor. The Court could not have under such circumstances refused to place the share of the respondent in some safe custody, as the Civil Court had done under the provisions of Act XL of 1858. Could the respondent have been still permitted to say that he is not bound by the legal consequences that would result from such a decree? I am far from imputing the slightest blame to the Civil Court for the way in which it has exercised its discretion. I think that a right to take by survivorship is after all a right of too fragile and contingent a character to be compared for one moment with the existing interests of the minor, and I am by no means satisfied that the arrangement sanctioned by the Civil Court in the present case has not been, upon the whole, for the benefit of the respondent. But whether it was so or not, the respondent is clearly bound by that arrangement; and as to Munnoo Lall, it was all the same to him whether the arrangement was made at his own request, or it was imposed upon him by a superior power over which he had no control whatsoever.

In order to place the preceding observations in a clear point of view, I wish to refer particularly to the relative positions of the respondent and Munnoo Lall with reference to each other. It will be seen that there is an important distinction between the different modes of management prescribed by Act XL. of 1858. Whether the certificate of administration is given to a trustee appointed by deed or to some near relative who is willing and fit to be entrusted with the charge, the law leaves it entirely in the discretion of the Civil Court to sanction any mode of management that might be suited to the position of the minor; except perhaps where there are positive instructions to the contrary left by the testator himself. When, however, the estate is placed in the hands of the public curator or other administrator under the provisions of the 10th Section of the Act, the management must be for the exclusive benefit of the minor, as is expressly laid down in the 15th Section. In the same way, where the estate is placed in the hands of the Collector under the provisions of Section 12, the only interest to be consulted by the manager is the interest of the minor and of nobody else That Section says that the Collector is to appoint a manager, whose duties are to be the same as those of a manager acting under the Court of Wards, so far as the rules laid down in respect of those duties shall be applicable to the case.

On referring, however, to the duties of a manager acting under the Court of Wards, we find the following provisions made by the Legislature. Section 11, Regulation X. of 1793 provides for an establishment of officers to act under the manager, and the appointment of these officers is left entirely in the discretion of the Collector. Section 11 lays down that an allowance is to be fixed for the support of the minor and of such persons of his family as are *entitled* to receive a provision from him. The same Section directs that a monthly account-current is to be furnished by the manager to the Collector, and the Collector is competent to give credit to the manager for such items only as have been spent *bonâ fide* for the support of the minor and for the preservation and improvement of *his* estate. Section 18 says that if the Collector should think it unnecessary or unadvisable to appropriate the surplus receipts in the improvement of the lands already under the manager's charge, he shall cause the same to be applied by the manager to the purchase of other landed property, or to interest, loans, or mortgages, or to the purchase of Government securities, as circumstances may render preferable; and that these new acquisitions are to be held as part and parcel of the *minor's* estate. Indeed, Section 16 distinctly states that the management is to be for the exclusive benefit of the minor, and the very terms of the obligation to be executed by the manager under the provisions of Section 9, clearly show that the interests of no other person in the world is to be consulted by him.

It is manifest, therefore, that the estate of respondent must have been managed without any reference whatever to the interests or wishes of Munnoo Lall. The servants appointed for the management of the respondent's estate were appointed without his sanction or approbation. The receipts and disbursements had nothing to do with his receipts and disbursements, and the profits made or losses incurred had nothing to do with him. How, then, can it be said that notwithstanding the existence of such a state of things, the family had still continued to be joint and undivided? So far as Munnoo Lall's own share was concerned, he had managed it without any reference to the interests of the respondent, and without any fetter or restriction upon his power to deal with it in any manner he liked. What sort of a joint family was it in which there was nothing common between the members thereof —a family in which there was no union even with regard to the appointment of the ser-

that very date down to the moment of his decease. These facts are sufficient, in my opinion, to constitute a legal partition. There was a separate appropriation, as well as a separate holding and enjoyment of distinct shares, which is, according to a recent ruling of the Privy Council, all that is necessary for that purpose under the Hindoo law administered in the Benares School. It is wholly immaterial that the respondent was incompetent by his age to exercise his own discretion in the matter. That a partition can take place notwithstanding the minority of some of the co-parceners is expressly sanctioned by the Hindoo law. Verse 9, Section 6, Chapter I. of the Mitakshara provides for the allotment of a share to a co-parcener who is born after a partition effected between the other members of the family. It is true that this verse refers to the case of co-parceners, the pregnancy of whose mother is not known at the time of the partition; but verse 12 of the same Section distinctly states that, where the pregnancy is known, the partition is only to be deferred till the time of delivery.

It should not be supposed, however, that the existence of more than one adult member in the family is in any way necessary for the application of this rule; or that it refers to a partition between brothers only. With reference to the first objection, it is sufficient to say that the result would be precisely the same whether the number of adult co-parceners is one or more, and if two or more adult co-parceners can effect a partition between themselves and an infant co-sharer, there seems to be no reason whatever why the same rule should not apply to a family which consists of two members only—one of whom is a major and the other a minor. The utmost that can be said is that the interest of the minor must be represented by somebody before a partition can be made, but this plea is by no means available to the respondent, as I will presently show.

The second objection is equally untenable. It is true that the verse quoted above ostensibly relates to partition between brothers, but verse 11 of the same Section extends the rule to the case of a partition between uncles and nephews. Indeed, the law of partition is one and the same, and it applies equally to all joint families, whatever might be the number of the members, and whatever might be the nature of the relationship existing between them. In the very definition of partition given in Verse 5, Section 1, Chapter 1, it is distinctly stated that the word *paternal* used in the text of Nareda implies "any relation which is the cause of property," and that the word *son* also used in that text indicates *propinquity in general*. In short, there is but one chapter of the work which relates to the law of partition, and the particular cases cited therein are merely used for the purpose of illustrating the general principles upon which that law is founded. It is clear, therefore, that the minority of the respondent was by itself no bar to the accomplishment of a partition.

It remains now to see that the partition relied upon by the appellant has been effected in a legal way. Now, it is a settled doctrine of the Hindoo law that every member of a joint undivided family has an indefeasible right to demand a partition of his own share. The other members of the family must submit to it whether they like it or not. According to the Mitakshara, a son is competent even to compel his own father to divide the family-estate when that estate is joint and ancestral. There can be no question, therefore, that Munnoo Lall, if he had liked it, could have effected a partition between himself and the respondent, provided there was some one to represent the interests of the latter. In the present instance, however, the converse case had happened: but this circumstance cannot make the slightest difference in the result. The respondent was fully represented by the *Civil Court*, and it was at the instance of that Court that the partition was effected. Section 2, Act XL. of 1858, expressly vests the Civil Courts with full and ample jurisdiction over the properties and persons of all minors not subject to the Court of Wards. It was in the discretion of the Civil Court, it is true, to place the estate of the respondent in the hands of the Collector or not; but this discretion has been already exercised on his behalf, and it is no longer open to him to repudiate the consequences that have inevitably resulted from it.

Suppose for instance that this identical state of things had been brought about by a decree passed by a Court of competent jurisdiction in a suit instituted by some one as the next friend or well-wisher of the respondent. It may be said that such a decree would not be passed, if the effect of it would be to deprive the respondent of his right by survivorship. Suppose, however, that the well-wisher or next friend had clearly made out a necessity for the interference of the Court by showing that Munnoo Lall had been playing

false with the interests of the minor. The Court could not have under such circumstances refused to place the share of the respondent in some safe custody, as the Civil Court had done under the provisions of Act XL. of 1858. Could the respondent have been still permitted to say that he is not bound by the legal consequences that would result from such a decree? I am far from imputing the slightest blame to the Civil Court for the way in which it has exercised its discretion. I think that a right to take by survivorship is after all a right of too fragile and contingent a character to be compared for one moment with the existing interests of the minor, and I am by no means satisfied that the arrangement sanctioned by the Civil Court in the present case has not been, upon the whole, for the benefit of the respondent. But whether it was so or not, the respondent is clearly bound by that arrangement; and as to Munnoo Lall, it was all the same to him whether the arrangement was made at his own request, or it was imposed upon him by a superior power over which he had no control whatsoever.

In order to place the preceding observations in a clear point of view, I wish to refer particularly to the relative positions of the respondent and Munnoo Lall with reference to each other. It will be seen that there is an important distinction between the different modes of management prescribed by Act XL. of 1858. Whether the certificate of administration is given to a trustee appointed by deed or to some near relative who is willing and fit to be entrusted with the charge, the law leaves it entirely in the discretion of the Civil Court to sanction any mode of management that might be suited to the position of the minor; except perhaps where there are positive instructions to the contrary left by the testator himself. When, however, the estate is placed in the hands of the public curator or other administrator under the provisions of the 10th Section of the Act, the management must be for the exclusive benefit of the minor, as is expressly laid down in the 15th Section. In the same way, where the estate is placed in the hands of the Collector under the provisions of Section 12, the only interest to be consulted by the manager is the interest of the minor and of nobody else That Section says that the Collector is to appoint a manager, whose duties are to be the same as those of a manager acting under the Court of Wards, so far as the rules laid down in respect of those duties shall be applicable to the case.

On referring, however, to the duties of a manager acting under the Court of Wards, we find the following provisions made by the Legislature. Section 11, Regulation X. of 1793 provides for an establishment of officers to act under the manager, and the appointment of these officers is left entirely in the discretion of the Collector. Section 11 lays down that an allowance is to be fixed for the support of the minor and of such persons of his family as are *entitled* to receive a provision from him. The same Section directs that a monthly account-current is to be furnished by the manager to the Collector, and the Collector is competent to give credit to the manager for such items only as have been spent *bonâ fide* for the support of the minor and for the preservation and improvement of *his* estate. Section 18 says that if the Collector should think it unnecessary or unadvisable to appropriate the surplus receipts in the improvement of the lands already under the manager's charge, he shall cause the same to be applied by the manager to the purchase of other landed property, or to interest, loans, or mortgages, or to the purchase of Government securities, as circumstances may render preferable; and that these new acquisitions are to be held as part and parcel of the *minor's* estate. Indeed, Section 16 distinctly states that the management is to be for the exclusive benefit of the minor, and the very terms of the obligation to be executed by the manager under the provisions of Section 9, clearly show that the interests of no other person in the world is to be consulted by him.

It is manifest, therefore, that the estate of respondent must have been managed without any reference whatever to the interests or wishes of Munnoo Lall. The servants appointed for the management of the respondent's estate were appointed without his sanction or approbation. The receipts and disbursements had nothing to do with his receipts and disbursements, and the profits made or losses incurred had nothing to do with him. How, then, can it be said that notwithstanding the existence of such a state of things, the family had still continued to be joint and undivided? So far as Munnoo Lall's own share was concerned, he had managed it without any reference to the interests of the respondent, and without any fetter or restriction upon his power to deal with it in any manner he liked. What sort of a joint family was it in which there was nothing common between the members thereof —a family in which there was no union even with regard to the appointment of the ser-

vants by whom the family estate was to be managed?

Suppose, for instance, that Munnoo Lall had asked the Collector for a large sum of money to defray some of his personal expenses. Would the Collector have given it to him out of the savings made from the proceeds of the respondent's 8-annas share of the estate? If the family had been joint and undivided, the refusal of such a request made by Munnoo Lall might have immediately led to a separation; and yet it is clear that such a request could not have been acceded to by the Collector under any circumstances? Suppose, again, that it had become necessary for Munnoo Lall to raise a large sum of money for the marriage of his daughters (if he had any) or for the performance of some indispensible religious ceremony such as the *shradh* of his father. If the family had been joint and undivided, Munnoo Lall might have raised this amount by alienating a portion of the joint estate without the sanction and authority of any one. Would the Collector, however, have permitted Munnoo Lall to touch one single item of property belonging to the respondent whether real or personal, even if he (Munnoo Lall) had clearly established the necessity for such a sacrifice? Suppose, lastly, that Munnoo Lall, having lost the whole of his 8-annas share, or the major part of it, by his own extravagance and mismanagement, had brought a claim against the Collector for division of the family estate. Would any Court of justice have decreed to him a share of the respondent's property that might have been improved five times in value by the prudent and wise management of the Collector? Most assuredly not. It is clear, therefore, that there was neither a unity of title nor a unity of possession, both of which elements are indispensibly necessary to constitute a joint undivided family. There was one way only in which the family could have again become joint, namely, by a *reunion*; but all prospects of such an occurrence have been cut off for ever by the death of one of the co-parceners. It has been recently held by the Privy Council that those who claim a right by survivorship are bound to make out a clear and satisfactory case before the widow's right by inheritance can be defeated. In the present case, however, it is clear that the state of facts admitted by the respondent himself is utterly inconsistent with the existence of any right to take by survivorship; and the appellant's title by inheritance must accordingly prevail.

I would, therefore, recall the certificate that has been awarded to the respondent, and grant a fresh certificate to the appellant as the next heir and representative of her deceased husband, Munnoo Lall. The Judge's decision ought, in my opinion, to be reversed with costs.

Jackson, J.—With considerable hesitation, occasioned by the difficulty which I feel in attributing so serious and unlooked for an effect to the order of the Civil Court, I concur in reversing the decision of the Court below, and in revoking the certificate granted to the respondent.

A fresh certificate will be granted, as proposed, to the appellant.

The 19th August 1868.

Present:

The Hon'ble F. B. Kemp and E. Jackson, *Judges.*

Alienation by Hindoo widow—Suit by reversioner—Limitation.

Case No. 900 of 1868.

Special Appeal from a decision passed by the Additional Judge of Tirhoot, dated the 14th December 1867, reversing a decision passed by the Sudder Ameen of that District, dated the 28th May 1866.

Suntokhee Thakoor (one of the Defendants), *Appellant,*

versus

Mussamut Balasee Koonwur and another (Plaintiffs), *Respondents.*

Baboo Debendro Narain Bose for Appellant.

Baboos Mohesh Chunder Chowdhry, Romesh Chunder Mitter, and *Annund Ghosal Paleet* for Respondents.

An alienation by a Hindoo widow with a life-interest only is binding during her life, and the suit of a reversioner to set aside such alienation is not barred if brought within 12 years of the period when the succession opens out to him.

Kemp, J.—THIS appeal is against the order of the Judge remanding the suit, overruling the plea in bar, and we have, therefore, only to consider whether the decision of the Judge is right on the plea in bar, the merits of the case not having been decided by the

Judge. It is clear that the reversioners, who are the plaintiffs in this suit, have sued within 12 years from the period when the succession opened out. But the question remains whether the possession of the assignees of Achumbeet Thakoorain and Ranee Thakooranee, the widowsof Booniad Thakoor, is adverse as against these widows, and consequently adverse as against the reversioners. It appears that Ranee Thakooranee had no title whatever in the estate alienated, inasmuch as her husband predeceased his father; but it appears that she joined with Achumbeet Thakoorain, the widow of Booniad Thakoor, and with the consent of the two ladies the alienation was made. There was no invasion of the rights of the widows, and the act of alienation was a voluntary one on their part. There has, therefore, been no adverse possession as against them which would bind the reversioner, and this case must be treated in the way that all cases of alienation by a widow with a life-interest only are treated, *viz.*, the alienation is binding during her lifetime. But the suit of a reversioner to set aside such alienation, if brought within 12 years from the period when the succession opens out to him, is not barred. We dismiss the special appeal with costs, including the costs of Ranee Thakooranee.

The 20th August 1868.

Present:

The Hon'ble J. B. Phear and C. Hobhouse, *Judges.*

Lease—Consideration paid by father—Maintenance.

Case No. 2622 of 1867.

Special Appeal from a decision passed by the Additional Judge of Chittagong, dated the 27th July 1867, modifying a decision passed by the Moonsiff of Futtickcheree, dated the 30th January 1867.

Zeemut Ali (Plaintiff), *Appellant,*

versus

Mussamut Alimoonissa and others (Defendants) *Respondents.*

Mr. G. A. Twidale for Appellant.

Baboo Nubo Kishen Mookerjee for Respondents.

Where a father obtained, once and again, a lease in the name of his wife and son, paying the consideration-money out of his own funds, and on the decease of his wife obtained the lease in the joint names of the same son and of his daughter by the deceased, and it was found that latterly the possession was not with the father: HELD that there was no error in law in the Judge's coming to the conclusion that the property was not intended by the father for his own benefit, but was given to his wife and children for their maintenance.

Phear, J.—THE property which is the subject of suit is what may be termed leasehold property. It was obtained, according to the finding of the Lower Appellate Court, by the father who paid the consideration-money out of his own funds, though the lease was taken by him in the joint names of one out of two of his wives and of her son. Afterwards again, on that lease falling in, a second lease was obtained also by the father in the name of the same wife and son. A third time, on the decease of that wife, a lease was obtained by the father, in the joint names of the same son as before and of his sister by the same mother. The Judge further finds that latterly, at any rate, the possession of the property was not in the father. Upon these facts, he comes to the conclusion that, although the property was obtained by the father out of his own funds, still it was not intended for his own benefit, but was given by him to his wife and her children for their maintenance and profit. And we think that there was no error in law committed by the Judge in coming to that conclusion upon these premises. The case differs, we need hardly say, altogether from the Gossain Case decided by the Privy Council.

We dismiss the appeal with costs.

The 20th August 1868.

Present:

The Hon'ble F. B. Kemp and E. Jackson, *Judges.*

Lakheraj lands—Summary ejectment by zemindar—Section 10, Regulation XIX., 1793—Onus probandi.

Case No. 914 of 1868.

Special Appeal from a decision passed by the Judge of Rungpore, dated the 16th December 1867, reversing a decision of the Sudder Moonsiff of that District, dated the 6th June 1867.

Munsaram Doss Kurmokar (one of the Plaintiffs), *Appellant,*

versus

Gridharee Ram Doss (Defendant), *Respondent.*

Baboos Kishen Sukha Mookerjee and *Greeja Sunkur Mozoomdar* for Appellant.

Baboos Romesh Chunder Mitter and *Kishen Doyal Roy* for Respondent.

In a suit to recover possession of lands which plaintiffs alleged to be lakheraj, and of which they had been dispossessed by the defendants (zemindars), HELD, that as plaintiffs had purchased the land as lakheraj, and had been admittedly in possession of them as such for a very long time, it was for the zemindar, who pleaded a right to oust them summarily under Section 10, Regulation XIX., 1793, to prove that the lakheraj title was invalid as having been created subsequent to 1790.

Kemp, J.—THIS was a suit to recover possession of certain lands, which the plaintiffs alleged are lakheraj, and were purchased in the name of their ancestors in 1259, and from which the defendants, who are the zemindars, have dispossessed them. The Court of first instance found that the lands in dispute have been held in possession by the plaintiffs as lakheraj for 38 years, and as the defendants admit that they are lakheraj, but invalid, the zemindar (the defendant) was not justified in ousting the plaintiffs of his own authority. The first Court, therefore, without going into the question of the validity of the lakheraj, gave the plaintiffs a decree. In appeal the Judge has reversed this decision, and has put the plaintiffs strictly to the proof of their title, and finds that they produce no *sunnud*, and that beyond a byenamah of 1830, in which the lands in dispute are designated as lakheraj, there is no evidence of the validity of the lakheraj, and that the zemindar (defendant) having ousted the plaintiffs under the provisions of Section 10, Regulation XIX. of 1793, acted perfectly legally. The decision of the first Court was therefore reversed, and the plaintiff's suit dismissed.

We think that this decision is wrong. The plaintiffs purchased the lands as lakheraj, and it is admitted that they have been in possession of these lands for a very long time as lakheraj before their ejectment by the defendant. The written statement filed by the defendant substantially admits that these lands were held as lakheraj, but that under Section 10, Regulation XIX. of 1793, the defendant (the zemindar) was entitled to oust the plaintiffs summarily. That the defendant rested his case on that Section, and on the powers conferred upon him by that Section is more clear from the petition of appeal to the Judge in which he distinctly invokes that Section, and asks the Judge to try the validity of the plaintiff's alleged lakheraj holding. Now, in a case of this description, it was for the zemindar to prove that the land in dispute was held under an invalid lakheraj title inasmuch as it was created subsequently to 1790, and that under the above quoted Section he was authorized to eject the plaintiffs. The *onus* of proving this was on the defendant (the zemindar). But the Judge, reversing the incidence of the *onus*, has thrown it entirely and most heavily upon the plaintiff. We have already observed that the plaintiffs purchased this lakheraj land as in execution of a decree, and it is not unlikely that being a purchaser he would not be in possession of the original *sunnud* creating the lakheraj tenure. But it is very clear that he was for many years in possession as lakherajdar. Had he brought his action at once, he would have been entitled to restoration to possession without even giving *primâ-facie* proof of his title. In the present case he has brought his action after the lapse of many years from the date of ouster. But he has given sufficient *primâ-facie* evidence of his title as lakherajdar to throw the *onus* of proving that this land is mâl, and not lakheraj, on the zemindar.

The zemindar, if he wishes to try the question of the validity of this lakheraj, must bring a suit for that purpose. In the present suit, and with reference to the pleadings of the parties, the plaintiffs are entitled to a decree for possession.

The decision of the Judge is reversed, and that of the Court of first instance, which appears to us to be a very proper and correct decision, restored with costs in all the Courts.

The 20th August 1868.

Present:

The Hon'ble J. B. Phear and C. Hobhouse, *Judges.*

Joinder of causes—Procedure—Suit for delivery of papers—Specific decree.

Case No. 585 of 1868 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of Dacca, dated the 3rd December 1867, affirming a decision passed by the Deputy Collector of Manickgunge, dated the 29th May 1867.

Ram Coomar Sircar (Defendant), *Appellant,*

versus

Kalee Coomar Dutt and another (Plaintiffs), *Respondents.*

Baboo Nuleet Chunder Sein for Appellant.

Baboos Chunder Madhub Ghose and *Kishen Dyal Roy* for Respondents.

Where a plaint containing separate causes of action on the part of distinct plaintiffs, though but one prayer, viz., for the delivery up of certain *nekasi* papers, was filed and tried as a single suit, the Court trying the case was held to have committed not a mere technical irregularity, but an incorrect proceeding liable to lead to injustice.

In decreeing such a suit it is not sufficient for the Court to give an order that the claim be allowed. The decree ought to be a specific order upon the defendant to deliver up the papers.

Phear, J.—THE mode in which this suit has been tried in both the Lower Courts, in our opinion, reflects any thing but credit upon the gentlemen who presided over those Courts.

In the first place, a plaint has been allowed to be filed which contains two separate causes of action on the part of two distinct plaintiffs, and the two plaintiffs sue together as if they were joint plaintiffs seeking a remedy upon one cause of action. This is not a mere technical irregularity. It is an incorrect proceeding which is liable to lead to the committing of injustice to the defendant, and it seems to us that, in this particular instance, it has, in fact, led to the result of the defendant not having a fair trial.

Then the suit, or rather the two suits, are brought in the Collector's Court under the provisions of Section 24, Act X. of 1859. The plaint, although it is double in its nature, contains but one prayer, and that is a prayer for the delivery up of the *nekasi* papers. There is no specific decree passed by the first Court. The only order given is that the claim be allowed. The Lower Appellate Court takes no notice of the very serious irregularities which had been allowed to take place below; but, on the contrary, says that it finds no fault with the decision of the first Court. And this the Judge says with the fact present to his mind that the plaintiffs were not suing on a joint right, for in his judgment he deals with their claims as being distinct the one from the other. With special reference to the claim of Hurro Soonduree, one of the plaintiffs, he writes as follows, namely, that "the appellant in his answer admitted that he collected rents for the plaintiffs," speaking of them in the plural. "He cannot, therefore, now take a new ground against the female plaintiff." We must say that this looks to us as much like catching an unfortunate litigant in a trap, as we have seen for a long time; and, in truth, when this statement of the defendant is carefully looked at, it does not turn out that he did therein in fact admit that he collected rent for both the plaintiffs. The plural form of the word plaintiff had reference to the plaintiffs' house, and not to the collection of plaintiffs' rents. On the other hand, in the very same

statement, there was an express denial by the defendant that he was agent for the female plaintiff. Again, the Judge's final order does nothing towards setting right the want of precision and accuracy in the decree of the Court below, or rather, we might say, the want of a decree at all in that Court, for the Judge confines himself to dismissing the appeal.

Under all the circumstances of the case, we think that the decrees of both the Lower Courts must be reversed, and the case remanded to the Judge with directions that he send it to the Court of first instance for re-trial on the issues which follow; and we desire to remind both the Lower Courts that in the re-trial of the case, they must treat it as if it were two suits, one brought by the male plaintiff, and the other by the female plaintiff, and they must conduct the trial of each of these separately, although the matter of complaint brought forward by the respective plaintiffs is contained in one formal plaint. The issues in both these suits will be the same, namely, *first*, whether the defendant was agent of the particular plaintiff for the collection of the rents of the land in respect of which that plaintiff's claim is made, or of any portion of that land. If the Court should find this issue in the affirmative, then the second issue will be whether the defendant had any, and, if any, what, *nekasi* papers relating to the said agency which he is liable to deliver up to the plaintiff. We will add that if the Court should find this second issue also in the affirmative, the decree ought to be a specific order upon the defendant to deliver up the *nekasi* papers which he has been found to be liable to deliver up. If the Court should find either of these issues in the negative, then it ought to dismiss the claim of that plaintiff in regard to which the issue is so found. We think that there has been such an entire misapprehension of the nature of the contest between the litigant parties, and such short-comings in the conduct of the trial, that both sides ought to be allowed to adduce any fresh evidence which they may desire. That which is already on the record may also be availed of. Costs of this appeal will abide the event.

The 20th August 1868.

Present:

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble Dwarkanath Mitter, *Judge*.

Onus probandi—Fraudulent sale—Examination of parties and witnesses—Powers of a Moonsiff—Sections 166 and 170, Act VIII., 1859.

Case No. 385 of 1868.

Special Appeal from a decision passed by the Principal Sudder Ameen of Chittagong, dated the 16th December 1867, affirming a decision passed by the Moonsiff of Raojan, dated the 29th May 1867.

Ram Gutty and others (Defendants), *Appellants*,

versus

Mumtaj Bebee and others (Plaintiffs), *Respondents*.

Baboo Gopeenath Mookerjee for Appellants.

Mr. G. A. Twidale for Respondents.

In a suit against a purchaser to set aside a sale in execution of a decree on the ground of fraud, the *onus* lies upon the plaintiff to make out that the sale was fraudulent.

A Moonsiff has power, if necessary, under Section 166, Act VIII., 1859, to examine any of the parties to a suit and to compel their attendance; or, in the event of their failure to comply with the order, to deal with the suit under Section 170. He also has power, if necessary, to examine any other person as a witness.

The general duties of the Lower Courts in connection with the examination of witnesses pointed out.

Peacock, C. J.—THIS is a suit brought to set aside a sale of an under-tenure in execution of a decree for arrears of rent of the tenure in an Act X. case. It is brought not only against the decree-holder in the execution case, and the tehsildar, who instituted the Act X. suit on behalf of the decree-holder, but also against the purchasers under the execution; and unless the sale was a collusive one and the property purchased for the benefit of the tehsildar, defendant No. 1, the purchasers are the principal defendants and the only persons really interested in the determination of the suit. The Principal Sudder Ameen says: "The plaintiffs aver "that nothing remained in balance out of "the rent of the said talook for 1225 and "1226 Mughee; that notwithstanding de-"fendant No. 1, tehsildar under defendant "No. 2, instituted a false suit for arrears of "the above years in the Revenue Court and "obtained an *ex-parte* decree without their "knowledge; and that instead of taking out "execution of that decree on the moveable

properties, he brought the property under claim to sale, and purchased the same in the name of his son and kindred." This a mere recital of the plaintiff's allegaoo, not of the facts found to be proved. But if it were true that the decree and sale ere obtained without notice to the defendnts in the suit (the present plaintiffs), one ould have expected that they would have pplied to the Court under Section 58 of Act . of 1859. Nothing of the kind, as I unerstand, appears in evidence.

The Principal Sudder Ameen, referring to e allegation to which I have above referred, oes on to say: "The defendants do not take any objection to the above allegation of the plaintiff; rather the principal defendant No. 1 does not take any objection." ut it is not because the principal defendt No. 1, the tehsildar, who, if the purase was a *bonâ-fide* one on the part of the her defendants, is no longer interested in e matter, did not take any objection that e sale was to be set aside as fraudulent as ainst the purchasers.

The Principal Sudder Ameen then says: Hence" (that is, because the defendant o. 1 did not take any objection) "it was illegal to bring first the immoveable property in suit to sale instead of the moveable property." If, however, the decree s fraudulent, as supposed by the Principal dder Ameen, it would have been illegal to ing either the moveable or the immoveable operty to sale under it. But so far from e fact being that the defendant No. 1 did t take any objection to the plaintiffs' algation that the Act X. suit was fraudulent, d that the decree was obtained in it *ex parte* thout notice, the tehsildar, defendant No. alleged in his written statement which was ly verified, "*first*, that the decree under Act ., the sale held in execution of that deee, and the notice of sale, as well as the oclamation of sale, were all *bonâ-fide* and according to law; *2ndly*, that the khilahs produced by the plaintiff are lse; and, *3rdly*, that the fact of your petitioner's son being one of the purchasers does not invalidate the sale, and that the other purchasers are not his relatives." It is evident that the Principal Sudder Ameen could not have read or duly considered the written statement.

The Principal Sudder Ameen then goes on to say: "It further appears that the "defendants allege the sealed dakhilahs "filed by the plaintiffs, which were given for "payment of the entire rents for 1225 and "1226 Mughee, to be forged. In fact, there "is no ground for the said dakhilahs being "fabricated, inasmuch as they bear the seal." But I understand that there was no evidence to prove that the seal *was* the seal of the zemindar (the plaintiff in the rent-suit). Mr. G. A. Twidale, on behalf of the respondents, admits that he has looked through the record and that there is no evidence on the record, to show that the seal was the seal of the zemindar.

The Principal Sudder Ameen then says: "Another objection of the defendants is "this, that the sale-notification was published, "in proof of which they have examined "certain witnesses. I do not at all believe "that the said notification was really published, because it is beyond credit that the "defendants, after originally omitting to take "out execution on the moveable properties "according to law, should duly publish a "proclamation in fraudulently bringing the "immoveable properties to sale first." So that he disbelieves the witnesses who prove that the sale-notification was published, simply because the tenure was brought to sale in execution before the moveable property.

In a suit against a purchaser to set aside a sale in execution of a decree on the ground of fraud, the *onus* lies upon the plaintiffs to make out that the sale was fraudulent. If the sale had been made without proclamation, the present plaintiffs might have applied to the Revenue Court before the sale was confirmed, but there is no evidence that they did so.

The Principal Sudder Ameen finds against the alleged settlement of a part of the property by Noor Buksh in the name of his son on the ground that the deed was not registered; but it is admitted by the pleaders on both sides that there is no evidence as to whether the son of Noor Buksh was in possession of any part of the property. If the plaintiff's son was really in possession of part of the property, it would have been an important point for consideration in determining the question under issue. The Moonsiff and Principal Sudder Ameen may have arrived at a just conclusion, but the evidence in the case was not sufficient to support it; nor are the reasons which the Principal Sudder Ameen has given in support of his judgment such as can be sustained by law. It was a very important fact to be determined in the case

whether the rent for 1225 and 1226, for which the decree was obtained and the tenure sold, was really due or not. The case has been so badly tried by the Principal Sudder Ameen and the Moonsiff, and the witnesses so insufficiently examined and the evidence is so imperfect, that it seems impossible to arrive at a just conclusion in the case as it now stands.

There is no excuse for the Court of first instance leaving a case in the unsatisfactory mode in which this was left as regards the evidence. When dakhilahs were produced with a seal upon them, and it was all important to ascertain whether they bore the seal of the plaintiff in the rent-suit or not, it was the duty of the Lower Court not to decide the case without ascertaining whether that seal was the plaintiff's seal or not. The Moonsiff had power, if necessary, under Section 166 of Act VIII. of 1859, to examine any of the parties to the suit, and to compel their attendance; or, in the event of their failure to comply with the order, to deal with the case under Section 170. He also had power, if necessary, to examine any other person as a witness. It appears that he did not even ask the witnesses who were called whether the seal to the receipts was the seal of the zemindar or not. If the rent for which the suit was brought had been actually paid, and the tehsildar notwithstanding brought a suit for that rent in the Revenue Court, and the son of the tehsildar afterwards purchased a portion of the tenure in execution of the decree, it would have gone a long way to the final disposal of the case upon its merits.

It was remarked by the Lords of the Judicial Committee in a recent case, Soorendronath Roy against Heeramonee Burmonee and others,* decided on the 2nd of July last: "It is a great misfortune of "Hindoo litigants that their cases often fall, "in the earlier stages of litigation, into the "hands of incompetent advisers, who, by "the mixture of falsehood with truth or "by the suppression or abandonment of "part of a true case, from some mistaken "view of policy or difficulty, create often "impediments to its success, from which the "true story, if revealed, would have been "free."

And I may add that it is another great misfortune of litigants in the mofussil in this country that the witnesses who are called to prove the facts of the case are not properly examined through the incompetency of those who have the management of the suits, and that the Judges do not make up for that incompetency by themselves examining the witnesses or exercising those powers for obtaining the truth with which they have been entrusted by the law of procedure. If the Moonsiff in this case failed in the due performance of his duty in that respect, it was no reason why the Principal Sudder Ameen should act upon evidence which was not admissible or come to a conclusion upon the facts without any evidence at all. The Principal Sudder Ameen had the power, if he thought it necessary, under Section 355 of the Code of Civil Procedure, to require further evidence. Instead of doing so, he appears to have determined the case merely upon conjecture, without any evidence to warrant it.

The case must be remanded, and I would request the Judge to call the case up to his own file, and after calling for such further evidence or directing such issues as he may think necessary, to decide the case upon the merits and to report his decision to this Court. The costs will abide the event of the suit.

This case is only one amongst several others in which Moulvie Ali Newaz Khan, the Principal Sudder Ameen of Chittagong, has exhibited incompetence to discharge those important duties with which he, as a Subordinate Judge, has been entrusted. The case is one of very small value, but that is no reason why the same care and attention should not be bestowed upon it as if it had been one of much greater value. It is painful to see parties in these small suits driven to appeal to the High Court for want of a proper discharge of their duties by the Lower Courts.

I do not mean to say that in this case the decision at which the Moonsiff and Principal Sudder Ameen have arrived may not turn out to be correct. The complaint is that they have dealt with the case without proper evidence of the facts, and without taking the proper means to make that evidence complete.

* *See* 10 W. R., Pri. Coun., p. 35.

The 20th August 1868.

Present:

The Hon'ble Louis S. Jackson and F. A. Glover, *Judges.*

Making third parties defendants—Section 73, Act VIII., 1859.

Case No. 3103 of 1867.

Special Appeal from a decision passed by the Officiating Principal Sudder Ameen of Sylhet, dated the 31st August 1867, affirming a decision passed by the Moonsiff of that District, dated the 21st June 1867.

Puddolochun Sein (Defendant), *Appellant,*

versus

Lall Chand Goopto (Plaintiff), *Respondent.*

Baboo Bama Churn Banerjee for Appellant.

No one for Respondent.

In a suit brought on the allegation that defendant had sold to plaintiff certain talooks, but had not put him in possession, in which defendant pleaded that he had put plaintiff in possession, and in which a third party petitioned, stating that defendant had only been joint owner of the talook with a co-heir whose right, title, and interest petitioner had purchased :

HELD that it was irregular to make this petitioner defendant, and that Section 73 of the Code of Civil Procedure does not enable parties who are not likely to be affected by the result to come into the suit, and raise new questions which do not properly arise.

Jackson, J.—THIS suit was originally brought by the plaintiff Lall Chand Goopto against the defendant Goonoo Bullubh Goopto, on the allegation that Goonoo Bullubh had sold to the plaintiff certain talooks, but had not put him into possession, and the plaintiff sought to obtain possession. Goonoo Bullubh stated, admitting the sale, that he had put the plaintiff in possession. Thereupon one Puddolochun petitioned the Court, stating that the plaintiff's vendor Goonoo Bullubh was not the sole owner of this talook, but that Goonoo Bullubh and Pran Bullubh were joint owners as heirs of their deceased father, and the petitioner had purchased from Pran Bullubh all his right, title, and interest. Thereupon Puddolochun was made a defendant in the suit, and the character of the suit was altogether changed. The Court proceeded to investigate the title of the plaintiff through Goonoo Bullubh and that of the new defendant. The Moonsiff, as well as the Principal Sudder Ameen in appeal, found that Goonoo Bullubh had been for years in possession of the property, and by some disposition of the paternal property made by the father Goonoo Bullubh had remained in possession, and was entitled to sell the property. Puddolochun appeals specially.

The first observation the Court has to make is that it was irregular in this suit to make Puddolochun a defendant, and thereby to raise issues altogether different from those arising in the suit as originally framed. Section 73 of the Civil Procedure Code enables the Courts to bring in as parties to the suit any persons whose rights appear to be involved, and who may be affected by the result of the suit. It does not enable parties, who are not likely to be affected by the result, to come in and raise altogether new questions which do not properly arise. As the parties, however, have all acquiesced in the irregularity, and the suit has gone to trial on the issues between Puddolochun and the plaintiff, the Court does not think it necessary to quash the proceedings, and reduce the suit to its original dimensions.

It appears to us, however, that the plaintiff was not entitled to a decree as the case stood. It appears that the defendant Puddolochun was in possession of half the talook under the sale from Pran Bullubh, one of the two sons of the last owner. It seems clear that the arrangement under which Goonoo Bullubh had sole possession of the talook in his father's lifetime was one which subsisted only during the father's life, and that, on the death of the father, whether under the deed which was produced or under operation of the Hindoo law, the two brothers became jointly entitled to the talook in dispute and to the other properties which the father left. There was no evidence to show that, since the death of the father, the brothers had come to a partition so as to enable Goonoo Bullubh alone to deal with the talook in dispute. We think, therefore, that the suit to obtain possession of the whole talook was liable to be dismissed. But the special appellant acquiesces in the plaintiff having a decree for half of the talook, leaving the plaintiff to take any proceeding against Goonoo Bullubh in respect of the remaining half which he has been unable to deliver.

Costs of all the Courts to be in proportion.

The 20th August 1868.

Present:

The Hon'ble F. B. Kemp and E. Jackson, *Judges.*

Witnesses—Further evidence—Form of deposition.

Case No. 937 of 1868.

Special Appeal from a decision passed by the Judge of Tirhoot, dated the 6th February 1868, reversing a decision of the Sudder Ameen of that District, dated the 17th June 1867.

Mahomed Saleh, for self and as guardian of Mahomed Khubel, minor (Defendant), *Appellant,*

versus

Mussummat Muriamoonissa (Plaintiff). *Respondent.*

Messrs. R. E. Twidale and *C. Gregory* for Appellant.

Moonshee Ameer Ali and *Moulvie Mahomed Eusuf* for Respondent.

Where plaintiff rested her claim solely on the deposition of the defendant, to be taken by his placing his hand on a particular text of the Koran, and the defendant being examined did not prove the claim—

HELD that the Lower Court very properly examined the defendant in the way and manner sanctioned by the procedure of the Court.

HELD, too, that the Lower Appellate Court was not right in allowing plaintiff to examine further witnesses and to re-open the case.

Kemp, J.—THIS is a suit in which the question which of two kobalahs is genuine is the main point in issue between the parties. The first Court dismissed the plaintiff's case on the following grounds: That the plaintiff had rested her claim on the evidence of Mahomed Saleh, the defendant, and that the defendant, being examined, did not prove the claim of the plaintiff, and swore to the falsity of the plaintiff's kobalah. On an appeal to the Judge, the case has been remanded for trial on the merits, directing the first Court to summon the remaining witnesses cited by the plaintiff. The Judge was of opinion that, as the plaintiff had rested her case on the deposition of the defendant, which was to be taken by his placing his hand on a particular text of the Koran, and he was not examined in that form, but under Act V., the plaintiff was entitled to have her remaining witnesses examined.

The point now before us for decision is whether the Judge is right, under the circumstances of the case, to allow the plaintiff to examine further witnesses and to re-open the case. We think that, under the circumstances of the case, and taking into consideration the intention of the plaintiff to be gathered by a reference, not to one petition alone, but to all the petitions on the record, it was her intention to rest her case entirely on the evidence of the defendant, his examination being taken by administering the oath on the Koran as above stated, or in any way the Court might deem proper. It is also clear that the plaintiff did not ask to have her other witnesses examined until after the deposition of the defendant was recorded, and which was not to the purport which she anticipated. The Lower Court very properly examined the defendant in the way and manner sanctioned by the procedure of the Court, and the defendant was equally bound to speak the truth whether examined under Act V. or on the Koran, and he was liable to the same penalties for perjury whether examined under one form or the other.

The pleader for the respondent has called our attention to a case published in Volume I., Weekly Reporter, page 263. But we do not think that that case is at all similar to the one under consideration. In that case, an Act X. case, the mookhtar stated that he intended to rely solely on the defendant's evidence, and that he should call no other witnesses. The learned Judges who decided that case held that this did not deprive the mookhtar of afterwards changing his intention, and in the exercise of his discretion placing before the Court, as long as the plaintiff's case was not closed, such relevant evidence as he might consider advantageous to his client's interests. The present case is a very different one. The plaintiff deliberately and repeatedly petitioned the Court to examine the defendant, resting her case on his evidence alone, and asking the Court not to examine the remaining witnesses. We, therefore, reverse the decision of the Judge, confirm that of the first Court, and decree this appeal with costs.

d

The 20th August 1868.

Present:

The Hon'ble H. V. Bayley and A. G. Macpherson, *Judges.*

Limitation — Legal disability — Section 11, Act XIV. of 1859.

Case No. 2304 of 1867.

Special Appeal from a decision passed by the Judge of Tipperah, dated the 14th June 1867, reversing a decision passed by the Principal Sudder Ameen of that District, dated the 27th November 1866.

Greemutty Obhoya Doorga (Plaintiff), *Appellant,*

versus

Hurrykristo Gope and others (Defendants), *Respondents.*

Baboos *Kalee Kishen Sein* and *Nuleet Chunder Sein* for Appellant.

Baboos *Romesh Chunder Mitter* and *Bama Churn Banerjee* for Respondents.

The object of Section 11, Act XIV. of 1859, is that when a person's disability has ceased, and an opportunity to sue upon the cause of action has accrued, then no subsequent disqualification of such person or of any person claiming through him should be allowed to operate to extend the period of limitation.

Bayley, J.—We think this appeal ought to be dismissed with costs.

The plaintiff sued to set aside a kobalah dated 14th Maugh 1251, and an *ex-parte* decree dated 9th April 1858, and to recover certain sale proceeds taken by the defendant in September 1858. The defendant pleaded limitation.

The question taken up by the Lower Appellate Court for its decision was whether the plaintiff's minority was to be considered to have ceased on the completion of her 15th year, or whether, as a proprietor paying revenue to Government, that majority commenced on the completion of her 18th year.

The Lower Appellate Court seems to have held that because the landed property passed by a sale, the plaintiff was no longer a proprietor paying revenue to Government, and accordingly dismissed the suit as barred by limitation.

The plaintiff appeals specially, and states that the surplus sale proceeds represented in fact the landed property, and therefore the Lower Appellate Court's judgment was wrong.

The special respondent, without attempting to support the judgment of the Lower Appellate Court on the grounds adopted by that Court, takes an objection under Section 348, Act VIII. of 1859, that whereas the plaintiff's husband survived for a year after attaining his majority, he ought to have sued within that time, and under Section 11, Act XIV. of 1859, subsequent disqualification of the plaintiff herself could not be successfully pleaded in order to extend the time. The special appellant contends against this that the law states "*if at the time when the cause of action accrues to any person,*" he is not under legal disqualification, the bar might remain; but as in this case the plaintiff's husband was, on the 14th Maugh 1251 when the cause of action accrued, a minor, Section 11 does not apply.

We do not think this last plea of the special appellant is tenable. The object of Section 11 is clear, that when legal disability has ceased, and an opportunity to sue upon the cause of action has accrued, then no subsequent disqualification of such person, or of any person claiming through him, should be allowed to operate to extend the period. Thus, as it is admitted in this case that the plaintiff's husband had a full year to sue upon his cause of action after attaining his majority, we think that the subsequent disqualification of the plaintiff herself cannot be allowed to extend the time.

Consequently, though for reasons other than those given by the Lower Appellate Court, we think the plaintiff's suit is barred by limitation. This appeal is, therefore, dismissed with costs.

The 20th August 1868.

Present:

The Hon'ble L. S. Jackson and F. A. Glover, *Judges.*

Jurisdiction—Appellate Court—Reversal of decree as to non-appealing defendants.

Case No. 2179 of 1867.

Special Appeal from a decision passed by the Principal Sudder Ameen of Purneah, dated the 29th July 1867, reversing a decision of the Moonsiff of that District, dated the 29th November 1866.

Mohunt Rung Lall Gossain (Plaintiff), *Appellant,*

versus

Gouree Mundul and others (Defendants), *Respondents.*

Baboo Anund Gopal Paleet for Appellant.

No one for Respondents.

Where a decree of a Court of first instance affects all the defendants, the Appellate Court is competent under Section 337 of the Code of Civil Procedure to reverse it in respect to all the defendants, including any who have not appealed or defended the suit.

Jackson, J.—THE case seems to be quite clear. The plaintiff sued the neighbouring zemindar as well as the parties in occupation of the land which he sought to recover. The occupying tenants defended the suit, and appealed to the Judge against the decision of the first Court. On their appeal, the Judge found the suit was barred by limitation, and he therefore reversed the decree below in favor of both the parties; and it is contended in special appeal that the Court is not competent to reverse the decree in favor of the zemindar who had not appealed or defended the suit; but inasmuch as the decree of the Lower Appellate Court reversed the decree of the Court below upon a point which affected all the defendants, it is clearly competent, under Section 337 of the Civil Procedure Code, to reverse the judgment in favor of all the defendants.

The special appeal is dismissed.

The 21st August 1868.

Present :

The Hon'ble L. S. Jackson and F. A. Glover, *Judges.*

Stamp-duty — Under-valuation of plaint — Supplemental plaint.

Case No. 992 of 1868.

Special Appeal from a decision passed by the Principal Sudder Ameen of Manbhoom, dated the 21st January 1868, affirming a decision of the Moonsiff of that District, dated the 29th June 1867.

Gudadhur Banerjee and others (Defendants), *Appellants,*

versus

Ranee Premomoyee Debia and others (Plaintiffs), *Respondents.*

Baboo Bungshee Dhur Sein for Appellants.

Baboos Umbika Churn Banerjee and *Gopeenath Mookerjee* for Respondents.

Where a suit was remanded to a Moonsiff's Court and on the defendants objecting that the plaint had been under-valued, an order was made by the Court that the plaintiff should in some shape or other put in the additional amount of stamp duty, and a supplemental plaint with the required stamp was accordingly put in and received, the irregularity was not considered to have affected the merits of the case or to call for a reversal of the Moonsiff's decision.

Jackson, J.—THE special appeal before us, which is the defendant's appeal, is based upon two grounds. The first is an alleged irregularity on the part of the Court of first instance in receiving, after the remand of this case by the Appellate Court, a supplemental plaint by which the subject-matter of the suit was greatly enlarged; and, secondly, that the decision of the Principal Sudder Ameen affirming that of the Moonsiff is to a great extent based upon documents filed by the plaintiff which, it is contended, were not properly admissible in evidence.

The circumstances out of which the first ground of appeal arose appear to be these. The defendant, now the special appellant, originally sued the present plaintiff for possession of 45 beegahs of land, which he alleged to be part of his estate and which had been so demarcated by the surveying authorities on their map, and on the institution of that suit the present cross-suit was brought in order to have plaintiff's possession confirmed, and the thak demarcation set aside. The first suit for possession, it seems, was dismissed and has come to an end. When the present suit went down to the Moonsiff's Court on remand, the defendants urged an objection which they had previously taken that the daghs mentioned in the plaint contained more than 45 beegahs, that in fact these daghs comprised an area of some 400 beegahs, and that the plaintiff by filing the plaint on a valuation of the 45 beegahs only, had committed a fraud upon the Government stamp revenue. Thereupon, it seems, an order was made by the Court, erroneously, as we think, that the plaintiff should, in some shape or other, put in the additional amount of stamp duty; and accordingly, a supplemental plaint with the required amount of stamp was put in and received. The defendants then filed a further written statement, first objecting to the additional plaint thus filed, and then going into their case; and it seems they also adduced further evidence in support of their allegations. Upon the plaint and statement

thus put in, the parties went again to trial. In the first place, it appears quite clear that whatever was done by the plaintiff in this matter of the supplemental plaint was done in consequence of the defendant's objection and by order of the Court. It does not appear that there was any substantial change in the matter before the Court for adjudication, nor, although the regularity of receiving the supplemental plaint may fairly be questioned, does it appear that the merits of the case were thereby affected. The defendant, indeed, urges that, if the remainder of the land had not been included in the suit, any further suit by the plaintiff in respect of that land must have been dismissed under section 7 of the Procedure Code, and he maintains that he is entitled to be placed in that advantageous position, but, in fact, it does not appear that it would have been necessary for the plaintiff to bring any further suit in respect of such land. The whole land was, and is, in the plaintiff's possession, and he appears to have brought a suit for declaration of his title, disturbed by the defendant's proceedings, and for amendment of the survey-map in so far as it was necessary. We think that the objection on this head is wholly untenable, and further that it is an unfair and disingenuous objection for the defendant to take.

* * * * *
* * * * *

The 21st August 1868.

Present:

The Hon'ble F. B. Kemp and E. Jackson, *Judges.*

Hindoo law—Self-acquired property—Testamentary disposition—Unequal distribution among heirs.

Case No. 83 of 1868.

Regular Appeal from a decision passed by the Principal Sudder Ameen of Tirhoot, dated the 8th February 1868.

Bawa Misser, father and guardian of Mokond Lall Misser, minor, and others (Defendants), *Appellants,*

versus

Rajah Bishen Prokash Narain Singh (Plaintiff), *Respondent.*

Mr. R. E. Twidale and *Baboo Mohesh Chunder Chowdhry* for Appellants.

Baboos Kishen Kishore Ghose, Onookool Chunder Mookerjee, and *Unnoda Pershad Banerjee* for Respondent.

Under the Mitakshara law, a father can dispose of his self-acquired property, moveable and immoveable, at his own will, and he can, by will, make an unequal distribution of the same amongst his heirs.

Kemp, J.—This was a suit to set aside a deed executed by Dabee Dutt Misser, the father of the defendant No. 1, Bawa Misser, and the grandfather of the defendants 2, 3, and 4, and for a declaration of the right and title of the defendant Bawa Misser in the properties specified in the deed. The deed is dated the 5th February 1866, and the object of the suit is to enable the plaintiff to bring to sale the properties covered by the deed in satisfaction of his claims against Bawa Misser.

It is alleged in the plaint that the properties covered by the deed were ancestral, and not self-acquired, and that Dabee Dutt Misser was not competent to execute the deed, and thereby defraud the creditors of his son Bawa Misser. In the plaint, the deed which the plaintiff seeks to set aside is termed a "deed of partition."

The Principal Sudder Ameen of Tirhoot, Syud Imdad Ali Khan, laid down the following issues of fact :—

1st.—Was the deed of partition pleaded by the plaintiff executed nominally in favor of parties with no interest, solely with the intention of defrauding creditors?

2nd.—Whether Dabee Dutt Misser, father of the debtor Bawa Misser, acquired the disputed properties from the money of his own earnings, or whether the property is ancestral. Whether Dabee Dutt Misser, having conveyed the ancestral property under a deed of sale to his relatives, caused them in return to execute another deed of sale in his favor? If the property was acquired from Dabee Dutt's own earnings, whether he was competent, according to the Shasters, to transfer or convey by gift his property to parties having no interest?

These issues have been taken from the decision of the Principal Sudder Ameen.

The Principal Sudder Ameen tried the two issues together. He finds that the property was not ancestral, but the self-acquired property of Dabee Dutt Misser. He observes that "the plea of the defend-

ants that all the disputed properties were acquired from Dabee Dutt Misser's exclusive resources is completely established, and plaintiff's allegation that the property is ancestral is false."

The Principal Sudder Ameen, on the second issue, finds, for reasons which are not very intelligible, that the deed executed by Dabee Dutt Misser was in fraud of the creditors of Bawa Misser. The suit of the plaintiff was decreed, the deed set aside, and the properties covered by the deed declared liable to be sold in satisfaction of the debts of Bawa Misser.

No cross-appeal has been filed by the plaintiff against that portion of the decision of the Principal Sudder Ameen which declares the properties in dispute to be the self-acquired properties of Dabee Dutt Misser.

The question for consideration is whether a father under the Mitakshara law can dispose of his self-acquired property, moveable and immoveable, at his own will. In the present case, the property is immoveable. The deed, the execution of which is admitted, amounts to a testamentary disposition of the estate of Dabee Dutt Misser. By this deed, the whole of the ancestral estate of the testator is left to his son Bawa Misser; the self-acquired estate is left to the three sons of Bawa Misser (the eldest son receiving a somewhat larger share than the other sons for reasons stated in the deed) and to the younger wife of the testator. The son was extravagant, and was involved. The father, anxious that the estate which had been acquired by his sole exertions should not be sold to satisfy the creditors of his son, and thus leave the grandsons and the wife unprovided for, made the above disposition of his estate to take effect after his death. In doing so, we are of opinion he acted honestly and with prudence. It cannot be said that a man who makes such a disposition of the property over which he has an absolute control, and by which he provides for his wife and grandsons, has done so in fraud of the creditors of his son to whom the estate over which the father had not an absolute right is given.

The deed is not a deed of partition to take effect at once, but it is a testamentary disposition of the property of the testator to take effect after his death.

By the Hindoo law as administered in provinces governed by the Mitakshara, a Hindoo has the power to make a testamentary disposition in the nature of a will, and in the case quoted in the margin decided by their Lordships of the Privy Council, a disputed will made by a Hindoo disposing of his self-acquired estate was established.

Nana Narain Roy, Appellant, *versus* Hurree Punth Bhao and others, Respondents.

Moore's Indian Appeals, Vol. IX., page 96.

Having disposed of the question whether Dabee Dutt Misser could make a will in the affirmative, we proceed to consider whether he could by will make an unequal distribution of his self-acquired estate amongst his heirs.

We are of opinion that he could. A son under the Mitakshara law has a right by birth in his father's and his grandfather's estate (the ancestral estate). But the father has a predominant interest in the estate acquired by himself, and the son must acquiesce in the father's disposal of his own property. Mitakshara, page 279, Cap. I., Section 5, para. 10. See also page 319 of Mr. Francis Macnaghten's Considerations of Hindoo Law, and a decision published in the Weekly Reporter. Volume VI., page 71.

There can, we think, be no doubt that Dabee Dutt Misser had the power of disposing of his self-acquired property at his will "*inter vivos*;" the son Bawa Misser acquiesced in that disposal, although his consent to the disposition was not necessary under the Hindoo law. The disposition, under the circumstances of the case, was one which a prudent man would naturally make, and there is no evidence whatever that this disposition was made in fraud of the creditors of the son of the testator.

In this view, we reverse the decision of the Principal Sudder Ameen, and decree this appeal with costs payable by the respondent.

Jackson, J.—I also am of opinion that the decision of the Principal Sudder Ameen should be reversed, and the suit of the plaintiff dismissed with all costs. I consider that the deed which the plaintiff seeks to have set aside is, in fact, a will. Under its terms, the testator leaves the ancestral property in the hands of the son, to whom, under the Hindoo law prevalent in that part of the country, it must descend, and he bequeaths his self-acquired property to his grandsons and his second wife in certain specified shares. He, in fact, disinherits his son as regards all self-acquired property. The evidence in this case discloses the

grounds upon which this disposition of the property was made, *viz.*, that the testator's son was at the time encumbered with debts and in the hands of his creditors. The plaintiff asks the Court to have this deed set aside, and to have it declared that the son is entitled to the whole of the self-acquired, as well as the ancestral, property of the testator.

To support this claim, Baboo Unnoda Pershad Banerjee has argued before us that, under the Mitakshara, a father cannot make an unequal partition even of his self-acquired property among his heirs. In my opinion, this is not the point at issue in this case. The testator has not made any partition of this self-acquired property among his heirs. On the contrary, he has disinherited his only direct heir as far as this property is concerned. It seems to me, therefore, that it is altogether unnecessary to give any opinion upon the point which has been argued by the pleader for the respondent. I do not, therefore, notice any of the texts which he has quoted in support of his argument. It is true that the property has been divided by the testator among some of the persons who are his natural heirs, but it is not a partition among his heirs in the meaning of those words as used in the Mitakshara. The testator has, in fact, disinherited his principal heir, and bequeathed his self-acquired estate among more distant heirs, who would, in the direct line of succession, not have at once inherited the property. Looking upon the testator's will in this light, it cannot be denied that its terms are within the law. If the testator could have made a gift of this self-acquired estate to whomsoever he pleased during his lifetime, he can give it by will to whomsoever he pleases after his death. It was not denied that he might make any alienation he wished of this estate during his lifetime or by will to a stranger, but there was an attempt to argue that, if the person who benefits by the alienation is one of the natural heirs, and not a stranger, that then the alienation is void in law. But no text was brought forward in support of such argument. There are numerous precedents of this Court and of the Privy Council, showing that there is no shadow of foundation for such a view of the law. The following were quoted during the argument, and are directly in point. Moore's Indian Appeals, Volume IV., page 103, Rungama Atchama, Appellant; Moore's Indian Appeals, Volume IX., page 96—the Bittor case—also Weekly Reporter, Volume VI., page 71, and Volume VIII., page 455.

Following these precedents, which give a person who has self-acquired property the fullest power of disposition over it, I would uphold the will of the testator in this case. It is not only a legal will, but that of a prudent man, which ought, on all considerations of equity, to be supported if not directly illegal. Taking this view, I concur with my learned colleague in decreeing this appeal, reversing the orders of the Principal Sudder Ameen, and dismissing the plaintiff's suit with all costs.

The 21st August 1868.

Present:

The Hon'ble J. B. Phear and C. Hobhouse, *Judges.*

Service-tenure—Alienation without grantor's consent.

Case No. 606 of 1868.

Special Appeal from a decision passed by the Principal Sudder Ameen of Dacca, dated the 21st December 1867, modifying a decision of the Moonsiff of Bohur, dated the 29th July 1866.

Ram Gopal Chuckerbutty and another (two of the Defendants), *Appellants,*

versus

Chundernath Sein and others (Plaintiffs), *Respondents.*

Baboos Onookool Chunder Mookerjee and *Chunder Madhub Ghose* for Appellants.

Baboo Urnurendurnath Chatterjee for Respondents.

In a suit to obtain khas possession of lands which were found to have been held of plaintiff and his ancestors by defendants and their ancestors upon a service-tenure, but which the grantees alienated to strangers without any acquiescence on the part of the grantor, and then ceased to perform the services, it was HELD that the defendants had forfeited their right to hold the land at all.

Phear, J.—THE plaintiff alleges that the lands in suit have been held for a very long period of him and his ancestors by the defendants and their ancestors upon service-tenure, namely, a tenure which bound the tenants from time to time to serve as guard to a certain idol, Luckheenarain, and to appear in processions of that idol. The defendants do not deny that they hold the lands of the talook of the plaintiff, but they say they hold

them *lakheraj* under a grant made to them previously to the Permanent Settlement; and the only question between the parties in this case has been, whether or not the tenure of these lands by the defendants and their ancestors has been subject to the condition of service which is alleged by the plaintiff. As to this, the burden of proof lay upon the plaintiff. The Lower Appellate Court is of opinion that the plaintiff has discharged that burden, and it has accordingly given a decree in favor of the plaintiff. On special appeal to this Court, substantially two objections only are made. The first is that there is no sufficient legal evidence on the record to support the finding of the Lower Court that the condition of service alleged by the plaintiff has been made out; and the second objection is, not to the findings of fact by the Lower Appellate Court, but to the form in which that Court has given its decree. This objection is to the effect that the plaintiff is not entitled to obtain *khas* possession, but only to a possession through the defendants as under-tenants.

With regard to the first objection, we think that there is evidence on the record legally sufficient to support the finding of the Lower Appellate Court. There are witnesses who speak from personal knowledge, extending over a large number of years, to the fact that the vendor-defendants and their ancestors have, from time to time and continually, performed the services which the plaintiff says is the condition of the tenure. The same witnesses also speak to the defendants' holding these lands, and they further say that, when the vendor-defendants alienated the lands to the vendee-defendants, the services so rendered ceased. No doubt, the evidence of these witnesses leaves an opening for the possibility that the services were not rendered on condition of holding the land; but they do so far connect the services with the holding of the land as to furnish evidence from which, in our judgment, the conclusion may properly be drawn by a Court having jurisdiction to decide upon facts, that the tenure was really upon condition of the performance of the services. In short, we think that there is evidence from which the conclusion may be drawn at which the Lower Court has arrived, although, no doubt, evidence could be conceived as existing which should show that the service was attributable to some other obligation. We think, therefore, that we ought not here on special appeal to interfere with the determination of the Lower Court upon the facts of the case, and we, therefore, come to the second objection as to the form of the decree.

Two precedents have been quoted to us to support the argument that the plaintiff, if he is entitled to recover the land, is not entitled to obtain *khas* possession as against the defendants. But those are, both of them, cases, where the service ceased, not by reason of default on the part of the defendants, but by reason of the plaintiffs no longer requiring the services which were the condition of the tenure. The defendants, therefore, under the circumstances of those cases, were entitled to say: We are perfectly ready to render the services for which we hold these lands; we wish to retain the lands, and we are prepared always to hold ourselves so ready; it is not our fault that you do not require the services; we ask to be declared entitled, at any rate, to hold the lands upon some condition which is not more burdensome than the one upon which we have always been accustomed to hold them; we are ready to do every thing that lies upon us to do; if you do not accept of the old services, at least we ask to be allowed to hold the property upon paying an equivalent in money. It is upon an equity of that kind, as we understand those cases, that it was held that the plaintiffs were not entitled to claim *khas* possession, and to turn the defendants completely out of the enjoyment of the property. The present case is not parallel with those. Here the failure of the services is entirely attributable to the wrong act of the defendants; and it seems to us that the defendants, when they say we will no longer perform the services, or at least when they do that which has produced a result equivalent to the same thing, namely, when they hand over to strangers the property which they have received upon condition of performing this service, without any acquiescence on the part of the grantor, and then cease themselves to perform the services, that there is no equity which they can put forward on their behalf enabling them to say we are still entitled, at any rate, to hold possession of these lands, although we do not do that for which they were granted to us, subject only to the condition that we pay some other consideration instead thereof.

It seems to us, taking the facts as the Lower Appellate Court in its discretion has found them, that the defendants have forfeited their right to hold the lands at all, and consequently there is nothing wrong in law in the decree of the Lower Appellate Court which awards *khas* possession to the plaintiff. We dismiss the appeal with costs.

b

The 21st August 1868.

Present:

The Hon'ble L. S. Jackson and F. A. Glover, *Judges.*

Jumma-wassil-bakee papers—Evidence—Section 43, Act II., 1855.

Case No. 1079 of 1868 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of Moorshedabad, dated the 1st February 1868, affirming a decision of the Deputy Collector of that District, dated the 7th July 1866.

Beejoy Gobind Burral and others (Plaintiffs), *Appellants,*

versus

Bheekoo Roy (Defendant), *Respondent.*

Baboo Bhugobutty Churn Ghose for Appellants.

Baboo Gopal Lall Mitter for Respondent.

Jumma-wassil-bakee papers are at the best corroborative evidence, not independent testimony.

Quære.—Can such papers be dealt with as a "book," or be described as "kept in the regular course of business," within the meaning of Section 43, Act II, 1855?

Jackson, J.—The ground of special appeal in this case is wholly untenable. It is that the Judge is wrong in thinking that the jumma-wassil papers referred to do not show variation in the rent of the defendant. This ground implies that, if the jumma-wassil papers had shown a variation in the rent of the defendant, then the plaintiff would have been entitled to a decree. This is an utter fallacy. This case was tried by the Judge upon a remand from this Court. The judgment of the case has been reported in VII. Weekly Reporter, page 533. The extent to which the jumma-wassil papers are admissible and the value of such papers on evidence are clearly pointed out in that judgment. The learned Judges say: "*Secondly*, if the "original were produced, it might, under "Section 43 of Act II. of 1855, perhaps be "admissible as a *book*, regularly kept in the "way of business, but, as such, it would be "corroborative, but *not independent proof* of "the facts stated therein, *viz.*, that in the "year 1235, the *defendant's rent was so and* "*so.*"

This makes it quite clear that those papers, if admitted at all, could only be admitted to corroborate the testimony of a witness who had knowledge of the facts, and who appeared in the case to prove those facts. The Section 43 of Act II. of 1855 is referred to by Mr. Justice Norman in giving judgment. Section 43 is in these words; "Books proved to have "been regularly kept in the course of busi-"ness or in any public office shall be admis-"sible as corroborative, but not independent "proof of the facts stated therein." I must confess that I have the most serious doubts whether a set of jumma-wassil-bakee papers, merely fastened together at the corner by a thread, can be dealt with as a book, or, looking at the mode in which such papers are usually prepared, that they can be described as "kept in the regular course of business." I am inclined to think such papers would not come within the provisions of the Section. But in this case it is admitted by the special appellants' vakeel that there was no independent evidence as to the payment of the rent at the rate stated by the plaintiff. That being so, the papers in question, which at the best could only be corroborative, were inadmissible. The ground of special appeal altogether fails. The special appeal is dismissed with costs.

Glover, J.—I concur. The papers could not be used as independent, but only as corroborative, evidence. The Judge has fallen into the mistake of taking these papers as direct evidence.

The 21st August 1868.

Present:

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice*, and the Hon'ble Dwarkanath Mitter, *Judge.*

Mortgage—Sale—Registration—Priority.

Case No. 2940 of 1867.

Special Appeal from a decision passed by the Officiating Judge of Shahabad, dated the 30th August 1867, reversing a decision of the Moonsiff of that District, dated the 16th June 1867.

Proladh Misser and others (Plaintiffs), *Appellants,*

versus

Oodit Narain Singh (Defendant), *Respondent.*

Baboos Unnoda Pershad Banerjee, Mohesh Chunder Chowdry, and *Poornoo Chunder Shome* for Appellants.

Baboos Kalee Mohun Dass and *Mohinee Mohun Roy* for Respondent.

Where property is sold under a decree obtained on a mortgage-bond, the purchaser does not purchase merely the rights and interests of the debtor, but the right which the mortgagee brings to sale by virtue of the decree.

By Section 2, Act XIX., 1843, a registered mortgage takes priority over an unregistered mortgage of earlier date, and a purchaser, under a decree on the mortgage which has priority, has a preferable right to the purchaser under the execution of a decree on the other.

Peacock, C. J.—THE appellant, the plaintiff, purchased the land on the 28th of September 1864 under a decree of the 28th of March 1864. That decree was obtained on a mortgage-bond, dated the 7th November 1863, and declared that the premises were liable to be sold in satisfaction of the mortgage-bond. The mortgage-bond of the 7th of November 1863 was duly registered. The defendant purchased on the 30th of March 1865 under a decree in his own favor, dated the 30th of July 1864. That decree was on a mortgage-bond dated the 7th of June 1859, which was not registered. The defendant's title, therefore, depends upon a purchase under a decree later in date than the decree under which the plaintiff purchased; but that decree, though later in date than the other decree, was for the enforcement of a mortgage-bond of earlier date than the mortgage-bond which was the subject of the suit under which the plaintiff purchased. But the mortgage-bond which was the subject of the suit under which the defendant purchased, though of a date earlier than that of the other bond, was not registered.

Now, it appears to me that a purchaser under a decree obtained upon a mortgage-bond, ordering the mortgage-property to be sold in satisfaction of the mortgage debt, does not purchase merely the right and interest of the debtor, but he obtains the right which the mortgagee brings to sale by virtue of the decree.

The question is whether the purchaser, under a decree for sale in satisfaction of a registered mortgage of a later date, is or is not entitled to priority over the purchaser under a decree enforcing an unregistered mortgage of an earlier date. It appears to me that the rights of the purchasers under such decrees must depend upon the priority of the rights of the mortgagees in satisfaction of whose charges the sales are made.

A Full Bench decision in 5 Weekly Reporter, page 61, Civil Rulings, has been referred to for the purpose of showing that a registered deed of sale does not, by virtue of the provisions of Act XIX. of 1843, invalidate a prior unregistered mortgage. But that decision depended upon the very peculiar wording of Act XIX. of 1843 and the circumstances under which that Act was passed, repealing Act I. of 1843, which was differently worded. That decision was that a registered deed of sale did not invalidate a prior unregistered mortgage, not that a registered deed of sale would not have priority over an earlier unregistered deed of sale, or that a registered mortgage would not take priority of an earlier unregistered mortgage. I have no doubt that, notwithstanding that decision, a registered mortgage does take priority of an unregistered mortgage.

The question turns upon Section 2. Act XIX. of 1843, which was the Section on which the Full Bench decision was founded. That Section enacts that, from the 1st day of May last past, every deed of sale or gift of lands, houses, or other real property, a memorial of which has been or shall be duly registered according to law, shall, provided its authenticity be established to the satisfaction of the Court, invalidate any other deed of sale or gift for the same property which may not have been registered, and whether such second or other deed shall have been executed prior or subsequent to the registered deed; and that from the said day, every deed of mortgage on land, houses, or other real property, a memorial of which has been or shall be duly registered according to law, and provided its authenticity be established to the satisfaction of the Court, shall be satisfied in preference to any other mortgage on the same property which may not have been registered, and whether such second or other mortgage shall have been executed prior or subsequent to the registered mortgage, any knowledge or notice of any such unregistered deed or certificate alleged to be had by any party to such registered deed or certificate notwithstanding.

These mortgages were made subsequent to the 1st May 1843, the one on the 7th November 1863, and the other on the 7th of June 1859. It is, therefore, clear that the registered mortgage took priority over the prior unregistered mortgage. and that the purchaser, under the decree which ordered a sale in satisfaction of the mortgage which had priority, had a preferable right to the purchaser under the execution of the decree of the other mortgage. Under these circumstances, the plaintiff is entitled to priority, the second mortgage having priority over the unregistered mortgage of earlier date.

The decision of the Lower Appellate Court is reversed, and the decree of the first Court upheld, with costs of this appeal and costs of the Lower Appellate Court.

d

The 21st August 1868.

Present:

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble Dwarkanath Mitter, *Judge*.

Effect of witnessing a deed of conveyance.

Case No. 551 of 1868.

Special Appeal from a decision passed by the Officiating Judge of Shahabad, dated the 21st December 1867, affirming a decision of the Sudder Ameen of that District, dated the 21st June 1867.

Matideen Roy (Plaintiff), *Appellant*,

versus

Mussoodun Singh and others (Defendants), *Respondents*.

Baboo Poornoo Chunder Shome for Appellant.

Baboo Kalee Kishen Sein for Respondents.

The fact of a party putting his name as a witness to his brother's signature to a deed conveying the whole of certain property was held to be evidence against such party, either that the whole property did belong to his brother, or that he was acquiescing in his brother's act of selling the whole.

Peacock, C. J.—We cannot remand this case to be tried upon the point upon which it was originally remanded. When the plaintiff put his name as a witness to his brother's signature to a deed conveying the whole of the property, the Court might reasonbly infer that he knew that his brother was selling the whole of the property. If he knew that his brother was selling the whole of the property as his own, and allowed him to do so without objection, it would be evidence against him either that the whole property did belong to his brother, or that he was acquiescing in his brother's act of selling the whole. As the Judge found that one-half did belong to the plaintiff, the former inference is got rid of, but then the other remains, *viz.*, that the plaintiff being entitled to one-half acquiesced in his brother's selling the whole. After that, he could not sue a *bona-fide* purchaser of the whole to recover the one-half.

The decision of the Lower Appellate Court is affirmed with costs.

The 22nd August 1868.

Present:

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble Dwarkanath Mitter, *Judge*.

Limitation—Indigo-advances—Account without signature—Section 4, Act XIV. of 1859.

Reference to the High Court by the Officiating Judge of the Small Cause Court at Kishnaghur.

Bengal Indigo Company

versus

Koylas Chunder Dass.

In a suit to recover a balance on account of indigo-advances made on a kubooleut executed by defendant, where defendant had broken no contract, but the discontinuation of the cultivation had been the act of the plaintiff, limitation was held to run from the date of the kubooleut, which operated as a written acknowledgment signed by defendant (Section 4, Act XIV. of 1859).

Held, too, that a statement of balances found in one of plaintiff's books duly verified, without any signature by defendant (who could not write), was not an acknowledgment within the meaning of Section 4; the entry of defendant's name in one column, taken in connexion with a cross in another column, formed no valid signature.

Case.—This is a suit for the recovery of indigo-advances. It is founded on a kubooleut executed by defendant, of which a translation is annexed.* I am of opinion that a

* To Mr. John J. Doyle,
Manager in behalf of the Bengal Indigo Company.

I, Koylas Chunder Dass, of Nookfool, do hereby execute this contract-kubooleut for supplying indigo-leaf. The accounts of the dealing I had with the Mulnath Factory for several years past have this day been settled, and the balance due by me is Rupees 45-5-1. I wilfully nullify the terms of the contract which I executed in 1864 to sow indigo on 2½ beegahs of land for 10 years till 1873, and for the purpose of sowing indigo on 3 beegahs every year for three years, from 1865 to 1867, and having received a fresh advance of Rupees 2, I do enter into this new agreement. I shall measure by the usual "rasi," and mark 3 beegahs of fertile lands, and cultivate the same in the proper season. Half of the lands I shall fit out for October sowings and the other half for subsequent sowings. The seeds which will be required for sowing I shall get from the factory. I shall sow the seed, and after harrowing and weeding, when the plants will be ready, I shall, per order of the factory, cut them, and at my own expense carry them to the factory each year, and shall receive consideration at the rate of four bundles per rupee, a bundle being 6 feet circumference; I shall pay four annas every year as value of seeds, and shall pay hire of carts or boats, as the case may be, which you will engage for the conveyance of the indigo-plants, at the rate of 1-4 per hundred bundles. Account will be cleared every year, and I shall have my dues, if there will be any, and pay off any sum for which I shall be held liable. If I fail to sow indigo in the proper season on the lands I have received advance for, during any one of the three years, I shall then pay damages at the rate of Rupees 10 per beegah. If in any one of these three years I don't give to the factory all the indigo-plants that would be grown on the lands, I shall pay compensation at the rate of 10 rupees per beegah for

large portion of the claim is barred by limitation, but at the request of plaintiff's pleader, and as the case is of considerable importance to the Company, inasmuch as it will furnish a precedent for a large number of similar suits which have been, or are about to be, instituted, I submit the question for the decision of the High Court.

The claim comprises the following items :—

Balance due by defendant at the close of 1865	45	15	11
Advance given in 1866 ...	2	0	0
Price of seed	0	13	0
Cart-hire	0	5	4
Total ...	49	2	3
Deduct the value of indigo furnished in 1866 ...	6	13	0
Total ...	42	5	3

On referring to the kubooleut, I find that there was a balance due by defendant at the close of 1864 of 45-5-1, which was increased by the transactions of 1865 to 45-15-11, and reduced by those of 1866 to 42-5-3. Cultivation was discontinued from September of the latter year.

Plaintiff's contention is that limitation begins to run from the last-named date, *viz.*, September 1866. That being the date of the latest transaction indicating mutual dealings between the parties, this reasoning might be admitted if plaintiffs and defendants could be looked on as merchants and traders who have had mutual dealings (Section 8, Act XIV. of 1859); but the High Court has expressly ruled the contrary (3 W. R., Small Cause Court cases). I am of opinion that limitation in regard to the Rupees 45-5-1 begins to run from the date of the kubooleut, *viz.*, 23rd December 1864, the kubooleut operating as a written acknowledgment signed by defendant (Section 4, Act XIV. of 1859); that plaintiff's suit should have been instituted within three years from that date; and that, as the plaint in this case was not filed till June 1868, plaintiff is out of time as regards the balance of 1864. If plaintiff were suing defendant for breach of contract, of which the kubooleut was the basis, and the amount therein admitted by defendant the consideration, the case would be different; the present suit, however, is not one for breach of contract. Defendant broke no contract, the discontinuation of indigo-cultivation not being his act, but that of the plaintiff.

Plaintiff then raised a second point, namely, supposing the period of limitation be held not to run from September 1866 (when transactions between the parties ceased), still that a statement of accounts made by defendant in December 1865 operates as a revival of his liability as to the old balance. This statement of accounts is to be found in one of plaintiff's books duly verified. The question on this point is, can this statement of accounts be construed into an acknowledgment in writing signed by the defendant, as laid down in Section 4, Act XIV. of 1859. I certainly think not, inasmuch as there is no signature by defendant at all. True he cannot write, but he might have got somebody to write his name for him, and touched the pen in token of acquiescence, as is usual with workmen. Plaintiffs contend that the entry of defendant's name in column 3, taken in connection with the cross in column 16, forms a valid signature. I am unable to coincide in this reasoning, and have no doubt that the entry in question does not satisfy the requirements of Section 4. I am, therefore, of opinion that the whole of the claim is barred except the advances of 1865 and 1866, and I have decreed for plaintiffs for that amount only, contingent on the opinion of the High Court.

Judgment of the High Court.

We are of opinion that the view taken by the Judge of the Small Cause Court is correct, and that the whole claim is barred except the advances for 1865 and 1866.

any loss the factory would suffer in consequence, and I shall also pay all balances due by me without any excuse; and though I shall pay all damages and balances as stated above, the terms of this contract will not be null and void before the expiration of these three years, and I shall not be able to refund the advance received. You will be able to bring any suit against me under the existing laws or any other law that may hereafter be passed, to make me liable under the conditions of this contract, and nothing will affect your right to sue for damages as stated above. All excuses to act according to the contract will not be heard, and for these purposes I willingly do receive the amount of advance, and execute this contract (kubooleut) this day, the 23rd December 1864.

f

The 22nd August 1868.

Present:

he Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble Dwarkanath Mitter, *Judge*.

arriage of goods—Damages—Set-off—Drawback.

eference to the High Court by the Judge of the Small Cause Court at Darjeeling.

Scanlan *versus* Herrold.

In a suit for money claimed on account of the carriage goods in which defendant pleaded non-indebtedness d a set-off on account of damage caused to the goods: HELD that defendant could not answer the claim th the set-off on account of damages; though the exnt, if any, to which defendant was entitled to draw ck might be put in issue, after which it would still be en to defendant to bring an action against plaintiff r special damages.

Case.—THE plaintiff is a carrier, and claims om defendant as agent of the Pankabarree ea Company, on account of the carriage of rtain goods, including a batch of tea. He aims on account of the carriage of this tea sum of Rupees 157.

The defendant pleads not indebted, and so a set-off to the amount claimed by plaint- on account of damage caused through aintiff's negligence to the above-mentioned atch of tea.

The point on which I wish to make a reerence is: Can defendant, in answer to the laint, plead this set-off, and, if so, within hat limit?

I am of opinion that defendant cannot nswer the claim with this set-off on account of damages sustained in regard to the batch of tea. It may be put in issue to what extent, if any, defendant is entitled to drawback on account of plaintiff's not having fulfilled his contract to deliver the tea entrusted to him in good condition. After the decision of this issue, it would still be open to defendant to bring an action against plaintiff for any special damages sustained by him owing to plaintiff's neglect.

My reason for the opinion I have expressed is that, under Section 121 of Act VIII. of 1859, a set-off can only be pleaded in a case of a debt due to the defendant.

Judgment of the High Court.

We are of opinion that the view taken by the Judge of the Small Cause Court is correct, and that the defendant cannot set off the damages.

The 22nd August 1868.

Present:

The Hon'ble J. B. Phear and C. Hobhouse, *Judges*.

Application under Section 25, Act X., 1859—Res judicata.

Case No. 617 of 1868.

Special Appeal from a decision passed by the Judge of Beerbhoom, dated the 20th December 1867, reversing a decision of the Moonsiff of Soory, dated the 9th May 1867.

Hureenath Doss (Plaintiff), *Appellant*,

versus

Tara Chand Sircar and another (Defendant), *Respondents*.

Baboo Motee Lall Mookerjee for Appellant.

Baboo Debendur Chunder Ghose for Respondents.

An application under Section 25, Act X., 1859, is not equivalent to the institution of a suit, and whether the Collector accedes to or refuses it, he in no sense adjudicates between the parties.

Phear, J.—WE think the Judge is wrong in this case. An application to the Collector, under Section 25, Act X. of 1859, is not equivalent to the institution of suit. It is entirely distinct from a suit brought to eject a tenant from his holding, because he has committed a breach of the conditions of his tenancy. An application under Section 25 is based entirely upon the assumption that the tenancy has come to an end, and it is the assistance of the Collector in his executive capacity which is sought for the purpose of turning the old tenant out, and to avoid committing a breach of the peace. Consequently, whether the Collector accedes to an application of this kind, or whether he refuses to give his assistance, he in no sense adjudicates upon any matter in issue between the parties. This has been already decided more than once by this Court, and in particular I would refer to two reported cases, one in Sutherland's Full Bench Rulings 118, and the other in Volume X. of the Weekly Reporter, page 7.

In this case, the Lower Appellate Court was, therefore, in no sense concluded by any opinion which the Deputy Collector had formed with regard to the lease set up by the plaintiff, and it ought to have tried the case upon its merits. Accordingly, we reverse the decision of the Judge, and remand the case to him for re-trial upon its merits. Costs will follow the event.

The 22nd August 1868.

Present:

The Hon'ble H. V. Bayley and A. G. Macpherson, *Judges.*

Resumption of invalid lakheraj—Settlement with ex-lakherajdar.

Case No. 205 of 1863.

Application for review of judgment passed by the Hon'ble Justices H. V. Bayley and A. G. Macpherson, on the 8th June 1868, in Special Appeal No. 1622 of 1867.

Bheekoo Singh and others, Plaintiffs (Appellants), *Petitioners*,

versus

The Government and others, Defendants (Respondents), *Opposite Party.*

Mr. J. T. Woodroffe and *Baboo Tarucknath Sein* for Petitioners.

Mr. G. Gregory and *Baboo Kishen Kishore Ghose* for Opposite Party.

When land is resumed as invalid lakheraj, there is no provision of law which compels Government, under a decree of the Civil Court, to make a settlement with the ex-lakherajdar, if, for so ne reason of its own, it declines to do so.

Bayley, J.—THIS application for review of our judgment is made on the following grounds:—

1st.—That we were wrong in holding that the Government has any such absolute power in it as to entitle it to refuse a settlement with an ex-lakherajdar whose lands have been resumed under Regulation II. of 1819.

2ndly.—That we were also wrong in affirming the order of the Lower Appellate Court, which held that, on the ground of the Government having such absolute power of refusal, the plaintiff had no *locus standi* in Court.

3rdly.—That we were wrong in holding that limitation barred the suit, as the cause of action arose from the date on which settlement was made with Joy Prokash Singh on the 23rd December 1862, and this suit was instituted within three years of that date, *viz.*, on the 22nd December 1865.

It is stated by the Lower Appellate Court that this land was resumed upon the rebellion of one Ekbal Ali, but when is not stated nor shown to us. In fact, however, nothing has been pointed out to us to indicate that such was the cause of resumption. On the contrary, it is clear that, on the 22nd May 1826, the lands were resumed under Regulation II. of 1819 on account of the plaintiff's predecessors being unable to show that they held the land rent-free under any grant or title whatever.

The Government seems at first to have held the resumed lands khas, and then, on the 22nd September 1840, a 20 years' settlement was made with parties alleged to be co-sharers with the plaintiff, but not with plaintiff.

On the 22nd September 1847, *viz*, during the currency of the 20 years' temporary settlement, a petition was made by the plaintiff's predecessors, begging that a settlement might be at once made with them, and if *that* could not be granted owing to the temporary settlement then existing and in force, there might be a recognition of their right to settlement, that is to say, malikanah might be allowed to them This petition was refused by the Collector, who stated that he could not break in on the temporary 20 years' settlement, but that, if the petitioners had any claim, they might take such further steps as they thought proper after the 20 years had expired; and that due enquiry would then be made. This order of rejection was upheld by the Commissioner in 1848, and it appears that the proceedings finally went in appeal to the Board of Revenue, who finally rejected the petition on the 22nd September 1849.

The learned Counsel, Mr. Woodroffe, states that the ex-lakherajdar has preferential title to settlement, and cites Sections 7, 8, and 17 of Regulation XIX. of 1793. Both Sections relate to grants before 1st December 1790, and here there is no such grant shown. Moreover, Section 7 only enacts that the lands resumed shall be independent talooks paying revenue to Government, and Section 8 gives the rules for the settlement with the proprietor *of the zemindaree* after survey and measurement. Section 17 states: "A grant "for land to be held exempt from the pay-"ment of revenue shall, if it has been forged, "&c., be adjudged null and void as far as "regards the exemption of the land from "the payment of revenue, and the land shall "be subjected to the payment of revenue "accordingly." But I do not read Section 17 to say or to mean that, therefore, settlement must, *as a matter of course*, be made with the ex-lakherajdar.

Clause IV., Section 21, Regulation II. of 1819, is next mentioned. That Clause states that, after resumption, information should be

given to the agent of the ex-lakherajdar, and the revenue-authorities shall proceed to make the assessment according to the law in force. That Clause gives no title to settlement by any terms in it to an ex-lakherajdar.

Section 5, Regulation XIII. of 1825, has been next quoted, but that Section enacts that it *shall be competent* to the Governor-General in Council in consideration of certain circumstances, such as long possession, to continue a talookdar or a lakherajdar in possession.

Then Section 15, Regulation VII. of 1822, has been quoted as enacting that Courts of Justice shall have full power to decide what claimants have the best title to settlement. But reading that and the preceding Section together, it is quite clear that the meaning of that Section is that which is admittedly recognized, *viz.*, that if *A* and *B* respectively claim a settlement before a settling-officer, the settling-officer shall, looking to the possession of the party, decide which of them is entitled to a settlement, and refer the other party to a Civil Court for adjudication of his alleged right.

The learned Counsel then cites the rules of the Board of Revenue for settlement, and various proceedings on record in the Gya Collectorate as prescribing rules directing settlement to be made with ex-lakherajdars, if they are willing to accept the jumma and fulfil the other conditions of the settlement. There is no doubt that this in the Revenue Department is the recognized administrative and executive rule and practice which settlement officers ordinarily follow ; still there is nothing shown in the Regulations of Government, which prescribes that, if the Government, for some reason of its own, declines to make a settlement with the ex-lakherajdar, there is any provision of law which compels Government under a decree of the Civil Court to make a settlement with the ex-lakherajdar, whether he wishes it or not. On this point, therefore, I do not see any reason to alter the decree already passed by us in this case.

The case cited from Sudder Dewanny Adawlut, 1850, page 407, merely states that the Resumption Courts only declare land liable to assessment, and do not decide conflicting proprietary rights between parties, and that such claim appertains to the Civil Courts.

On the point of limitation, I think it is clearly laid down that, when, as here, a party claims malikanah, which is well known to be, in other words, a claim for recognition of right to settlement on the ground of being an ex-proprietor, and his title to settlement and to proprietary right are rejected, the order of rejection could only be set aside by a suit brought within *three* years of that time. It is quite clear that, after the refusal of the recognition of plaintiff's right to settlement (which is urged on the ground of his being an ex-lakherajdar) in 1849, no steps were taken by him to sue. He is, there-

fore, in my opinion, barred by limitation in the present suit. On that point, therefore, I do not think it necessary to alter the decree passed by us.

This application will, therefore, be rejected with costs. Separate costs to be allowed to Government.

Macpherson, J.—I concur in rejecting this application for review. My reasons are stated in the judgment I delivered at the hearing of the appeal; and I do not see any cause to alter the opinion I then formed. The application will be refused with costs.

The 22nd August 1868.

Present:

The Hon'ble J. B. Phear and C. Hobhouse, *Judges.*

Right of way—User.

Case No. 1710 of 1868.

Special Appeal from a decision passed by the Second Principal Sudder Ameen of the 24-Pergunnahs, dated the 4th April 1868, affirming a decision of the Moonsiff of Manicktollah, dated the 17th June 1867.

Obhoy Churn Dutt (Defendant), *Appellant,*

versus

Nobin Chunder Dutt and others (Plaintiffs), *Respondents.*

Baboo Rash Beharee Ghose for Appellant.

No one for Respondents.

User during previous ownership is no evidence of a right of way, which relates to the land of another.

Phear, J.—We think the Principal Sudder Ameen was wrong in considering that anything which took place before the partition was evidence of the plaintiff's right of way over lands which became the lands of the defendant by virtue of that partition. Antecedently to that period, the passing to and fro along this path by the plaintiff and his family was simply the exercise of a right of ownership over the land which he held jointly with the defendant and his family, and was not referable to a right of way, which, by its nature, necessarily relates to the land of another person. When, by the partition, the land became the sole property of the defendant, the plaintiff's rights of ownership ceased, and among them his right to pass and repass along the old path. But a new right of way might have been created in his favor at the partition, or the defendant might have given him such a right since; and whether either of these alternatives had occurred was what the Lower Courts had to try. Therefore, as the Principal Sudder Ameen has misapprehended the case, and has based his judgment mainly upon consideration of the lengthened user which he thought had taken place before the partition, we feel obliged to reverse his decision, and remand the case to him for re-trial: and in so doing we think it right to remind him that, although user before the partition must not be taken into consideration in the decision of this case, yet any user which may have taken place since the partition as of right by the plaintiff and his family is good evidence, as far as it goes, of such a right having been given to him by the defendant. Of course, the Principal Sudder Ameen will not give undue weight to this evidence in the absence of explanation as to the circumstances under which, and the time when, the supposed grant of the right of way to the plaintiff was made by the defendant. Costs will abide the event.

b

The 24th August 1868.

Present:

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice,* and the Hon'ble Dwarkanath Mitter, *Judge.*

Damages—Execution—Code of Civil Procedure.

Case No. 428 of 1868.

Special Appeals from a decision passed by the Judge of Shahabad, dated the 9th December 1867, affirming a decision passed by the Principal Sudder Ameen of that District, dated the 26th August 1867.

Mussamut Benda Bibee, for self and as guardian of Rajkishen Paurey, and others (Defendants), *Appellants,*

versus

Lalla Ram Surun Singh (Plaintiff), *Respondent.*

Baboo Kalee Kishen Sein for Appellants.

Baboos Unnoda Pershad Banerjee and *Otool Chunder Mookerjee* for Respondent.

Case No. 623 of 1868.

Bhenuch Singh and another (Plaintiffs), *Appellants,*

versus

Tugger Singh and others (Defendants), *Respondents.*

Baboo Kalee Kishen Sein for Appellants.

Baboos Otool Chunder Mookerjee and *Ubinash Chunder Banerjee* for Respondents.

The Code of Civil Procedure gives no power in an ordinary suit for damages to direct the amount to be assessed in execution, as it does with regard to wassilat.

Peacock, C. J.—It is clear that, upon the finding, there were three separate *ahurs*, and not one continuous *pyne*. The decree of the Lower Appellate Court is affirmed with costs in both cases.

I remark that, in these cases, as in some other recent cases, the Lower Courts do not assess the damages themselves, but leave them to be assessed in execution. This is clearly wrong. There is no power given by the Code of Civil Procedure in an ordinary suit for *damages* to direct the amount to be assessed in execution, as there is with regard to wassilat by Section 197, Act VIII. of 1859. There was an Ameen deputed in this case, and he might just as well have assessed the damages as an Ameen in execution of the decree, and the additional expense would have been saved. There was no ground of appeal upon this point, but I think it right to notice it, in order that the attention of the Lower Courts may be drawn to this irregularity.

The 24th August 1868.

Present:

The Hon'ble H. V. Bayley and A. G. Macpherson, *Judges.*

Alienation—Land devoted to religious purposes (wuqf).

Case No. 3450 of 1867.

Special Appeal from a decision passed by the Judge of Cuttack, dated the 27th August 1867, reversing a decision passed by the Principal Sudder Ameen of that District, dated the 19th March 1866.

Futtoo Bibee (one of the Defendants), *Appellant,*

versus

Bhurrut Lall Bhukut (Plaintiff), *Respondent.*

Moulvie Syud Murhummut Hossein and *Baboo Bykuntnath Paul* for Appellant.

Baboo Obhoy Churn Bose and *Umbika Churn Banerjee* for Respondent.

Where the whole of the profits are not devoted to religious purposes, but the land is a heritable property burdened with a trust, *e. g.*, the keeping up of a saint's tomb, it may be alienated subject to the trust.

Macpherson, J.—We think this appeal ought to be dismissed with costs. It does not appear that the land is absolute *wuqf*, that is to say, that the whole of the profits arising from it is devoted to religious purposes. It rather appears that it is a heritable estate burdened with a trust—the keeping up of the *peer's* tomb. Being, therefore, a heritable property burdened with a trust. it may be alienated subject to the trust. This has been decided by the late Sudder Court in cases reported in Sudder Dewanny Adawlut Reports of 1858, pages 586, 1028, and 1218.

As regards the objection that some lands are lakheraj, the objection was not taken either in the Lower Courts or in this Court when the case formerly came before us in special appeal. We, therefore, decline to allow the point to be raised now.

The 24th August 1868.

Present:

The Hon'ble J. B. Phear and C. Hobhouse, *Judges.*

Rights of cultivators—Produce—Occupancy.

Case No. 718 of 1868.

Special Appeal from a decision passed by the Principal Sudder Ameen of Chittagong, dated the 28th December 1867, reversing a decision passed by the Moonsiff of Howlah, dated the 25th June 1867.

Obhoy Churn Sein (one of the Defendants), *Appellant,*

versus

Ram Huree Odhikaree (Plaintiff), *Respondent.*

Baboo Nubo Kishen Mookerjee for Appellant.

Baboo Kishen Succa Mookerjee for Respondent.

Where plaintiff had cultivated land, and defendant had taken away the crops produced—HELD that plaintiff would have no right to recover the value of the crops, unless he either had good right as against the defendant to occupy and cultivate the land, or had been led by the conduct of the defendant to suppose that he had such right. If he had cultivated with the knowledge of defendant, that would give him a right to the produce, even though not entitled to the occupation.

Phear, J.—WE think this case must be remanded. The Lower Appellate Court has decreed that the defendant shall pay the plaintiff the value of certain crops raised upon the lands in suit, merely because it was of opinion that the plaintiff had cultivated the land last year, and by that cultivation had produced the crops, and that these crops had been taken away by the defendant. But the Lower Appellate Court at the same time declined to go into the question by what right the plaintiff occupied and cultivated the land. Now, it seems to us that the plaintiff would have no right to recover the value of the crops from the defendant, unless he either had good right as against the defendant to occupy and cultivate the land, or that he had been led by the conduct of the defendant to suppose that he had such right. Consequently, the Lower Appellate Court was wrong in not enquiring into the title by which the plaintiff cultivated the land in suit. We, therefore, reverse the decision of the Lower Appellate Court, and remand the case for re-trial upon its merits. We may as well remark that, should the Principal Sudder Ameen remain of opinion that the plaintiff has cultivated the land in question for two or three years, and has so cultivated them, or even for the last year has cultivated them, to the knowledge of the defendant, that will give him a right as against the defendant to the produce of the lands, even though he (the plaintiff) may not be able to make out a title to the occupation.

The 24th August 1868.

Present:

The Hon'ble J. B. Phear and C. Hobhouse, *Judges.*

Survey-maps—Evidence—Section 13, Act II., 1855.

Case No. 170 of 1868.

Special Appeal from a decision passed by the Judge of the 24-Pergunnahs, dated the 26th March 1868, affirming a decision passed by the Additional Moonsiff of that District, dated the 14th December 1866.

Koomodinee Debia (Plaintiff), *Appellant,*

versus

Poorno Chunder Mookerjee (Defendant), *Respondent.*

Baboos Juggadanund Mookerjee, Khetternath Bose, and *Kedarnath Chatterjee* for Appellant.

Baboo Bhowanee Churn Dutt for Respondent.

Under Section 13, Act II. of 1855, Government survey-maps are evidence, not only with regard to the physical features of the country depicted, but also with regard to the other circumstances which the officers deputed to make the maps are specially commissioned to note down. Further than this, they are not evidence as to rights of ownership.

Phear, J.—THE only question for us to determine in this case is whether or not the survey-map relied upon by the defendant can properly be used in evidence between the parties. We have looked at the map itself, and it bears on the face of it the appearance of being an ordinary Government survey-map. There is nothing to show us that it was made under any special circum-

stances. Now, we are of opinion that Section 13, Act II. of 1855, makes Government maps evidence, not only with regard to the physical features of the country which are depicted upon the maps, but also with regard to the other circumstances which the officers deputed to make the maps are specially commissioned to note down; and we think that an ordinary Government survey-map for this reason is evidence as to the boundaries of any plots or estates which stand under a separate number in the Collector's books. Further than this, we do not think that they are evidence as to rights of ownership; so that, if the plaintiff had in this case confined himself to a statement of his own proper title to the property which he claims, the survey-map could, probably, not have been made use of as evidence upon any issue material to the determination of his claim. But we understand that, in this case, the plaintiff claimed the land in suit as being a portion of a certain plot standing in the Collector's books under No. 48. He has thus made the Collector's books a link in the proof of his title, and consequently, for the reasons which we have already mentioned, we think that the survey-map was properly received in evidence in the investigation of that title.

* * * * * *

The 24th August 1868.

Present:

The Hon'ble H. V. Bayley and A. G. Macpherson, *Judges.*

Right of suit—Reversioner—Hindoo widow—Mortgage—Usufruct of mortgaged property.

Case No. 240 of 1868.

*Application for Review of Judgment passed by the Hon'ble Justices H. V. Bayley and A. G. Macpherson, on the 9th July 1868, in Special Appeal No. 2726 of 1867.**

Bama Soonduree Dossee (Appellant), *Petitioner,*

versus

Bama Soonduree Dossee (Respondent), *Opposite Party.*

Baboo Bykuntnath Paul for Petitioner.

Baboos Luckhee Churn Bose and *Kalee Prosunno Dutt* for Opposite Party.

Suits to set aside improper alienations by a widow cannot be brought by those whose rights are only inchoate and remote, as are those of a minor who is only entitled in reversion after the life-estate of his mother and her sister, in the event of their surviving their mother, whose alienations he seeks to set aside.

If the usufruct of mortgaged property was to be enjoyed in lieu of *interest*, the mortgagee's having had possession is no ground for the inference that any portion of the debt save the interest was paid off from the usufruct.

Macpherson, J.—In this case, we think we must grant the petition for review, and remand the case to the Lower Appellate Court for re-trial. The first point to be decided by the Lower Court is, whether the minor, on whose behalf the present suit has been instituted, is a reversioner in such a sense of the term as to entitle him to bring this suit. This objection was not taken in the Lower Court, nor in the written grounds of special appeal; but it was taken, and with our permission, orally, at the hearing. We omitted, however, to refer to it in our judgment, and we think, therefore, that the respondent has a right to ask for a review, in order that this omission may be supplied. There is no doubt that, if the minor is not the immediate reversioner, but is only entitled in reversion after the life-estate of his mother and her sister, in the event of their surviving *their* mother, whose alienations this suit has been brought to set aside, the suit will not lie, for the interest of the minor is too remote. While we say this, it may possibly be that a suit brought by the minor against his grandmother and the immediate reversioners, *viz.*, his mother and aunt, would lie if such suit were brought upon the ground that the grandmother and her daughters were acting fraudulently and in collusion with each other, with reference to the alienations complained of. But that is not the nature of the present suit.

It has been frequently decided that suits to set aside improper alienations by a widow must be brought by those whose rights and interests are directly affected, and not by those whose rights are only inchoate and remote, as are the rights of the minor in this case.

The Judge will ascertain precisely what position the minor occupies with reference to the estate alienated by the grandmother, and will then say whether or not his legal status is such as enables him to institute this suit.

* See *ante*, p. 133.

The object of bringing the suit in the present form, in the name of the minor rather than in the name of the daughter, his mother, is patent. The daughter, who appears here as guardian of the minor, is herself estopped by having joined in making the alienation which it is now sought to set aside. To get rid of the estoppel, she makes use of her minor son's name.

On another point, also, we think that our judgment is defective, and that the judgment of the Lower Appellate Court is wrong. With reference to the question whether there was any necessity for converting what was originally a mortgage into an absolute sale, the Judge relies very much upon the fact of the mortgagee's being in possession, as if the fact of his being in possession necessarily led to the inference of the mortgage-debt having been, in some measure at least, paid off. If the Court below find that the suit will lie at all, it must consider the case anew with reference to the question of necessity which existed for converting the mortgage into an absolute sale; and in considering that question, the Court must look to the terms of the original mortgage-deed under which the mortgagee held possession. If the usufruct of the property was to be enjoyed in lieu of *interest*, the mortgagee's having had possession will not in any way lead to an inference that any portion of the *debt*, save the interest, was paid off from the usufruct.

The case is remanded with reference to the above remarks, and the Court will re-try the two questions :—

1stly.—Whether, under the circumstances of the case, this suit will lie at all; and

2ndly.—If the suit will lie, whether there is or is not such proof of the necessity of converting the mortgage into an absolute sale, as will bring the case within the ruling of the Privy Council, in Hunooman Pershad Pandey's case.

Under the circumstances, the parties will respectively bear their own costs, both of the special appeal and of this review.

The 24th August 1868.

Present:

The Hon'ble F. B. Kemp and E. Jackson, *Judges.*

Malikanah—Limitation.

Case No. 1058 of 1868.

Special Appeal from a decision passed by the Judge of Tirhoot, dated the 30th December 1867, affirming a decision passed by the Sudder Ameen of that District, dated the 30th May 1867.

Budurul Huq and others (some of the Defendants), *Appellants,*

versus

The Court of Wards on behalf of the minor Rajah of Durbhungah (Plaintiff), *Respondent.*

Mr. R. E. Twidale for Appellants.

Baboo Juggadanund Mookerjee for Respondent.

A claim to malikanah allowed to lie over, and not enforced for more than 12 years, was held to be barred by limitation.

Jackson, J.—THIS was a suit, brought by the Court of Wards acting on the part of the minor Rajah of Durbhungah, to recover certain annual payments, which, it is alleged, are due from the defendants as jageerdars of certain estates.

The defendants deny that they have ever made any such payments, or that such payments are due, and alleged that the claim is barred by limitation. The Judge apparently has found upon the merits that there are certain papers, of a date anterior to the Permanent Settlement, alluding to these jageers and to certain annual malikanahs as being payable by the jageerdars; and he also states that there are certain decisions of the Court, of later dates, alluding thereto. He finds, on the point of limitation, that, as certain others of the jageerdars have been in the habit of paying these rents, the suit is not barred by limitation. The special appeal is directed particularly to this point, namely, that for 12 years and more these defendants have not been called upon to make these payments, and that no payments have, in fact, been made by them or their predecessors on account of these jageers.

In support of this view of the law, the pleader for the appellant quoted a precedent published at page 336, Volume VII. of the Weekly Reporter. The precedent is directly in point. It rules that the payment of malikanah is not, as regards limitation, on the same terms as payment of rent, and that, if a person allows his claim to lie over, and does not enforce it, limitation will ultimately bar that claim. We concur in this view of the law, and it appears from the evidence in this case that for much more than 12 years, the defendants and the parties who have been in their place before them have not been called upon to pay this malikanah. Following that precedent, we are of opinion that they cannot now be forced to pay, and that the suit as against these defendants is, consequently, barred by limitation. We therefore reverse the decision of the Judge, and dismiss the plaintiff's suit with costs.

The 24th August 1868.

Present:

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice*, and the Hon'ble Dwarkanath Mitter, *Judge*.

Manager—Family-property.

Case No. 628 of 1868.

Special Appeal from a decision passed by the Principal Sudder Ameen of Midnapore, dated the 19th December 1867, affirming a decision passed by the Moonsiff of that District, dated the 30th March 1867.

Koylashessur Bose (Defendant), *Appellant*,

versus

Sreemutty Narainee Dassee (Plaintiff) and another (Defendant), *Respondents*.

Baboo Mohesh Chunder Bose for Appellant.

Baboo Mohendro Lall Shome for Respondents.

A manager of a family estate who receives the rents has no power to sell the property of an adult member.

Peacock, C. J.—THERE is no ground of appeal in this case. Defendant claimed as a purchaser from Pitambur, and he said that the defendant, the widow of Pitambur's brother, had relinquished all her share in favor of Pitambur. There was no allegation that Pitambur was authorized by the widow to sell her share of the property. It was found that the widow had not relinquished her right to Pitambur, and it is contended by the appellant that the Judge ought to have found whether Pitambur, as manager, had authority to bind the plaintiff. That, however, would be a very different question from that set up by the defendant, under which he contended that Pitambur sold his own rights. Further, a manager of property, who is receiving the rents, has no power, in our opinion, to sell the property of an adult member of the family. The decision of the Lower Appellate Court is affirmed with costs.

The 24th August 1868.

Present:

The Hon'ble F. B. Kemp and E. Jackson, *Judges*.

Remand—Additional evidence.

Case No. 3419 of 1867.

Special Appeal from a decision passed by the Judge of Shahabad, dated the 18th September 1867, affirming a decision passed by the Assistant Collector of that District, dated the 13th July 1867.

Ram Jeewan Lall (Plaintiff), *Appellant*,

versus

Arjun Chowbey and another (Defendants), *Respondents*.

Baboo Poorno Chunder Mookerjee for Appellant.

Baboo Mohinee Mohun Roy for Respondents.

Where a case is remanded with a view to some special evidence being taken, the Court, receiving the order of remand, is not at liberty to allow the parties to produce additional evidence.

Jackson, J.—THIS case was remanded to the Lower Appellate Court in order that, before deciding certain issues, certain evidence might be recorded. That evidence was recorded, and the issues decided against the plaintiff. The plaintiff at that time asked that additional evidence of other witnesses, whom he had then brought into Court, might also be recorded. But the first Court refused to examine these fresh witnesses, as the case had not been remanded to take down such further evidence. The Judge, on appeal, was of opinion that the first Court was right in refusing to examine these witnesses. On special appeal, this is objected to. But we agree with the Lower Appellate Court that the

case was remanded to take some special evidence, and that the Court was not at liberty to go anew into the case, and allow both parties to produce any additional evidence that they pleased. We, therefore, dismiss the special appeal with costs.

The 24th August 1868.

Present:

The Hon'ble F. B. Kemp and E. Jackson, *Judges.*

Rent due from several ryots—Suit against one ryot.

Case No. 1029 of 1868 under Act X. of 1859.

Special Appeal from a decision passed by the Additional Judge of Tirhoot, dated the 15th January 1868, modifying a decision passed by the Deputy Collector of that District, dated the 31st July 1866.

Roop Narain Singh (Plaintiff), *Appellant,*

versus

Juggoo Singh (Defendant), *Respondent.*

Baboo Doorga Doss Dutt for Appellant.

Mr. R. E. Twidale for Respondent.

A suit for rent due from several ryots on account of a holding which has been let out to them cannot be properly and legally brought against one of them, but must embrace all.

Jackson, J.—THE plaintiff in this suit, having let out certain lands to three ryots, has sued one of them, and obtained against him a decree for one-third of the amount due on the total holding. He has objected to this, and asks that the Court will give him a decree for the whole. The defendant, on the other hand, also objects to the decree, and says that the suit should have been brought against the three ryots, and not against him alone.

We think that the defendant's objection is good in law; that the suit was not properly and legally brought; and that it is impossible, as the case now stands, to decide what the rights of this one defendant are. The rent is due from three persons, and the suit should have been brought against these three persons.

We accordingly reverse the decision of the Lower Court, and dismiss the suit, the plaintiff being at liberty to bring a fresh suit in a proper form. The respondent will obtain his costs.

The 25th August 1868.

Present:

The Hon'ble H. V. Bayley and A. G. Macpherson, *Judges.*

Decree for arrears of rent—Notice to unregistered tenant.

Case No. 2550 of 1867.

Special Appeal from a decision passed by the Officiating Additional Principal Sudder Ameen of East Burdwan, dated the 26th July 1867, affirming a decision passed by the Moonsiff of that District, dated the 26th June 1866.

Bhubo Tarinee Dossia (Defendant), *Appellant,*

versus

Prosunno Moyee Dossia (Plaintiff), *Respondent.*

Baboos Otool Chunder Mookerjee and *Anund Chunder Ghossal* for Appellant.

Baboos Tarucknath Dutt and *Mohendro Lall Shome* for Respondent.

A zemindar, in execution of a decree, sold the rights and interests of his tenant. He subsequently ejected the purchaser at that sale under a decree (dating prior to the above sale) for arrears of rent and ejectment under Section 78, Act X., which latter decree became complete on the expiry of 15 days without deposit of the arrears due.

HELD that, until the purchaser adopted means to have his name registered in the zemindar's sherishta, the latter was not bound to give him notice to pay the arrears due on the tenure which he purchased, before proceeding to give effect to the decree.

Bayley, J.—IN this case, the plaintiff sued for declaration of his right to a certain tenure and for possession thereof, on the allegation of his having, on the 7th Assar 1240 B. S., purchased the rights and interests of one Chundee Churn Mundul, at a sale, in execution of a decree held by Koylasnath Chunder. The plaintiff also alleged fraud on the part of the zemindar.

The defendant Koylasnath pleaded that the plaintiff might or might not have purchased the tenure, but that he ought to have paid the rent decreed against the recorded tenant, and that, as he had not so paid, he was liable to be ejected. Defendant added, that he had sued for arrears of rent on the 23rd Cheyt, and got a decree under Section 78 for rent and for ejectment on the 3rd Assar 1270, which decree became complete on the expiry of 15 days without deposit of the arrears due; that thus defendant's ejectment of plaintiff was quite legal.

Both the Lower Courts have given the plaintiff a decree. The Lower Appellate Court does not clearly find the allegation of fraud proved by the plaintiff; but that Court seems to infer that, because the same Koylasnath, who, as a judgment-creditor, sold the rights and interests of Chundee Churn on the 7th Assar 1270, must, as the talookdar, who, on the 3rd Assar 1270, got a decree for possession and ejectment which became complete 15 days after, *viz.*, about 18th or 19th Assar, have known that, during the intermediate time, that is to say, on the 7th Assar, the plaintiff had become the purchaser of the tenure, and that consequently the defendant Koylasnath should have demanded the arrears of rent from the new purchaser, and not having done so, was not competent to eject the plaintiff for arrears of rent due against the *tenure*.

The defendant appeals specially against the Lower Court's decree, and urges that the plaintiff's allegation of fraud has not been established, and that it was no necessary consequence, that, because Koylasnath had his decree completed 15 days after the date thereof, or about 18th Assar 1270, he *must* have necessarily known that the plaintiff was the purchaser of the rights and interests of the previous tenant at a sale in execution of a money-decree on the 7th Assar; and, moreover, ought to have demanded arrears of *rent* due against the previous tenant. *2ndly*, that it was for the purchaser, if he wished to place himself in the position of the former tenant, to take the ordinary course prescribed by law, *viz.*, to obtain the registration of his name in the zemindar's sherishtah, and that, until he did this, the zemindar was not at all bound to recognize him as his tenant.

I am of opinion that fraud has not been legally found at all by the Lower Appellate Court, because I do not see it proved that there was any clear and distinct knowledge on the part of Koylasnath that the plaintiff, by reason of his purchase, stood in the place of former tenant. Further, even if he had that knowledge, I find it has been laid down in the case of Sarkies, dated 1st July 1864, that "the mere cognizance by the zemindar of the "fact of a party having purchased a tenure, "is not sufficient to cure the defect of non-"registration. It must be proved that the "zemindar has not only known of the trans-"fer, but has also accepted the transferee "as his tenant; the receipt of rent by the "zemindar from the transferee being one of "the best proofs of the fact of the zemindar "having accepted him as his tenant." Here there is neither necessary legal knowledge nor cognizance of the transfer of the land to plaintiff shown; nor are we shown that the purchaser had had any such actual possession of the tenure, that even in that view the zemindar might be said to have had the opportunity to know that the plaintiff was, in fact, the party holding the tenure. I think, under these circumstances, that, until the plaintiff adopted means to have his name registered in the zemindar's sherishtah, and was so registered as transferee, the defendant Koylasnath was not bound to give notice to the plaintiff to pay the arrears of rent due on the tenure, which he purchased before the defendant could proceed to give effect to the decree which he obtained about the 3rd Assar, and completed about the 18th.

I would, therefore, reverse the decision of the Lower Courts, and decree this appeal with all costs.

Macpherson, J.—I concur in thinking that the decree of the Lower Court ought to be set aside, and that the plaintiff's suit ought to be dismissed with costs. The Lower Courts do not find any fraud in the proper sense of the term, nor is there, in fact, any evidence of fraud. The case of the plaintiff may somewhat be hard. But the defendant had a legal right to adopt the course which he took; and the present suit must fail, unless distinct fraud in the conduct of the proceedings under Act X. of 1859 is proved.

The 25th August 1868.

Present:

The Hon'ble G. Loch and F. A. Glover, *Judges.*

Claims to attached property—Limitation—Sections 86 and 227, Act VIII., 1859.

Case No. 634 of 1868.

Special Appeal from a decision passed by the Judge of Purneah, dated the 23rd December 1867, affirming a decision passed by the Principal Sudder Ameen of that District, dated the 27th September 1866.

Mahomed Mubson (Plaintiff), *Appellant,*

versus

Sumputtee Sahoon Chowdhrain (Defendant), *Respondent.*

Messrs. R. T. Allan and *C. Gregory* for Appellant.

Baboos Juggadanund Mookerjee and *Mohinee Mohun Roy* for Respondent.

The rejection of a claim to attached property, simply on the ground that it had been presented too late, was held to be no legal bar to the adjudication of the claim when it was again advanced after attachment made under decree. A claim of this kind may be admitted even after proclamation of sale, provided it has not been designedly and unnecessarily delayed to obstruct the ends of justice.

Loch, J.—It appears by the judgment of 6th March 1860 that the respondent in this case laid claim to the property now in suit, which had been attached previous to that judgment by the plaintiff in a suit against Gopeenath Sahoy. In that case, the respondent's claim to the property was not allowed, because the Judge considered that the claim had been advanced at too late a stage. Subsequently, the property was attached in execution of the plaintiff's decree against Gopeenath Sahoy, and the defendant came forward, and successfully claimed the property as belonging to herself; and it was released from attachment by an order of 27th July 1867. The present suit is brought to set aside that order, and to declare the property liable to sale in execution of the decree of the plaintiff (special appellant). The Lower Appellate Court, in affirming the judgment of the first Court, has held that the property belongs to the defendant, and has dismissed the suit.

In special appeal, it is urged that, as the application of the defendant was once rejected on the 6th of March 1860, the admission of her claim to this property subsequent to the decree, and the release of the property under order of 27th July 1867, was illegal. As, however, no adjudication was made when the defendant put forth her first claim, but it was rejected simply on the ground that it had been presented too late, we think that there was no legal bar to an adjudication of her claim to the property when it was again advanced after attachment made after decree. It is urged that Section 86 must be read with Section 227 of Act VIII. of 1859, and by the latter Section it was required that the claim of the nature advanced by the defendant should be made at the earliest opportunity; but the defendant has allowed several years to elapse without making such claim, though the property continued under attachment all the while. No doubt, claims of this kind should be made as early as possible, but then no period of time is prescribed by law within which claims of the kind must be made, and therefore a claim may be admitted even after proclamation of sale has been issued, provided that the claim be not designedly and unnecessarily delayed with a view to obstruct the ends of justice. It does not appear in this case, nor has any evidence been offered by plaintiff to prove, that such was the object of the defendant in making the claim. We, therefore, reject the first ground of appeal. * * *

* * * * * * *

* * * * * * *

Under this view of the case, we dismiss the special appeal with costs.

The 25th August 1868.

Present:

The Hon'ble H. V. Bayley and A. G. Macpherson, *Judges.*

Mahomedan law — Succession — Daughters of deceased brother.

Case No. 213 of 1868.

Special Appeal from a decision of the Principal Sudder Ameen of Pubna, dated the 19th November 1867, affirming a decision of the Sudder Moonsiff of that District, dated the 31st July 1867.

Mussamut Azeegunnissa and Mussamut Jan Khatoon (Defendants), *Appellants,*

versus

Moonshee Ruhmanoollah (Plaintiff), *Respondent.*

Mr. G. A. Twidale and *Baboo Ashootosh Chatterjee* for Appellants.

No one for Respondent.

Under Mahomedan law, the daughters of a deceased brother of a person who demises cannot take any share of such person's property so long as a brother and sister, or only a brother, survives.

Macpherson, J.—The plaintiff Ruhmanoollah sued to recover his share of certain property which once belonged to his brother Fermanoollah; and the question is whether the share for which the Lower Court has given him a decree is the share to which he is, under the circumstances which have occurred, legally entitled.

There were three brothers: Fermanoollah, Irfanoollah, and Ruhmanoollah, and one sister Panchoo.

Fermanoollah died in 1262, leaving the following persons as his heirs, *viz.*, his two daughters Azeegunnissa and Jan Khatoon

(who are the appellants before us), his brothers Irfanoollah and Ruhmanoollah, and his sister Panchoo.

Irfanoollah died in 1268, and his heirs were—his widow Abeedoonissa, his two daughters Akeedoomnissa and Turkondor, his brother Ruhmanoollah, and his sister Panchoo. These various heirs took among them not only Irfanoollah's original estate, but the share which came to him as one of the heirs of Fermanoollah.

Panchoo died in 1272, and Ruhmanoollah was her sole heir, taking all her estate, including the share she took as one of the heirs of Fermanoollah, and also the share which, as an heir of Irfanoollah, she took in the shares which had descended to him from Fermanoollah.

The particular objection (and it is the only one urged in special appeal) is that the appellants, the daughters of Fermanoollah, have been improperly excluded from the lists of heirs of Irfanoollah and Panchoo, and that, in consequence, Ruhmanoollah has got a decree for more than he is entitled to. The appellants' pleader, however, does not specify the share which they claim; nor does he show any authority for his contention that, according to Mahomedan law, the daughters of a deceased brother take any so long as a brother and sister, or a brother only remains.

We are of opinion (*see* Macnaghten's Mahomedan Law, Chapter I., Section 3, paras. 43, 44, and 45) that, under the circumstances, the daughters of Fermanoollah did not rank among the heirs of Irfanoollah or of Panchoo.

This appeal will, therefore, be dismissed with costs.

The 25th August 1868.

Present:

The Hon'ble F. B. Kemp and E. Jackson, *Judges.*

Enhancement of rent — Kubooleut — Shareholder's right of suit.

Case No. 1047 of 1868 under Act X. of 1859.

Special Appeal from a decision passed by the Additional Judge of Hooghly, dated the 1st February 1868, affirming a decision passed by the Deputy Collector of Howrah, dated the 22nd October 1867.

Dookhee Ram Sircar (Plaintiff), *Appellant,*

versus

Gowhur Mundul (Defendant), *Respondent.*

Baboo Greeja Sunkur Mojoomdar and *Moulvie Syud Murhumut Hossein* for Appellant.

Moulvie Mahomed Eusuf for Respondent.

Where there is no joint lease, and the plaintiff's share is not disputed, a suit for a kubooleut at an enhanced rent will lie. In such a case, the suit must be for the enhancement of the rent of the whole of defendant's tenure, to enable the Courts to decide as to the proportion payable to plaintiff.

Kemp, J.—This was a suit for a kubooleut at an enhanced rate. The plaintiff, who is a 6 annas, 13 gundahs, 1 cowrie, 1 krant shareholder, purchased at a sale for arrears of Government revenue. The revenue appears to have been paid separately into the Collectorate, and there is no dispute as to the extent of the plaintiff's share. The defendant also admits in his evidence that he has paid the plaintiff's rent separate. Both the Courts below held that the suit will not lie. The Judge in his judgment says that this question has been decided by the High Court; but he does not quote any decision. The pleader for the special appellant has quoted a decision published in Volume VI., Weekly Reporter, page 23, and the pleader for the special respondent has quoted a decision published at Volume V., Weekly Reporter, page 68. We are of opinion that the precedent quoted by the pleader for the special appellant is in point, and that quoted by the pleader for the special respondent not so. In the decision quoted by the pleader for the special respondent, the defendants held under a joint lease, and contracted to make one payment of the rent, and not several. There is no joint lease shown in this case, and the plaintiff's share is not disputed, and therefore the suit for a kubooleut will lie. The Lower Court, in trying the question of enhancement, will remember that the plaintiff must sue to enhance the whole of the defendant's tenure, and then, and then only, will the Courts be able to decide what is the proportion of the whole rent payable to the plaintiff on his share.

The suit is remanded for re-trial with reference to the above remarks.

The 25th August 1868.

Present:

The Hon'ble L. S. Jackson and Dwarkanath Mitter, *Judges.*

Limitation—Action for damages.

Case No. 357 of 1868.

Special Appeal from a decision passed by the Judge of Midnapore, dated the 5th December 1867, affirming a decision of the Principal Sudder Ameen of that District, dated 12th July 1867.

Huree Narain Mytee (Defendant), *Appellant,*

versus

Ojoodhya Ram Sein (Plaintiff), *Respondent.*

Baboo Kedarnath Chatterjee for Appellant.

Baboos Gopal Lall Mitter and *Debendro Narain Bose* for Respondent.

In a suit for damages on account of a false and malicious statement made by defendant before a Magistrate, in consequence of which criminal proceedings were taken against plaintiff—HELD that limitation runs, not from the date on which plaintiff was acquitted and discharged, but from the time the alleged statement was made, or any of the resulting damages occurred, which would constitute a cause of action.

Jackson, J.—IT appears to me that, in this case, the decision of the Court below must be reversed. Plaintiff brought his suit against the defendant for damages on the allegation that the defendant had, on the 23rd January 1866, made before the Magistrate a certain untrue and malicious statement, in consequence of which plaintiff's house was searched and his business interrupted, and he in various ways injured. This suit was commenced on the 8th March 1867. It appears that in the Court of first instance no evidence was given on the side of the plaintiff either as to the acts done by the defendant or as to the consequent damages resulting to the plaintiff, but the defendant, it seems, was required to prove to the satisfaction of the Court that the charge which he made was not false and malicious as alleged by the plaintiff, in other words, without any evidence on the side of the plaintiff, defendant was called upon to justify.

This was a suit coming within the terms of Section 1, Clause 2, of Act XIV. of 1859, which declares that "to suits for damages for injury "to the person and personal property or to "the reputation, the period of one year "from the time the cause of action arose." The alleged false statement made by the defendant was dated more than one year before the commencement of the suit, and upon the record there was nothing to show that any of the resulting damages which would constitute a cause of action occurred within twelve months previous to the suit. It appears to me that the plaintiff in this case was bound to prove the act of which he complained and the resulting damage, and also to show that the suit had been brought within one year from the time when the cause of action arose. We are not called upon in special appeal to express any opinion upon the merits of the case, but this at least may be said that it was unquestionably a case in which it was specially necessary that evidence of the facts should have been given before the Court, and subjected to the test of cross-examination.

We have been referred to a case in Volume VIII., Weekly Reporter, page 443, in which it was held that the plaintiff was at liberty to sue within one year from the determination of the charge made by the defendant. I understand from Mr. Justice Dwarkanath Mitter, who was one of the Judges before whom that case was heard, that the circumstances of that case differ materially from those of the present. It is contended to-day that the plaintiff's cause of action arose from the date of his discharge. No doubt, the proceedings in this criminal investigation appear to have been most unusually and unduly prolonged. Even supposing that the defendant had been properly chargeable with the whole annoyance arising out of these protracted proceedings, I think that it cannot be said that the cause of action entitling the plaintiff to damages could arise on the date on which the plaintiff was acquitted and discharged. I think that the plaintiff was too late; that the decision of the Court below must be set aside, and the special appeal allowed with costs.

Mitter, J.—I concur. I think that the decision cited from Volume VIII. of the Weekly Reporter does not apply to this case. That was a suit for damages for malicious prosecution. In the present case, the prosecution itself was the act of the Magistrate. The only wrongful act alleged against the defendant was that he gave a certain information to the Magistrate, upon which the Magistrate thought it necessary to take criminal proceedings against the plaintiff. This case, therefore, is clearly distinguishable from that cited by the respondent; and his claim is accordingly barred by limitation. I am also of opinion that the plaintiff has given no evidence to show that the information he complains of was either malicious or untrue.

The 25th August 1868.

Present:

The Hon'ble F. B. Kemp and E. Jackson, *Judges.*

Sale in execution—Priority of purchase.

Case No. 1043 of 1868.

Special Appeal from a decision passed by the Principal Sudder Ameen of West Burdwan, dated the 13th March 1868, affirming a decision passed by the Moonsiff of Bistopore, dated the 24th September 1867.

Bromo Gopal Adhikaree (one of the Defendants), *Appellant,*

versus

Bholanath Poddar (Plaintiff), *Respondent.*

Baboos Nil Madhub Sein and *Rash Beharee Ghose* for Appellant.

Baboo Grish Chunder Mookerjee for Respondent.

The purchaser at a sale in execution of a decree founded upon a bond which mortgaged the property, was held not to have a preferential title over a prior purchaser, because the liability of the property under the mortgage was not declared in the decree, which was only a money-decree.

Jackson, J.—THE ground taken in special appeal is that the defendant's title is preferential to that of the plaintiff, inasmuch as the defendant purchased the rights and interests of the former owner of the disputed lands before the plaintiff purchased them, whereas the Lower Appellate Court has held that the plaintiff's purchase, though subsequent in date, was good against the defendant's purchase, inasmuch as the plaintiff bought at a sale in execution of a decree founded upon a bond which mortgaged this property. The special appellant points out that in the decree the liability of this property under the mortgage was not declared, but only a money-decree was given. It is quite clear that, under those circumstances, the plaintiff's title has no priority over the defendant's, and the plaintiff must, therefore, fail in his suit. We reverse the Lower Court's decision, and dismiss the plaintiff's suit with all costs.

The 26th August 1868.

Present:

The Hon'ble L. S. Jackson and Dwarkanath Mitter, *Judges.*

Hindoo law—Ancestral property—Alienation by widow.

Case No. 323 of 1867.

Regular Appeal from a decision passed by the Principal Sudder Ameen of Midnapore, dated the 3rd August 1867.

Chowdhry Junmenjoy Mullick (Defendant), *Appellant,*

versus

Rasmoyee Dossee (Plaintiff), *Respondent.*

Baboo Ashootosh Chatterjee for Appellant.

Baboos Kishen Succa Mookerjee, Kalee Mohun Dass, Sreenath Doss, and *Doorga Doss Dutt* for Respondent.

A Hindoo widow has full right to alienate any portion of the estate in her possession, if the benefit of her husband's soul requires such a sacrifice, even though the act by which that benefit is to be secured is to be performed by a male member of the family.

Mitter, J.—THIS was a suit instituted by the plaintiff, now respondent before us, to recover possession of certain moveable and immoveable properties described in the plaint. The case set up by the plaintiff was, that the properties sued for by her were held and owned by her father, the late Gudhadhur Roy; that, on the demise of her father without male issue, his whole estate, real and personal, devolved upon her mother, Sreemuttee Doyee, as his next heir and successor; that on the death of her mother, which took place on the 19th Bhadro 1273, the plaintiff, as the only heir and representative of her father, wanted to take possession of the estate, but that she was opposed by the defendants in the cause under color of various titles alleged to have been created in their favor by the said Sreemuttee Doyee. The cause of action was stated to have arisen on the 14th May 1866, the date when this opposition was alleged to have been offered. The Principal Sudder Ameen of Midnapore, Baboo Nobin Kishen Paulit, has given a decree to the plaintiff in respect of a portion of her claim, and the present appeal has been accordingly preferred to

us by the defendant Chowdhry Junmenjoy Mullick.

The properties involved in this appeal may be conveniently arranged under the following heads:—

1st.—Eight annas of Joonbuldia.

2nd.—One anna 5 gundas of Mehal Bhuck Shampullasa.

3rd.—Two hundred and four beegahs of lakhiraj land referred to in paragraph 6 of the written statement filed by the appellant.

4th.—Two hundred and twenty-two beegahs of lakhiraj land referred to in the 7th paragraph of the written statement filed by the appellant.

With reference to the second item of property, it is to be observed that the appellant claims one anna out of the 1 anna and 5 gundas comprised therein, under a conveyance executed in his favor by the mother of the plaintiff on the 12th Choit 1264; the remaining 5 gundas being claimed by him under another conveyance executed in his favor by some of the co-sharers of the plaintiff's father. The Principal Sudder Ameen has set aside the purchase made from the mother of the plaintiff, on the ground that the appellant has failed to establish any justification for the alienation, and the remaining 5 gundas share has been also taken away from him upon the ground that his vendors had no right to transfer it to him.

With reference to the purchase made from the mother of the plaintiff, the appellant contends that she, the plaintiff, was a consenting party to the alienation; and further that, independently of such consent, there was a valid necessity to support it. The Principal Sudder Ameen appears to have said nothing on the first point, and we are, therefore, obliged to decide it for the first time in appeal, although it was urged by the appellant from the very beginning. We think, however, that the appellant has disproved his own plea. It is true, indeed, that the evidence produced by the appellant goes to show that the plaintiff was a consenting party to the alienation she now complains of; but that very evidence, or at least the major part of it, conclusively shows that the plaintiff was a minor at the time. We think, therefore, that this plea must be rejected.

The second objection, however, is sound. The appellant has shown by good and satisfactory evidence that the plaintiff's mother had occasion to defray the expenses of the *shradh* of her husband's mother; and that it was for the purpose of raising funds on account thereof that the sale in question was made. Some of the co-sharers of the plaintiff's father, who are also members of the same family with him, have been examined to prove this fact, and we do not see the slightest reason for discrediting their testimony.

The Principal Sudder Ameen says that Soonder Narain Roy, the eldest brother of plaintiff's father, being then alive, the mother of the plaintiff had nothing to do with the *shradh;* but the Principal Sudder Ameen entirely forgets the position which a Hindoo widow occupies with reference to the estate of her deceased husband. This position is clearly laid down in the Dayabhaga, page 182. "For women the heritage of their husbands "is pronounced applicable to *use*. Let not "women on any account make *waste* of their "husbands' wealth." The word *waste* is expressly defined to mean "expenditure not "*useful* to the owner of the property." It is clear, therefore, that the mother of the plaintiff had full right to alienate any portion of the estate in her possession, if the benefit of her husband's soul required such a sacrifice, even though the act by which that benefit was to be secured was to be actually performed by a male member of the family. It is a mistake to suppose that she holds the estate in trust for the benefit of the next heir of her husband, and such an heir has no right to contest the validity of an alienation that has been made for the spiritual welfare of the deceased owner himself. Now, the performance of the *shradh* of his mother was a matter of the utmost importance to the manes of the plaintiff's father; and whoever might have performed it, the plaintiff's mother was fully justified in raising funds for such performance. It is a settled doctrine of the Hindoo law that a deceased Hindoo participates in the funeral cakes that are offered by any one of his surviving relatives to a common ancestor, to whom he himself was bound to offer them when living. If the plaintiff's father had been living, he would have been bound to perform the *shradh* of his mother, and he is, therefore, competent, after his death, to share in the oblations offered to her by any of his male relatives. The mother of the plaintiff, therefore, was bound in duty to raise funds for the *shradh*, whoever might have performed it; and by raising funds for this purpose she was using

and not wasting, the property within the meaning of the definition above pointed out.

The Principal Sudder Ameen also says that the appellant has given no evidence to prove that this *shradh* was actually performed; but evidence on this point is altogether unnecessary. All that the appellant was bound to show was that he had made reasonable enquiries about the existence of the alleged necessity, and that it was a necessity sanctioned by the Hindoo law. The appellant has given ample evidence to prove this part of his case, and there is literally no evidence produced by the plaintiff to rebut it.

The decision of the Principal Sudder Ameen with reference to the remaining 5 gundas share is also incorrect. The appellant had throughout contended that the share of the plaintiff's father in the family-estate was 4 annas only. Such, indeed, appears to have been his share under the general law of inheritance, and the plaintiff has not given the slightest evidence to show that it was 5 annas, and not 4 annas.

* * * * * * *
* * * * * * *

The 26th August 1868.

Present:

The Hon'ble H. V. Bayley and A. G. Macpherson, *Judges.*

Sale of rights and interests — Existing assets — Retrospective effect.

Case No. 154 of 1867.

Regular Appeal from a decision passed by the Principal Sudder Ameen of Pubna, dated the 7th May 1867.

Chunder Coomar Roy (Plaintiff), *Appellant,*

versus

Mr. C. J. Wilkins and others (Defendants), *Respondents.*

Baboo Sreenath Doss for Appellant.

Mr. R. T. Allan and *Baboos Hem Chunder Banerjee* and *Mohinee Mohun Roy* for Respondents.

Where a plaintiff sued on the alleged purchase by him of the rights and interests of certain parties in an indigo-concern, it was held that the rents collected and appropriated, and the indigo manufactured and taken away, before the date of the purchase, could not form part of the stores and assets sold to the plaintiff, unless the sale of the assets, &c., had been as from some date prior to the date of purchase.

Bayley, J.—The plaintiff sues on an alleged purchase of the 4th September 1863, from the Official Assignee, of the rights and interests of Messrs. Willis and Earle in an indigo-concern called the "Bhellabarya Concern." The plaintiff demands under his purchase the value of indigo-cakes, the rents of a dur-ijara mehal, cash in hand, and cash on account of rents collected from the tenants, and, lastly, certain miscellaneous charges.

The defendant Kenny, who was first sued, pleaded that he only acted as the agent for the Official Assignee, and that, on the 3rd July 1863, the Official Assignee had sold the indigo-leaves to R. Thomas and Co. for the purpose of manufacture, and that the money thus realized had been duly credited to the concern with the exception of a certain sum received from Messrs. Moran and Co., which also was afterwards duly credited, and that there was no cash in hand to be accounted for.

The Official Assignee denies any right in the plaintiff in respect to the Bhellabarya Indigo Concern or the rents collected by the defendant Kenny. The Official Assignee avers that, previous to the plaintiff's purchase of the 4th September 1863, the indigo-leaves had already been sold by him (the Official Assignee) to Messrs. Thomas and Co.

The Principal Sudder Ameen has held that, as the plaintiff had not produced any deed of sale to show his right to the indigo, cash, and rents existing prior to the date of plaintiff's purchase, and as the plaintiff's right to them was clearly denied on the averment of a previous sale of the indigo by the Official Assignee to Messrs. Thomas and Co., the Principal Sudder Ameen, acting under Section 145 of the Procedure Code, dismissed the plaintiff's suit with costs.

An application for review was made on the ground that the plaintiff could not produce the deed of sale, because he had not obtained one, but that the decision of the High Court, dated the 9th June 1865, was evidence in favor of the plaintiff's right to what he had claimed in this suit. The application was rejected on the ground that the title on which the plaintiff sued for indigo, cash, rents, &c., previous to the sale, had not been proved.

The plaintiff appeals, and admits that even now he cannot produce the deed of sale, and states that this Court's decision above referred to was ample evidence of his title, and that the pleadings of the Official Assignee showed that the purchase

was made of the dena-paonah, or outstanding assets and liabilities of the concern, and consequently the Lower Court's judgment was wrong.

I entirely differ from the appellant in this view. He comes into Court distinctly alleging his right to the items stated in the schedule of his plaint, on the ground that that right arose out of his purchase, but he never shows any deed conveying that right. I, therefore, think that the Lower Court was right in considering, with reference to the pleadings, that the plaintiff has not proved his case.

It is pleaded before us that the Official Assignee admitted plaintiff's title. But the written statement of the Official Assignee, taken as a whole, is to my mind a clear denial that the plaintiff had any right to any of the items claimed by him, which, in fact, the Official Assignee sets forth had been otherwise disposed previous to plaintiff's purchase.

I would, therefore, dismiss this appeal with separate costs to each of the respondents.

Macpherson, J.—I concur in dismissing this appeal with costs. The plaintiff, in fact, discloses no cause of action on the face of his plaint. He sues on the allegation that the defendant Kenny acted as the attorney or manager for the Official Assignee in the management of this property from the 13th July 1863 to the 4th September of that year. Then he states that between those dates the defendant Kenny "cut and manufactured the indigo cultivated "in the said concern, took the cash in hand "and the indigo-cakes in store belonging "to it, and gradually collected and received "rent from its ryots." The complaint is that the plaintiff having, on the 4th of September, purchased the concern with all goods in store, assets, and liabilities, the defendant Kenny did not deliver over, to the plaintiff's satisfaction, the indigo and cash taken by him prior to the plaintiff's purchase. There is no allegation that either the rents collected or the indigo manufactured before or while Kenny was the manager of the concern, and taken away during his management, that is to say, before the 4th September, formed portion of the goods in store or assets of the concern at the date of the plaintiff's purchase. On the contrary, the plaint states that the indigo and the rents had been taken by Kenny previous to the purchase. Indigo and rents appropriated and taken away by the agent of the Official Assignee prior to the date of the sale to the plaintiff could not possibly form part of the stores or assets which the Assignee sold, unless the sale of the assets, &c., had been as from some date prior to the 4th of September, the date of the actual sale to the plaintiff. But it is not alleged that the sale was to have such retrospective effect.

I think that the plaint is bad on the face of it, and that, if only on that ground, the suit ought to be dismissed, quite independently of the other objections to the plaintiff's case.

The 26th August 1868.

Present:

The Hon'ble G. Loch and F. A. Glover, *Judges.*

Ameen's report — Evidence not on oath — Section 180, Code of Civil Procedure.

Case No. 698 of 1868.

Special Appeal from a decision passed by the Judicial Commissioner of Chota Nagpore, dated the 1st February 1868, reversing a decision passed by the Principal Sudder Ameen of Maunbhoom, dated the 7th June 1867.

Dole Gobind Sing (Plaintiff), *Appellant,*

versus

Chamoo Sing (Defendant), *Respondent.*

Mr. Mun Mohun Ghose and *Baboos Bungshee Dhur Sein* and *Bama Churn Banerjee* for Appellant.

Baboos Romesh Chunder Mitter and *Rash Beharee Ghose* for Respondent.

Where an Ameen, who had been deputed to make a local inquiry, took the depositions on oath of several witnesses on both sides, and afterwards for further satisfaction recorded the statements of certain persons whose religious prejudices stood in the way of their giving evidence on oath—HELD that his report and the original depositions on oath were receivable in evidence under Section 180 of the Code of Civil Procedure.

Glover, J.—THE point taken in this special appeal is that the Judicial Commissioner has decided against the plaintiff on what is not admissible as evidence, and particular reference is made to the award of the arbitrators before the Survey Deputy Collector and to the Ameen's report.

It does not appear that the Judicial Commissioner took the arbitrators' award or that of the Deputy Collector upon it as evidence

in the case; or relied upon it in any way. His decision is based generally on the whole of the evidence, and on that he finds that the special appellant, who came into Court for the purpose of setting aside the survey-award, had altogether failed in making out a case, and that the award ought, therefore, to stand. There was no necessity, we observe, for treating the case as one of disputed boundary; for, as the plaintiff himself made his cause of action, he was bound to show that the award giving certain lands to the defendant as belonging to his estate was an improper order.

With regard to the Ameen's report, we find that it was not, as stated by the special appellant, based on evidence not recorded on oath. The Ameen took the depositions on oath of several witnesses on both sides, and afterwards, for his further satisfaction, recorded the statements of certain persons of the better class residing on the spot, whose religious prejudices stood in the way of their giving evidence on oath, and found that they confirmed his previous opinion formed on the original depositions. The report and original depositions on oath, therefore, were receivable in evidence under Section 180 of the Code of Civil Procedure, and the Judicial Commissioner was justified in considering them as such.

For the rest, the Lower Appellate Court has gone very fully into all the evidence, and has given its reasons in detail for disbelieving that adduced by the plaintiff. This was a finding of fact, with which there is no interference possible in special appeal.

The special appeal is, therefore, dismissed with costs.

The 26th August 1868.

Present:

The Hon'ble G. Loch and E. Jackson,

Judges.

Registration—Section 17, Act XVI. of 1864.

Case No. 255 of 1868.

Special Appeal from a decision passed by the Principal Sudder Ameen of Purneah, dated the 22nd November 1867, affirming a decision passed by the Moonsiff of Bahadoorgunge, dated the 30th April 1867.

Musst. Soornum Batty (Plaintiff) *Appellant,*

versus

Musst. Boodhessuree and others (Defendants), *Respondents.*

Baboo Grish Chunder Ghose for Appellant.

Baboo Khettur Mohun Mookerjee for Respondents.

Where the Registrar for any cause refuses to register a deed of sale presented for registration under the provisions of Section 17 of Act XVI. of 1864, the law does not provide that the applicant can bring a suit against the vendor to enforce registration, unless there is an express condition or contract to register.

Loch, J.— THIS suit is brought to compel the registration of a deed of sale of property of value under 100 rupees under the provisions of Section 16 of Act XVI. of 1864. The Act came into operation in January 1865. An application to the Deputy Registrar was made on the 18th December 1865 for registration of the deed. Notice was served on the vendor requiring him to attend on the 18th December 1865. He appeared and raised certain objections, and the Deputy Registrar refused to register the deed. Plaintiff then instituted the present suit on the 15th February 1866 against the representatives of the vendor to enforce registration. The Moonsiff held that, as the value of the property was under 100 rupees, registration was not compulsory, and he dismissed the suit. The Judge, on appeal, referred to Section 16 of the Act, and appears to have made some mistake as to the reading of the words "may be registered," and seems to have thought that, as deeds of the kind might be registered, the plaintiff might compel the vendor to register by a civil suit. On remand, the Moonsiff held that registration was not necessary, and, on appeal, the Principal Sudder Ameen concurred with the finding, and dismissed the appeal.

A special appeal has been preferred against that order. As the deed was executed previous to the date on which Act XVI. of 1864 came into operation, the deed does not come within the provision of Section 16 of that Act; but Section 17 of that Act provides that deeds of the description mentioned in Section 16, executed before the date on which the Act came into operation, might be accepted for registration if presented within 12 months from such date; but the law does not anywhere provide that, if the Registrar, for any cause, refuses to register the deed, the applicant can bring a suit against the vendor to enforce registra-

tion, unless there be an express condition in the deed of sale or other contract to register. We think, therefore, that the order of the Lower Appellate Court is correct, and dismiss the special appeal with costs.

The 26th August 1868.

Present:

The Hon'ble F. B. Kemp and E. Jackson, *Judges.*

Pre-emption—Partition of land—Immunities and appendages held in co-parcenary.

Case No. 946 of 1868.

Special Appeal from a decision passed by the Principal Sudder Ameen of Tirhoot, dated the 20th January 1868, reversing a decision passed by the Moonsiff of Durbhungah, dated the 18th March 1867.

Mahtab Singh (Plaintiff), *Appellant,*

versus

Ram Tahal Misser (Defendant), *Respondent.*

Mr. R. E. Twidale and *Baboo Kishen Succa Mookerjee* for Appellant.

Mr. R. T. Allan and *Baboo Bhowanee Churn Dutt* for Respondent.

In a suit based on a right of pre-emption, where plaintiff had proved the due observance of the necessary preliminaries, and claimed as a partner in certain julkur and neemuksaher which was still held joint, though the land had been divided between plaintiff and the defendant's vendor—HELD that, as, notwithstanding the division of the land, the immunities and appendages thereof were still held in co-parcenary, plaintiff, as owner of one puttee, was entitled to a right of pre-emption over a stranger in respect of the other puttee which was sold.

Kemp, J.—THE plaintiff is the special appellant. His suit is based on a right of pre-emption, and he claimed the right in two capacities: *first*, as a partner in the immunities and appendages of the land sold; and, *secondly*, in right of vicinage. The first Court decreed the plaintiff's case, holding that the plaintiff had proved the due observance of the necessary preliminaries, and that, as a partner in the julkur and neemuksaher, which was still held joint, though the land had been divided between the plaintiff and the vendor of the defendant, the plaintiff was entitled in preference to the vendee, defendant, who is a mere stranger. The Principal Sudder Ameen has reversed this decision for reasons which are not very intelligible. The Principal Sudder Ameen observes that "by reason of the plaintiff's "ignorance of the amount of consideration-"money, because the whole of the property "claimed under pre-emption was sold under "one and the same kobalah and in lieu of "one and the same amount of consideration, "and the value of the neemuksaher and "julkur has not been specified, and hence "their value is uncertain and unknown, and "ignorance of the value precludes one from "the right of pre-emption."

As observed above, we do not understand the reasoning of the Principal Sudder Ameen. The plaintiff's claim is that, although the original puttee which he held in co-parcenary with the defendant's vendor has been separated, and he holds one puttee and the vendor the other puttee distinctly and separately, still, as the julkur and neemuksaher have been reserved, and not divided, he, as the owner of one puttee, is entitled to a right of pre-emption over a stranger in respect of the other puttee which has been sold. The price of the puttee which has been sold is defined, and there can be no ignorance or uncertainty on the part of the plaintiff as to the amount for which the property has been sold. The right of Shuffah appertains to a partner in the immunities and appendages of the land such as the right of water; Hedaya, Volume III., page 562. The right of Shuffah takes place with regard to all lands or houses; Hedaya, Volume III., page 591: *see* also decisions published in Volume I., Weekly Reporter, page 234; Volume II., page 47; and Volume VIII., page 413.

We think, therefore, that the plaintiff has made out his right, and we decree the special appeal, reverse the decision of the Principal Sudder Ameen, and affirm the decision of the first Court, with costs in all the Courts payable by the special respondent.

The 26th August 1868.

Present:

The Hon'ble L. S. Jackson and Dwarkanath Mitter, *Judges.*

Mahomedan law—Inheritance—Males and females.

Case No. 465 of 1868.

Special Appeal from a decision passed by the Principal Sudder Ameen of Patna, dated the 17th December 1867, affirming a decision passed by the Sudder Moonsiff of that District, dated the 27th April 1867.

Ram Beharee Singh (Plaintiff), *Appellant,*

versus

Sitara Khatoon and others (Defendants), *Respondents.*

Baboo Debendro Narain Bose and *Moulvie Syud Murhumut Hossein* for Appellant.

Mr. C. Gregory and *Baboo Annund Chunder Ghossal* for Respondents.

Where surviving kindred are related in like degree to a deceased party, the males are entitled, under Mahomedan law, to a double share of the inheritance.

Jackson, J.—In this case, the suit related to the property left by one Zenutunnessa. This lady had two sisters, named Asmutunnessa and Rahatunnessa. Asmutunnessa had a son named Ehsan Ally, whose daughter, Sitara Khatoon, is the defendant. Rahatunnessa had also a son named Lutf Ally, who had two sons, Ashuree and Aga Jan. The last-named, Aga Jan, had two sons. The plaintiff claims the property in dispute under purchase from Ashuree and the two sons of Aga Jan. The Principal Sudder Ameen, who tried this appeal, remarks that Mahomedans do not take by representation, and consequently the defendant Sitara, as well as Ashuree, on whose title alone the plaintiff now relies, were equally excluded from inheritance; but he observes that it is immaterial in respect of the defendant, who is in possession of the property.

The plaintiff in special appeal before us, abandoning any claim under the purchase from the sons of Aga Jan, contends that his vendor Ashuree and the defendant Sitara being related in the like degree to Zenutunnessa, would inherit from her; but Ashuree being a male and Sitara a female, the former is entitled to a double share, and consequently he should have a decree to that extent. It appears to me that there can be no question as to the correctness of this contention, if it be found as a fact that Ashuree was descended as alleged, and that, at the time of Zenutunnessa's death, there was no nearer heir in existence. It has been contended for the defendant that, independently of the question of descent which has to be proved, Sitara, the defendant, and Ashuree, would be entitled to equal portions; but it appears to me that the authorities upon this point are all one way and conclusively in favor of the plaintiff.

Sir William Macnaghten in the 53rd paragraph, page 11 of his work on Mahomedan Law, says: "Should there be no "difference between the strength of relation, the sides, or the sexes of the persons through whom they claim, regard "must be had to the sexes of the claimants "themselves." In like manner, Mr. Baillee, in his Digest of Mahomedan Law, page 706, treating of distant kindred, says: "If "the claimants are equal in proximity to "the deceased, and there is no child of an "heir among them, the property is to be "equally divided among them, if they are all "males or all females; and if there is a "mixture of males and females, then in the "proportion of two parts for a male and one "to a female."

This is without any difference of opinion when the sex of the ancestors, whether male or female, is the same. If, therefore, the fact in this case had been distinctly found, we should have had no difficulty in disposing of the suit, but the Principal Sudder Ameen, supposing the plaintiff's claim to be barred in the way above stated, has not fully determined the facts stated above. It is necessary that this case should go back to the Lower Court, in order that he should find whether, at the death of Zenutunnessa, Ashuree and Sitara were, as distant kindred, the persons entitled to take by inheritance. If this be so, then the plaintiff will be entitled to two-thirds of the property sold in right of Ashuree, the defendant being justly entitled to the remaining one-third.

The 26th August 1868.

Present:

The Hon'ble L. S. Jackson and Dwarkanath Mitter, *Judges.*

Right of way—Long silence as to obstruction—Implied acquiescence.

Case No. 461 of 1868.

Special Appeal from a decision passed by the Principal Sudder Ameen of Beerbhoom, dated the 13th December 1867, affirming a decision passed by the Moonsiff of that District, dated the 11th December 1866.

Banee Madhub Doss and others (some of the Defendants), *Appellants,*

versus

Ram Joy Rokh and others (Plaintiffs), *Respondents.*

Baboo Nil Madhub Sein for Appellants.

Mr. M. L. Sandel and *Baboo Onookool Chunder Mookerjee* for Respondents.

Where plaintiff sued to have a dwelling-house pulled down, which defendant had erected seven years previously upon a path whereby plaintiff and others had been accustomed to go across defendant's land to a tank (the path being not the only, but the shortest, way to the tank), it was held that plaintiff's conduct in allowing the building to be erected, and in keeping silence for so many years, warranted the inference that he acquiesced in what defendant did, and that plaintiff's claim was unreasonable under the circumstances, and such as a Court of equity and good conscience ought not to enforce.

Jackson, J.—In my opinion, the judgment of the Court below cannot be sustained. It seems that the plaintiff (in common, it is alleged, with other members of the community) were accustomed to go across the defendant's land to a tank. It appears that there was more than one way to approach the tank, but upon that way which is the subject of the present suit, the defendant, to whom the land belonged, seven years before the commencement of the suit, erected a building which was part of his family dwelling-house, and has since used and enjoyed the building so erected. After that length of time, plaintiff comes into Court, and asks that the building in question may be pulled down, in order to restore to him the shortest mode of access to the tank above mentioned. The Courts below have held that the plaintiff's right of way, which they find to have existed for a number of years previous to the act complained of, "is such that it cannot in any way be interrupted," and, apparently putting aside other considerations of equity, they have ordered the defendant's house to be pulled down, and the pathway to be restored.

We do not wish to decide in the present case whether such right of way as is asserted by the plaintiff is an interest in immoveable property within the meaning of Clause 12, Section 1, Act XIV. of 1859, for we prefer to decide the case on other grounds. It seems to me, in the first place, that the conduct of the plaintiff in allowing the erection of the defendant's house to proceed without interruption, and in remaining silent for seven years before he brought his suit, was such that the Court ought to have inferred that the defendant had the plaintiff's acquiescence in what he did. I am of opinion that this is a defect in the investigation quite sufficient to enable us to set aside the judgment of the Court below, which, in consequence, is erroneous on the merits; but I also think that, where a person, having a right of way over another's ground, permits that other to divert (for it does not appear that more has been done in this case) the right of way by the erection of buildings at more or less expense, and further permits the owner to habituate himself and his family to the convenience and comfort of the building so erected, and allows that state of things to continue for seven years, the claim of such person to destroy the building so erected and put an end to the convenience which the defendant has enjoyed, merely for the purpose of shortening the plaintiff's access to a particular locality, is an unreasonable claim such as a Court of equity and good conscience ought not to enforce. It is difficult, moreover, to understand how the Courts can be called on to give effect to a right of easement which must rest on a presumed ground, where the evidence, and, indeed, the plaintiff's allegation, shows an entire intermission of the enjoyment of it for seven years.

I am of opinion, therefore, that the decision of the Court below is erroneous, and it must be set aside, and the special appeal allowed with costs.

Mitter, J.—I am also of the same opinion. It appears to me that, upon the facts found by the Lower Appellate Court, the special respondent has no right to obtain the relief he has asked for. It is true that there is no legislative enactment directly applicable to rights of easement; but, in the absence of such an enactment, our duty is to decide according to equity and good conscience. The plaintiff in this case allowed the defendant to shut up the pathway in question, and to build a house upon it seven years prior to the institution of this suit; and he is not, therefore, entitled, in my opinion, to

maintain this action before a Court of equity and good conscience. It has been held that, if a person builds upon land jointly belonging to himself and his co-sharers, and these co-sharers stand by and allow him to do so without objection, an action subsequently brought by them to pull down the building would not be allowed by a Court of justice. The principle of this decision is applicable *à fortiori* to the circumstances of the present case. A right of easement is much weaker than a right of proprietorship; and if a co-sharer cannot maintain the action referred to above, I do not see any reason why the plaintiff should be permitted to maintain such a suit.

I would, therefore, decree this special appeal with costs.

The 26th August 1868.

Present:

The Hon'ble G. Loch and F. A. Glover, *Judges.*

Limitation—Section 246, Act VIII., 1859—Substitution of heirs as defendants.

Case No. 1088 of 1868.

Special Appeal from a decision passed by the Officiating Judge of Moorshedabad, dated the 7th March 1868, affirming a decision passed by the Moonsiff of Hurhurparah, dated the 25th September 1867.

Sreekishen Chowdhry and others (Plaintiffs). *Appellants,*

versus

Ram Kristo Bhuttacharjee and others (Defendants), *Respondents.*

Baboo Mohinee Mohun Roy for Appellants.

Baboo Chunder Madhub Ghose for Respondents.

In a suit to set aside the sale of certain lands which had been attached and sold by a decree-holder as the property of his debtor, plaintiff brought his action against the decree-holder and a party whom he supposed to be the auction-purchaser. Subsequently, finding that his supposition had been erroneous, he applied to have the real purchaser made a party, and the heirs of the decree-holder (who had died) substituted as defendants.

HELD that the suit against the heirs was not barred by lapse of time, as it was originally brought within the period of limitation against the decree-holder, of whose death plaintiff first learnt the news from the return made to the summons.

HELD also that, even if the auction-purchaser had been omitted from the list of defendants, the suit would not have been defective as he took no part in the execution-proceedings.

Loch, J.—IN this case, we find that one Bhugobutty Debia held a decree against one Mooktakeshee Dossee, and attached certain lands, alleging them to be the lakheraj property of the debtor. The guardian of the present plaintiff intervened, and, under Section 246, claimed possession of the attached property as his purchased lakheraj and the remainder as his mâl land. The claim to the lakheraj was admitted, that to the mâl rejected on the 17th of May 1866, and the said lands were sold under Bhugobutty's decree on the 19th of September 1866. Plaintiff brought the present suit on the 17th of May 1867 against the decree-holder Bhugobutty and one Ram Kristo Bhuttacharjee, who, he thought, was the auction-purchaser; but subsequently, finding out his mistake, he, on the 28th of June, applied to the Court to make Ram Soondur Bhuttacharjee, the real purchaser, a party, and also stated that, as Bhugobutty had died in Assin 1273, her heirs might be substituted as defendants in the case against her. The Lower Appellate Court has held that, as the suit was not brought against Ram Soondur within one year from the date of 17th May 1866, as required by Section 246 of the Procedure Code, the suit is barred by limitation against all the defendants.

We think the Lower Appellate Court was in error. So far as the heirs and representatives of Bhugobutty are concerned, the suit is not, and cannot, be barred, as it was brought within one year against Bhugobutty, and it is not shown to us that plaintiff was aware that Bhugobutty was dead. Indeed, looking at his application to make the heirs of Bhugobutty defendants in the case, it appears that he first learnt the news of her death from the return made to the summons. With regard to Ram Soondur, it is said that the case only began against him on the date he was substituted for Ram Kristo, and the decision of this Court in VI. Weekly Reporter, page 298, is quoted in support of that plea. We quite agree with the Judges who pronounced that judgment, but in that case the party substituted was not the heir of the party originally sued when the cause of action accrued. With regard to the party

substituted for Bhugobutty, they being heirs of her, the suit against them would, on her death, properly be carried on against them. Admitting that the suit had not been brought within time against Ram Soondur, we think it a matter of little consequence whether it was so or not. It is, of course, advisable to make him a party in order that all objections may be disposed of at once, but as he was no party to the execution-proceedings, and had no hand in bringing the property to sale, we think that, even if he had been omitted from the list of defendants, the suit would not have been defective, for, if the plaintiff is successful as against the decree-holder, and can prove that the property sold did not belong to the judgment-debtor, the sale is of itself null and void, and the purchaser bought nothing but a bag of wind.

We think that the orders of the Lower Court must be reversed, and the case remanded to the first Court for determination on the merits. Costs will follow the result.

The 26th August 1866.

Present:

The Hon'ble L. S. Jackson and Dwarkanath Mitter, *Judges.*

Jurisdiction—Section 229, Act VIII., 1859—Objection.

Case No. 464 of 1868.

Special Appeal from a decision passed by the Principal Sudder Ameen of Patna, dated the 21st January 1868, reversing a decision passed by the Moonsiff of that District, dated the 30th May 1867.

Buhal Singh Chowdhry (Plaintiff), *Appellant,*

versus

Beharee Lall and others (Defendants), *Respondents.*

Bâboos Onookool Chunder Mookerjee and *Hem Chunder Banerjee* for Appellant.

Mr. C. Gregory for Respondents.

An application, complaining that the defendants, having obtained a decree against a third party, were attempting unlawfully to interfere with plaintiff's possession, was rejected by the Court of first instance. On appeal, the Judge decided that the application was entertainable under Section 229, Act VIII., 1859, and remanded the case for trial. The first Court then gave the plaintiff a decree, which the Subordinate Judge reversed on appeal. It was objected in special appeal that the proceedings were illegal.

HELD (by Jackson, J., whose opinion prevailed) that the objection was not taken too late; that the plaintiff's claim could not be made under Section 229; and that the error was one which affected the jurisdiction of the Court of first instance to take summary cognizance of the case.

Jackson, J.—THIS case appears to me so clear that, but for the contrary opinion of Mr. Justice Mitter, from whom I am sorry to dissent, I should have no doubt upon it.

Section 229 is the last of four Sections of the Civil Procedure Code which deal with cases of obstruction to execution of decrees for immoveable property. The first of these Sections (226) is in these words: "If, in the "execution of a decree for land or other "immoveable property, the officer executing "the same shall be resisted or obstructed by "any person, the person in whose favor "such decree was made may apply to the "Court at any time within one month from "the time of such resistance or obstruction. "The Court shall fix a day for investigating "the complaint, and shall summon the party "against whom the complaint is made to "answer the same."

Therefore, the Section supposes obstruction or resistance actually made, and in such case it enables the party in whose favor the decree was made to complain of it, and from his complaint the party against whom it is made is to be summoned. It will be seen throughout these four Sections that the person creating the obstruction is dealt with as the party complained of or defendant, in the enquiry which is to follow, as the case may be. For Sections 227 and 228 deal with the case in which the party obstructing is a defendant in the suit, or some person at his instigation. Under Section 227, in such case the Court "may pass such orders as may be proper under the circumstances of the case;" and by Section 228, if the Court be satisfied in such case that the resistance or obstruction was without any just cause, it may commit the person obstructing to custody. Under Section 229, we have a different class of cases, in which the person committing the obstruction is some one "other than the defendant claiming *bonâ fide* to be in possession of the property on his own account or on account of some other person than the defendant;" and in these cases the claim is to be numbered and registered as a suit between the decree-holder as plaintiff and the claimant as defendant, "and the Court shall proceed to investigate the claim in the same manner and with the like power as if a suit for the property had been instituted by the decree-holder against the claimant," that is to say, reversing the position which the claimant

(special appellant) has assumed in this case, for he seeks to be dealt with as plaintiff, whereas the claimant in Section 229 is to be the defendant.

Under Section 230, which deals with a distinct class of cases, *viz.*, "where any person other than the defendant shall be dispossessed of any land or other immoveable property in execution of a decree," such person may apply to the Court; and if it appear that he has probable ground for his application, he is made plaintiff, and the decree-holder, defendant; and the matter is investigated as in a suit so framed. That Section, it is admitted, will not apply in the present case, and the sole question is whether the case can be brought under Section 229.

It has been said that this objection has been taken now for the first time; it has also been said that the objection is technical, and one which cannot be entertained in conformity with Section 350 of the Code; and, further, that to entertain it now would be an act of injustice to the special appellant, because, if it had been taken in the first instance, the special appellant might have gone into the mofussil, made actual resistance, and so committed a misdemeanour. With great deference, I think that the objection has not been taken too late. The application was not made under Section 229, but, at least, as it was understood and doubtless intended, under Section 230. The Moonsiff in the first instance refused to entertain the application, holding that Section 230 was not applicable. The Judge decided that the application is entertainable, not under Section 230, but under 229, and remanded the case for trial. In this state of things, the decree-holder's remedy was, it may be said, by special appeal. But it has been held that a party is not bound to appeal specially to this Court under a mere interlocutory order, but may reserve such objection to be urged in the appeal against the final order. I think, if the opposite objection had now been made by the claimant, namely, that Section 230 did apply, it would be now in time.

Now, as to the observation that the objection is technical, and not entertainable by reason of Section 350, the latter part of that Section is in these words: "But no "decree shall be reversed or modified, nor "shall any case be remanded to the Lower "Court, on account of any error, defect, "or irregularity either in the decision or "any interlocutory order passed in the "suit not affecting the merits of the case "or the jurisdiction of the Court." The phrase "jurisdiction of the Court" is, no doubt, one which has been very much misapplied, but it is fully applicable in this case. The question which the special appellant desired to bring under the cognizance of the Court was one which had not been investigated in the previous suit. It was one which, if he desired to have it investigated under ordinary circumstances, he ought to have brought in the form of a suit commencing with a plaint on the prescribed stamp; but, under the circumstances set forth in Section 229 or 230, he might be enabled to bring his case under the cognizance of the Court otherwise than by regular suit, but only under such circumstances. Section 230 admittedly would not apply, and therefore the appellant claimed to bring his case under Section 229; and as the claim, in my opinion, could not be made under Section 229, I think the error was one which affected the jurisdiction of the Court to take summary cognizance of the case.

It is suggested that the word "resistance" does not necessarily mean resistance by force. I fully agree in this opinion. It is only necessary to bring the case within Section 226 and the following Sections that the officer of the Court shall have been obstructed and resisted, and in consequence of that the decree-holder shall have complained. That is not the case in the present instance. I think that the application was one which the appellant was not entitled to make. I am of opinion that the Judge's order was erroneous, and that the proceedings should be set aside.

I regret very much that my learned colleague is of a different opinion; but under the 36th Section of the Letters Patent, I have no option but to give effect to my judgment, and to direct that the special appeal be dismissed with costs.

Mitter, J.—The plaintiff, now special appellant before us, preferred an application to the Moonsiff of Behar, complaining that the defendants Beharee Lall and Gunori Loll, having obtained a decree against one Mittrojeet Singh, were attempting unlawfully to interfere with his possession in execution of that decree. This application was rejected by the Moonsiff, but on appeal to the Judge the Moonsiff was directed to deal with it under the provisions of Section 229, Act VIII. of 1859. The Moonsiff then gave a decree to the plaintiff, holding that

the plaintiff was entitled to remain in possession as a mokurrureedar, and that the defendants had no right to interfere with that possession in execution of the decree obtained by them against Mittrojeet Singh. Against this decision, an appeal was preferred by the defendants to the Subordinate Judge of Patna, and that officer has reversed it upon the ground that the plaintiff has failed to show that the mokurruree pottah relied upon by him was ever delivered to him by his lessors.

The plaintiff appeals specially to this Court; but a preliminary objection has been raised before us upon the ground that the proceedings in the case are illegal, inasmuch as there was no complaint before the Moonsiff that any resistance or obstruction had been offered to the officer who was deputed by the Court to execute the decree.

I am of opinion that this objection is of a purely technical character; and as it appears that it was never taken before either of the Lower Courts, I would not entertain it at this late stage of the proceedings. Rightly or wrongly, the case has been already numbered and registered as a regular suit between the parties, and has been dealt with as such by both the Lower Courts. Nor has it been suggested to us that the Moonsiff could not have tried this suit either with reference to the nature of the relief sought for, or with reference to the value of the property involved in it. Under such circumstances, it is clear that the objection is not one which affects either the merits of the case or the jurisdiction of the Court by which it has been tried, and this Court is not competent, in my opinion, to entertain such an objection under the provisions of Section 350 of the Code. Whether there was a complaint before the Moonsiff under the provisions of Section 226 or not, it is too late now to enquire. The fact, however, is evident, that, whilst the defendants were trying to obtain possession of the property decreed to them, the plaintiff came forward, and complained against them before the Moonsiff, instead of taking the law into his own hands. If this objection had been taken earlier, the plaintiff might have gone back and resisted the officer who was deputed to deliver possession to the defendants, although I am far from saying that such a course would have been either legal or proper. At any rate, the objection amounts to nothing more than a plea that the plaint has not been engrossed upon a full stamp; but such a plea, I apprehend, is not within the jurisdiction of this Court to entertain when the case has been tried upon its merits by both the Lower Courts; I would, therefore, overrule this objection, and try this special appeal upon the merits.

The 26th August 1868.

Present:

The Hon'ble L. S. Jackson and Dwarkanath Mitter, *Judges.*

Intervention—Section 77, Act X. of 1859.

Cases Nos. 3030 and 3031 of 1867 under Act X. of 1859.

Special Appeals from a decision passed by the Judge of Dacca, dated the 27th August 1867, affirming a decision of the Deputy Collector of that District, dated the 22nd April 1867.

Umbika Churn Nag (Objector), *Appellant,*

versus

Musst. Shibosoonduree Debea (Plaintiff), *Respondent.*

Baboo Sreenath Banerjee for Appellant.

Baboos Nil Monee Sein and *Rajendronath Misser* for Respondent.

Section 77, Act X. of 1859, does not allow an intervenor to set up an allegation of receipt of rent against a recent declaration of title.

Jackson, J.—It appears to me that this special appeal is groundless. The plaintiff has shown that the decision of the Civil Court has established his right to the land in question. It is not the meaning of Section 77 of Act X. of 1859 that an intervenor should be allowed to set up an allegation of receipt of rent against a recent declaration of title; nor could the plaintiff be justly remitted to a fresh suit to establish that which he had already established in a former suit. The special appeal is dismissed with costs.

The 27th August 1868.

Present:

The Hon'ble J. B. Phear and C. Hobhouse, *Judges.*

Onus probandi—Allegation of fraud.

Case No. 791 of 1868.

Special Appeal from a decision passed by the Judge of Beerbhoom, dated the 14th January 1868, reversing a decision passed by the Principal Sudder Ameen of that District, dated the 24th June 1867.

Lalla Roodro Pershad (one of the Defendants), *Appellant,*

versus

Binode Ram Sein and others (Plaintiffs), *Respondents.*

Baboo Kishen Succa Mookerjee for Appellant.

Baboo Romesh Chunder Mitter for Respondents

A decree-holder, driven by an order of the Court under Section 346 of the Civil Procedure Code, made in the execution-proceedings, to seek a remedy in a regular suit, sued to establish his right to certain property as being that of his judgment-debtor. The defendant, admitting that the property had been the judgment-debtor's, alleged that it had passed to himself by conveyance. Plaintiff, admitting the fact of such a deed of sale, alleged that it was fraudulently executed in order to deprive him of his just rights.

HELD that plaintiff was bound to prove the fraud.

Phear, J.—WE think that the Judge of the Lower Appellate Court has dealt erroneously with this case. He seems to have entered upon it with the impression that the order of the Principal Sudder Ameen made in the execution-proceedings, and there allowing the present defendant's claim, could in some way or other affect the burden of proof in this suit. It is clearly not so. The only effect of the Principal Sudder Ameen's order under Section 246 of the Civil Procedure Code was to drive the plaintiff to bring this suit for the purpose of asserting his right, and further to bring this suit within twelve months. But the suit having once been brought, the burden lies upon the plaintiff to give some *primâ-facie* proof of his claim. Now, his claim to the property which is the subject of the suit is nothing other than this, that the property is the property of his judgment-debtor, and, as such, he is entitled to take it in execution of his former decree. It does happen in this case that the defendant affords the plaintiff the *primâ-facie* proof which he wants, for the defendant in his written statement admits that the property was the property of the judgment-debtor, and says that it has passed to him (the defendant) by a conveyance from that judgment-debtor. At this stage, then, the burden of proof is shifted, and it becomes incumbent upon the defendant to show that there has been a transfer of the property from the judgment-debtor to him. But here again, he, like the plaintiff, can appeal to the words of his opponent for the purpose of supplying at least *primâ-facie* evidence on this point, for the plaintiff in his plaint clearly admits that there was a deed of sale from the judgment-debtor to the defendant executed between the parties, only, he asserts, that this document is invalid for the purpose of transferring the property as against him (the plaintiff), because it was concocted in fraud and with the direct intention of defeating his (the plaintiff's) just rights.

In this view of the case, it is clear that the Lower Appellate Court was wrong in enquiring whether or not the deed was executed. The parties stood before the Court with the admission by the plaintiff himself that a deed executed by the judgment-debtor in favor of the defendant did actually exist. The matter which was in contest between the parties was whether or not that was a good and valid deed—whether it had the effect which in terms it purported to have. The plaintiff said it had not, as we have already mentioned, because he said it was a fraudulent act against him, and therefore must be treated as a nullity. Now, if this be so, nothing can be plainer, we think, than this, that the burden of proving the allegations of fraud and collusion lay upon the plaintiff. The plaintiff made those allegations; and, unless those allegations were proved, there was a good title in the defendant—there was a transfer of the property from the judgment-debtor to the defendant, which the judgment-debtor himself could not gainsay; and it is, we think, difficult to draw any substantial distinction between the case as it thus rests between the parties, and the case of Sreeman Chunder Dey against Gopal Chunder Chuckerbutty, decided by the Privy Council, and reported at page 10, VII. Weekly Reporter, Privy Council Reports. But, even apart from the decision of the Privy Council which is there reported, it is almost elementary to say that, where a litigant party's case depends upon the establishment of fraud in the conduct of the other side, it lies upon him to prove the fraud. Now, it seems to us that the Judge of the Lower Appellate Court has decided the suit between the parties, not upon the

issue of fraud which it lay upon the plaintiff to make out, but upon the false issue whether or not the defendant's kobalah had ever been executed, which issue, if it really arose between the parties, no doubt, would rightly rest upon the defendant.

Under these circumstances, we think that we must reverse the decision of the Lower Appellate Court, and remand the case to that Court for re-trial upon the issue whether or not the kobalah executed by the judgment-debtor to the defendant was made to the knowledge of the defendant, in fraud of the plaintiff, and to defeat his rights in execution of the Civil Court decree. If the Judge should be of opinion that the deed was made in fraud of creditors among whom the plaintiff was one, he ought to find this issue in the affirmative, even though he should not come to the conclusion that the judgment-debtor and the defendant had, at the time of the execution of the deed, a specific intention to defraud the plaintiff personally. Costs will abide the event.

The 27th August 1868.

Present:

The Hon'ble F. B. Kemp and E. Jackson, *Judges.*

Evidence—Pleader's admission.

Case No. 1110 of 1868.

Special Appeal from a decision passed by the Judicial Commissioner of Assam, dated the 1st February 1868, modifying a decision of the Principal Sudder Ameen of Kamroop, dated the 18th December 1867.

Kaleekanund Bhuttacharjee (one of the Defendants), *Appellant,*

versus

Gireebala Debia (Plaintiff) and others (Defendants), *Respondents.*

Baboo Obhoy Churn Bose for Appellant.

Baboo Girendur Mohun Chuckerbutty for Respondents.

The admission of a defendant's vakeel in Court was held to be legal evidence of the receipt of money, and to do away with the necessity for other proof.

Jackson, J.—THE plaintiff, the mortgagee of Pergunnahs Roopshee and Bhowaneepore, has sued to recover from the defendant No. 1 and defendant No. 2, the servant of defendant No. 1, his one-third share of the rents of Pergunnahs Roopshee and Bhowaneepore for the year 1270. His allegation is that, notwithstanding that the defendant's father's brother mortgaged to him a one-third share of these Pergunnahs, the defendant No. 1, partly directly and partly through the defendant No. 2, has collected his (plaintiff's) share of the rents. The defendant No. 1 denies that he directed his agent to collect the plaintiff's rents, but states that he has solely collected his own two-thirds share of these Pergunnahs. The defendant No. 2 admits that he has collected Rupees 535-5-4 of the rents belonging to the plaintiff. The first Court has decreed the suit partially against the defendant No. 2 for the amount collected by him, and has given a decree also against the defendant No. 1 for the one-third share of the rents collected by him, as well as for the amount collected by his agent, the defendant No. 2. The defendant No. 2 has acquiesced in the decree, as he has not appealed; and it is final so far. The defendant No. 1 has appealed. But the Lower Appellate Court has confirmed the decree of the first Court. The defendant No. 1 now appeals specially. His ground is that he did not direct his agent to collect the rents of the plaintiff, but only his own rents. The Lower Appellate Court has found upon the facts that he did give a purwannah to collect the rents of these Pergunnahs, which purwannah did not specify the share of the rents which his agent had to collect; and further that he appears to have given a jumma-bundee to his agent, which included the whole of the rents.

It may or it may not be that it was a misapprehension on his agent's part, and that he did not deliberately intend that his agent should collect the rents of the plaintiff. Still, it appears that, in accordance with his orders, these rents were collected. As regards the sum collected, however, namely, 535 rupees 5 annas and 4 pie, which belonged to the plaintiff, it is clearly shown and admitted by the plaintiff that the defendant No. 2 offered them to the plaintiff. But the plaintiff refused to receive them. Under these circumstances, we think the defendant No 1 should not be made liable for this sum, which his agent was ready to pay over, and which he had previously offered to repay. In addition to this sum, however, it was also found by the Lower Appellate Court that the sum of Rupees 473-1-13 had been directly collected by the defendant No. 1; and, in addition to that, that the sum of Rupees 284-8 was also collected by the agents of the defendant No. 1. Taking the

aggregate of these sums, it is clear that the defendant No. 1 obtained more than his share of the rents. The Lower Appellate Court, accordingly, confirmed the decree of the first Court decreeing to the plaintiff one-third of these two sums.

It is objected in special appeal that there is no legal evidence of the fact that these sums were collected by the defendant No. 1. On examining the record, we find that the vakeel of the defendant No. 1 was distinctly asked in Court whether his client had received these sums of money, for which receipts had been filed in Court, and in answer the defendant No. 1's vakeel admitted that his master had received all this money. That admission is legal evidence, and did away with the necessity under which the plaintiff would otherwise have laboured to prove these receipts. We see no reason, therefore, for interfering with the decision of the Lower Court as regards these sums of Rupees 473-1-13 and 284-8, as for one-third of which the plaintiff is entitled to a decree against the defendant No. 1. But as regards the remaining sum of 535 rupees 5 annas and 4 pie, we think that the decree should have been passed only against the defendant No. 2, and so far we modify the decree of the Lower Appellate Court. The parties will pay their own costs.

The 27th August 1868.

Present:

The Hon'ble L. S. Jackson and F. A. Glover, *Judges.*

Enhancement of rent—Grounds in the notice—Section 17, Act X., 1859.

Case No. 1105 of 1868.

Special Appeal from a decision passed by the Officiating Judge of Moorshedabad, dated the 1st February 1868, affirming a decision of the Deputy Collector of Jungeepore, dated the 11th April 1866.

Dwarkanath Chowdhry (Defendant), *Appellant,*

versus

Beejoy Gobind Burral and others (Plaintiffs), *Respondents.*

Baboo Gopal Lall Mitter for Appellant.

Baboos Luckhee Churn Bose, Bhuggobutty Churn Ghose, and *Ashootosh Chatterjee* for Respondents.

It is not sufficient for a notice of enhancement of rent to allege generally the grounds of enhancement mentioned in Section 17, Act X. of 1859: it should set forth specific and tangible grounds of enhancement applicable to the particular case.

Jackson, J.—Two questions were raised in this special appeal; one relating to the defendant's liability to enhancement: and the other, as to the rates at which he was ordered to pay. It is contended, first, that the Court below had found that the defendant was liable to enhancement, denying him the benefit of the presumption under Section 4, Act X. of 1859, upon no other ground than the proof afforded by the plaintiff's jumma-wassil bakee papers. On referring to the record, it turned out that there was independent evidence upon the point, which was corroborated by the jumma-wassil-bakee. On this part of the case, therefore, there is no ground for disturbing the judgment of the Lower Appellate Court. Upon the other point, however, we think that the judgment complained of cannot be sustained. It appears that the notice served on the defendant, as unfortunately we have seen in many other cases of the same kind, did not set out specific and tangible grounds of enhancement applicable to the particular case, but alleged generally all the grounds of enhancement mentioned in Section 17, upon which a tenant having a right of occupancy may be enhanced, and the plaint seems to have been framed in the same manner. The plaintiff wholly failed in regard to two of the grounds, *viz.*, as to the increased productiveness of the soil and as to the area of the holding. But some evidence was adduced to show, not that the prevailing rate for similar lands in the vicinity was higher, but that certain ryots holding similar lands did pay at a higher rate. But part of the same evidence also went to show that the ryots generally in the same mouzah were paying at less rates than the witnesses, though what those less rates were was not precisely stated. It appears to us that evidence of this description is not such as will support a suit for enhancement under the 2nd Clause of Section 17; and I also think, as I have held before in similar cases, that the zemindar who proceeds against the ryot with such indefinite notice as given in the present case, and supports his demand with such unsatisfactory proof, ought not to succeed. We are of opinion, therefore, that the decision of the Lower Appellate Court is erroneous.

The special appeal is allowed with costs.

The 27th August 1868.

Present:

The Hon'ble F. B. Kemp and E. Jackson, *Judges.*

Tenancy under a mowrusseedar—Suit by zemindar—Indenture in English form—Kubooleut—Act X., 1859.

Case No. 795 of 1868 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of Hooghly, dated the 2nd March 1868, reversing a decision of the Deputy Collector of Howrah, dated the 28th November 1867.

Kishen Doss and another (Defendants), *Appellants,*

versus

Hurry Jeebun Doss (Plaintiff) and others (Intervenors), *Respondents.*

Baboos Khettur Mohun Mookerjee and *Poorno Chunder Shome* for Appellants.

Baboos Debendro Narain Bose and *Tara Prosunno Mookerjee* for Respondents.

Where a party, who had tenanted land from a mowrusseedar, and had built upon it, was sued by the zemindar for a kubooleut, and, instead of pleading his tenancy under the mowrusseedar, gave the latter notice through his attorneys to appear: HELD that the mowrusseedar was not bound to appear in that suit.

Where two parties bind themselves under an indenture drawn up in the English form, the one to lease, and the other to pay rent for certain land, the contract is complete, and a suit for arrears of rent due under it will lie under Act X., 1859, although no separate kubooleut is executed.

Kemp, J.—THIS was a suit for rent. The Judge has decreed the plaintiff's suit. In special appeal, it is contended, *first*, that the Lower Court is wrong in construing the lease executed by the plaintiffs as a contract binding upon the special appellants, the defendants, inasmuch as there was no exchange or counterpart, which was necessary for the completion of the contract; *2ndly*, that, in the absence of a kubooleut, the plaintiffs' suit for arrears of rent ought to have been dismissed; *3rdly*, that the special appellant never held possession of the land under the pottah; *4thly*, that the Lower Appellate Court should have inquired into the allegations of the defendant that he entered into the contract under a misapprehension; and, *5thly*, that the plaintiffs having stood by and allowed the zemindars to obtain a decree for a kubooleut against the special appellants, although they, the special respondents, had been served with a notice calling upon them to prove their title, the special respondents must be held to have waived their title.

The *first* and the *second* grounds may be disposed of together. The parties to the suit bound themselves under an indenture drawn up in the English form, the one to lease certain lands, and the other to pay rent for the same This contract is complete in itself and is not disputed, and a suit for arrears of rent due under that contract will lie under the provisions of Act X. of 1856, although no separate kubooleut was executed. A kubooleut would simply imply the consent on the part of the appellants to pay rent, and this consent is to be found in the indenture noticed above.

On the *third* ground, the defendant in his deposition admits that the plaintiff gave him possession of the land. On the *fourth* ground, there were no allegations of fraud, nor is there anything on the record to show that the defendant entered into this contract under a misapprehension The terms of the contract are most favorable to the defendant, who obtained thereby 7 beegahs more or less situated on the banks of the river close to Calcutta, of land suitable for the erection of screws and godowns, &c., at a yearly rent of 50 rupees, and he has the option, after the expiry of the term of the first lease, to renew the lease on the same favorable terms for the same period, namely, 20 years. Such a transaction appears to us to be free from any taint of fraud.

With reference to the *last* ground, it appears that the zemindar, after the defendant had erected buildings for a screw, and otherwise laid out money upon the land, threatened the defendant to turn him out, unless he came to terms with him. A suit was brought by the zemindar for a kubooleut, and the defendant, instead of pleading his tenancy under the plaintiff, who apparently is the mowrusseedar, confessed judgment. It is said that he gave the plaintiff a notice through his attorneys to appear in that suit, and to prove his title. But the plaintiff was not bound to appear in that suit His title could not be questioned by his tenant, and there was no contention as between the zemindar and the mowrusseedar. If the defendant had cited the plaintiff as a witness, and had pleaded his tenancy under the plaintiff, it may have been that the suit of the zemindar would not have been successful; at all events, the plaintiff, the alleged mowrusseedar, would have had to disclose his title. Instead of adopting this procedure, the defendant thought proper to take the ill-advised step of confessing judgment.

We concur entirely in the judgment of the Judge, and dismiss this appeal with costs.

The 27th August 1868.

Present:

The Hon'ble L. S. Jackson and Dwarkanath Mitter, *Judges.*

Purchase of mortgaged property—Encumbrances.

Case No. 126 of 1868.

Special Appeal from a decision passed by the Officiating Judge of Shahabad, dated the 5th December 1867, affirming a decision of the Principal Sudder Ameen of that District, dated the 19th August 1867.

Banee Pershad (Plaintiff), *Appellant,*

versus

Reet Bhunjun Singh and others (Defendants), *Respondents.*

Baboos Kalee Kishen Sein, Abinash Chunder Banerjee, and *Boodh Sein Singh* for Appellant.

Baboos Romesh Chunder Mitter and *Hem Chunder Banerjee* for Respondents.

A purchaser of property sold under a decree in favor of a mortgagee cannot claim to set aside, as prejudicial to his rights, a ticca pottah granted by the mortgagee when those rights were not in existence.

It cannot be maintained that the purchaser in such a case takes the property free from such lease or farm as the owner might have found to be expedient or convenient, provided the value of the property was not impaired and the operation of the mortgagee's lien not impeded.

Jackson, J.—We think the decision of the Lower Appellate Court must be affirmed.

The first ground of special appeal is that the ticca pottah complained of should be set aside as being prejudicial to the plaintiff's rights. The plaintiff's rights were not in existence when the ticca was granted, and the right, title, and interest which he has acquired are those of the mortgagee who created the ticca.

The second ground is that the plaintiff having purchased the property under the decree in favor of the mortgagee, takes it free from all alienation, or incumbrance created subsequently to the mortgage.

We apprehend that this proposition is not maintainable in the full sense of the words in which it is framed, if the term incumbrance is meant to include such temporary arrangements by way of lease or farm as the owner might find to be expedient or convenient.

The mortgagor was restrained from alienating the property which he had pledged, but he was not divested of, or restricted in, the management of the property, and as long as nothing took place which impaired the value or impeded the operation of the mortgagee's lien, we think that the mortgagor in creating a temporary lease acted within his powers, and that the purchaser has no legitimate cause of complaint.

It is not our intention that the effect of this decision should go beyond the particular case before us, and with this statement we dismiss the special appeal with costs.

The 28th August 1868.

Present:

The Hon'ble L. S. Jackson and F. A. Glover, *Judges.*

Res adjudicata—Section 23, Act X., 1859—Section 2, Code of Civil Procedure.

Case No. 1402 of 1868.

Special Appeal from a decision passed by the Principal Sudder Ameen of Bhaugulpore, dated the 25th March 1868, affirming a decision of the Moonsiff of that District, dated 12th July 1867.

Mr. F. Holloway (Defendant), *Appellant,*

versus

Asman Roy (Plaintiff), *Respondent.*

Baboo Boodh Sein Sing for Appellant.

Baboo Kalee Kishen Sein for Respondent.

In a suit by a tenant to recover possession of land from which he had been dispossessed by defendant under color of a sub-lease alleged to have been extorted by force, it appeared that plaintiff had on this very cause of action sued the defendant in the Court of the Collector, who had found the sub-lease to be good and valid and had dismissed the suit: HELD that the suit having once been dismissed by a Court of competent jurisdiction could not again be entertained by the Civil Court.

Jackson, J.—It appears to be quite clear that the plaintiff is not entitled to maintain the suit in the Civil Court. The allegation is that the plaintiff is a tenant entitled to the occupation of the land; that the defendant Mr. Holloway was the farmer representing the landlord; and that he had dispossessed the plaintiff from his land. The plaint states also that this dispossession took place under color of an alleged sub-lease granted by the

plaintiff to the defendant, which sub-lease is alleged to have been extorted by force. It is stated, and not denied, that the plaintiff had complained of this force in the Criminal Court, and the complaint had been dismissed; further, the plaintiff had upon this very cause of action sued the same defendant in the Court of the Collector, alleging that he had been illegally dispossessed from the land in dispute. The Collector entertained the suit, and on the defendant setting up the sub-lease, the Collector found it to be good and valid, and he dismissed the suit. It is for this very dispossession that the plaintiff has now again brought the present suit before the Civil Court.

The Principal Sudder Ameen, affirming the judgment of the Moonsiff, has held that the suit might be entertained and has given judgment for the plaintiff, and in giving his judgment he refers expressly to some precedents, and amongst others, to the case of Gooroo Doss Roy, appellant, reported in VII. Weekly Reporter, page 186.

I think that the precedent in question does not apply, and that the special appellant justly contends that this suit having once been dismissed by a Court of competent jurisdiction could not again be entertained by the Civil Court. The precedent in VII. Weekly Reporter just referred to applies to cases in which there is a question of title between the ryot and the ejecting landlord. In this case, there is no such question, the title of the ryot being fully admitted, the defendant's answer being in this suit, as in the previous, that the ryot had granted him a lease and so assigned to him a portion of his interest in the land—that constituting a valid answer to the first suit as well as the second. It seems to me that when the Collector had with complete jurisdiction once tried the suit, to suffer the plaintiff to raise the same issue again in the Civil Court would entirely frustrate the intention of the Legislature as expressed both in Section 23, Act X. of 1859, and in Section 2 of the Civil Procedure Code.

It was contended by the special respondent that the plaintiff in the first suit had merely complained of an illegal dispossession by his landlord, whereas in the second suit he referred in his plaint to the pretended sub-lease set up by the defendant, and that in this way the question to be tried was varied. I think that the plaintiff, whether in the Collector's Court or in the Civil Court, would have to recover upon his own title and could neither conclusively say what the defendant's title was, nor by a statement of that title alter the nature of the suit. It is manifest that this suit was not by mistake brought to the Collector's Court, and dismissed by the Collector as one beyond his competency to try, nor one which the Collector could try partly and inconclusively so that it was necessary to resort to the Civil Court for a complete and binding decision; but the plaintiff being unsuccessful in the Collector's Court has thought fit to repeat his experiment in the Civil Court. The special appeal is allowed, and the judgment of the Lower Appellate Court is reversed with costs.

Glover, J.—I concur.

The 28th August 1868.

Present:

The Hon'ble H. V. Bayley and A. G. Macpherson, *Judges.*

Mortgage — Foreclosure proceedings — Construction of a compromise — Cross appeal against co-respondent—Section 348, Act VIII., 1859.

Special Appeal from a decision passed by the Principal Sudder Ameen of Jessore, dated the 7th August 1867, affirming a decision of the Sudder Moonsiff of that District, dated the 12th February 1866.

Goonomonee Dossia (one of the Defendants), *Appellant,*

versus

Parbutty Dossia (Plaintiff) and others (Defendants), *Respondents.*

Baboo Oopendur Chunder Ghose for Appellant.

Mr. J. S. Rochfort and *Baboo Romesh Chunder Mitter* for Respondents.

A mortgage-debt not having been paid off on the date on which it was payable, notice of foreclosure was issued and served. During the currency of the year of grace, the mortgagor and mortgagee having come to an arrangement, filed petitions in Court in the foreclosure-proceedings, setting forth that part payment had been accepted, and that the rest of the debt would be paid with interest on the date of the expiry of the year of grace, failing which the sale should become absolute.

HELD that it was not the intention of the parties to substitute a new contract for the one under which the notice of foreclosure issued, or that the proceedings should be allowed to drop.

If a decree is passed partly in favor of, and partly against, a plaintiff, and one of the defendants alone appeals as against the decree in favor of the plaintiff, making a co-defendant a respondent, there is no reason why the latter should appear or interest himself in the result; nor why the plaintiff should be allowed at the hearing to raise objections to his suit having been dismissed against the other defendant.

Macpherson, J.—THE main question in this case was whether certain foreclosure-proceedings taken by the respondents were sufficient. The suit is for possession as upon the foreclosure of a mortgage. The mortgage-debt was, according to the terms of the mortgage-contract, re-payable on the 13th Magh 1266. The debt not being paid off, the mortgagee, on the 5th Joyst 1267, issued notice of foreclosure, which notice was served upon the mortgagor on the 12th Joyst.

According to the practice of the Courts which prevailed until within the last few weeks, the year of grace was reckoned from the date of the notification. A Full Bench of this Court has recently decided that the year of grace is to be counted, not from the date of the notice, but of the *service* of the notice; but, according to the old practice, the year of grace in this case would have expired on the 5th Joyst 1268. During the currency of the year of grace, and on the 6th Bhadro 1267, the mortgagor and mortgagee having come to an arrangement, both filed petitions in Court in the foreclosure-proceedings. Their petitions substantially agree, and they profess to set forth the arrangement which had been come to. The mortgagor in her petition says in effect: "I not having paid the whole, &c., "within the stipulated period, notice was "served on me; therefore it is agreed upon "between us that, I not being able to pay "all that is due, I have paid Rupees 690 out "of the total of Rupees 1,272; and I will "pay the remaining Rupees 562 on the 5th "Joyst with interest. *If I do not pay that "sum within the time, then the sale of that "mehal shall become absolute*, no one of my "heirs, &c., shall make any objection, &c."

It is contended that the effect of this arrangement of the 6th Bhadro was to supersede the original mortgage-contract altogether, and (so far as the balance of Rupees 562 was concerned) to substitute an entirely new contract; and it is urged that, a new contract being thus entered into, the old one was at an end, and the proceedings of foreclosure taken under the old contract were of no value or effect as regards the balance of Rupees 562. The appellant, in fact, contends that the present suit for possession will not lie, because there have been no proceedings of foreclosure taken with reference to the alleged new contract of 6th Bhadro 1267.

No doubt, if the arrangement of the 6th Bhadro had the effect of substituting a new contract for the original contract, the consequence contended for by the appellant would necessarily follow. But I think that, upon a right construction of the petitions filed by the parties, it is evident there was no intention to substitute an entirely new contract for the one under which the notice of foreclosure issued; and that all that the parties meant was to declare that a payment in part was made and accepted *then*, and that the balance would be paid and accepted upon the day which both the parties believed to be the date of the expiry of the year of grace. I think it was no part of the intention, either of the appellant or of the mortgagee, that the proceedings towards foreclosure should be allowed to drop, or that the year of grace should not expire finally upon the 5th Joyst.

With merely these petitions before us, it is not easy to see what particular benefit accrued to the mortgagor from entering into this arrangement, for, as the year of grace could not possibly expire before the 5th Joyst 1268, she might, if she chose, without any such arrangement as that which she entered into on the 6th Bhadro, have deferred paying off the mortgage-debt till the last day of the year of grace.

It may, however, be that, by paying Rupees 690 at once, she escaped the liability for the interest on that sum, and it may also be (although I do not say it was so in fact) that some other benefit accrued to her from the arrangement. Whether there was or was not any direct benefit to her, it is, in my opinion, clear that all that she meant was to pay down Rupees 690 at once, and declare distinctly her intention of paying Rupees 562 on the day that the year of grace expired. The mortgagee's object probably was to give notice to the Court that he accepted the Rupees 690 without prejudice to his right to proceed as regards the 562 rupees; and he had good reason for giving some such notice to the Court, because, if he had taken a part-payment without specially saying that he did so without prejudice, it might have been a very serious question whether, by accepting the 690 rupees, he had not waived his right to proceed further under the foreclosure.

Putting this construction upon the transaction of the 6th Bhadro 1267, and holding that the old contract remained unaffected, I think that the foreclosure-proceedings were sufficient, and therefore the objection of the appellant fails.

In cross-appeal, Baboo Romesh Chunder Mitter objects to the decision of the Lower Court, on the ground that, whereas the mortgage professed to be one of 16 annas, and the

plaintiff was entitled to the 16 annas, the Lower Court has only given him a decree for 10 annas.

It appears that the mortgagor is a certain widow named Goono Monee, and that, after the mortgage, the reversionary heirs of a younger brother of Goono Monee's husband, persons who succeeded in reversion as heirs upon the death of the younger brother's widow Doya Moyee, sued Goono Monee, claiming half of the property as having belonged to the younger brother. It would, further, appear that Goono Monee compromised that claim by giving up a 6-annas share of the property to the claimants. When the plaintiff instituted the present suit to get possession of the property as on foreclosure of the mortgage, he made only the mortgagor Goono Monee a defendant. But the claimants to whom she had given up the 6-annas under the compromise were subsequently added as defendants; and the Lower Appellate Court, apparently considering the plaintiff bound by the compromise, gave the plaintiff a decree for only a 10-annas share of the property mortgaged.

Baboo Romesh Chunder Mitter contends that the Lower Appellate Court was wrong, inasmuch as the suit brought against Goono Monee by the heirs of the younger brother of her husband was no evidence against the plaintiff, as he was not a party to that suit. It may be that this is so, but we think that the mortgagee cannot be heard to take the objection now by way of cross-appeal under the circumstances under which this case comes before us. The mortgagee having been plaintiff in the Court below, and the claimants of the 6-annas share being defendants, and the plaintiff's suit as regards the six annas being dismissed, it was for the plaintiff to appeal against the decree of the Lower Court, if he was dissatisfied with it. He did not appeal, and the only person who did so was the mortgagor, who appealed in respect of the 10-annas share for which the plaintiff obtained a decree. The claimants of the 6-annas share have been made respondents, but have not appeared in this appeal. It has been repeatedly decided (*see* VII. Weekly Reporter, page 39) that a respondent cannot be heard by way of cross-appeal under Section 348, Act VIII. of 1859, as against a co-respondent; and for this rule there are very substantial reasons. The object of Section 348 is merely to ensure justice being done between the immediate parties to an appeal, who are contending before the Appellate Court.

If a decree is passed partly in favor of, and partly against, a plaintiff, as in the present instance, it may well be that one defendant is dissatisfied with the judgment, and wishes to appeal; while the other defendant is perfectly satisfied, and does not wish to appeal. If the dissatisfied defendant alone appeals, seeking relief as against the decree which the plaintiff has obtained, his making the other defendant a respondent is no reason why the latter should appear or interest himself in any way in the result of the appeal. Nor because one defendant appeals against a decree which the plaintiff has obtained against him is that any reason why the plaintiff, who has not himself appealed, should be allowed at the hearing to raise objections to his suit having been dismissed as against another defendant.

It is quite unreasonable to construe Section 348 in such a manner as to make it absolutely requisite for every body who has been made, properly or otherwise, a respondent, to appear, even although he has nothing to say against the claim of the appellant, merely in order that he may be present to support the judgment of the Lower Court so far as it was favorable to himself, against any objection which may possibly be taken at the hearing of the appeal by the plaintiff, who has never chosen to give notice of his intention to ask the Court to interfere with the decree of the Lower Court.

I think, on the whole, the defendant's appeal ought to be dismissed with costs, and that the plaintiff's cross-appeal ought also to be dismissed.

Bayley, J.—I concur.

The 28th August 1868.

Present:

The Hon'ble J. B. Phear and C. Hobhouse, *Judges.*

Joint Hindoo family—Purchase by a member—Presumption.

Case No. 867 of 1868.

Special Appeal from a decision passed by the Additional Principal Sudder Ameen of Dacca, dated the 10th January 1868, reversing a decision of the Moonsiff of Naraingunge, dated the 23rd March 1867.

Kisto Chunder Kurmokar and others (Plaintiffs), *Appellants,*

versus

Rughoonath Kurmokar and others (Defendants), *Respondents.*

Baboos Chunder Madhub Ghose and *Ashootosh Chatterjee* for Appellants.
Baboos Romesh Chunder Mitter and *Nubo Kishen Mookerjee* for Respondents.

Where property is purchased by a member of a joint Hindoo family, the fact of his living jointly or in commensality with others affords no presumption as to the source of the purchase-money.

Phear, J.—I THINK that, on the judgment of the Lower Appellate Court, the decree of that Court ought to have been given in favor of the plaintiffs. The Principal Sudder Ameen finds that the property was acquired in the name of the plaintiff's grandfather. He also finds—indeed, it is, as I understand, admitted by the other side—that there is possession (of 4 annas at least) on the part of the plaintiffs at the present time, excepting so far as it was disturbed by the decision in the Revenue Court. There is also the finding that, according to the documentary evidence, Modun Mohun, father of one set of the plaintiffs, was in possession of the howalah at an antecedent time; and against this there is, as I understand the case, absolutely no evidence at all to show that the right which *primâ facie* appears to belong to the plaintiffs and their ancestors was rebutted, and that the defendants were entitled either to a share of the property or to the whole of the property as against the plaintiffs. The alleged admission of Modun Mohun really amounts to nothing. It is a mere statement that his brothers were jointly with himself possessors of a certain howalah, which he does not name or describe in any way, and which cannot otherwise than by conjecture be identified with the howalah in dispute.

The Principal Sudder Ameen considered that it lay upon the plaintiffs, not only to show that the property stood in the name of their grandfather, and to show a possession and enjoyment of the property on behalf of themselves and their predecessors, but further to show that the property was acquired by their grandfather out of his own funds as distinguished from the funds of the family. It seems to me that the Principal Sudder Ameen was wrong in this view. The plaintiffs and the defendants are certainly not now members of one joint family. I believe that there is nothing in the evidence to indicate that, when the plaintiff's grandfather apparently acquired this property, he and his brothers (the defendants' ancestors) formed a joint family. But, even assuming that they were at that time thus living joint, I do not think that that fact alone affects the force of the title-deeds as evidence of ownership. In my opinion, it has more than once in effect been laid down by this Court that there is no presumption as to the source of the funds which constituted the purchase-money, arising merely from the circumstance that the person in whose name the property was acquired was living jointly or in commensality with others. I have on other occasions explained what I conceived to be the two presumptions which are made with regard to the *continuation* of *joint* property and *joint living*, but I do not understand that any presumption arises by law against the plaintiff's title merely on the ground of his having been, at the time of the purchase, a member of a joint family.

Under the circumstances which the Principal Sudder Ameen has found to exist in this case, as I have already said, I think that the judgment of the Lower Appellate Court ought to have led to a decree in favor of the plaintiff's. Accordingly, I would reverse the decision of the Lower Appellate Court, and confirm the decision of the first Court, with costs both here and in the Court below.

Hobhouse, J.—I agree in the decision of Mr. Justice Phear that the decree should have been in favor of the appellant to this Court, mainly for the reasons that he has given. And my judgment is so far a stronger judgment than his, that I hold that it was not the intention of the Court below to find that Modun Mohun Kurmokar was in possession under the *bundobustee* papers which are alluded to by the Lower Court; still I think that, for the reasons given, the decree of the Lower Court ought to be reversed.

The 28th August 1868.

Present :

The Hon'ble J. B. Phear and C. Hobhouse, *Judges.*

Res adjudicata—Section 84, Act XX., 1866.

Case No. 863 of 1868.

Special Appeal from a decision passed by the Additional Principal Sudder Ameen of Chittagong, dated the 9th January 1868, modifying a decision of the Moonsiff of that District, dated the 27th June 1867.

Ram Chunder Paul (one of the Defendants), *Appellant,*

versus

Becharam Dey (Plaintiff), *Respondent.*

Baboo Bama Churn Banerjee for Appellant.

plaintiff was entitled to the 16 annas, the Lower Court has only given him a decree for 10 annas.

It appears that the mortgagor is a certain widow named Goono Monee, and that, after the mortgage, the reversionary heirs of a younger brother of Goono Monee's husband, persons who succeeded in reversion as heirs upon the death of the younger brother's widow Doya Moyee, sued Goono Monee, claiming half of the property as having belonged to the younger brother. It would, further, appear that Goono Monee compromised that claim by giving up a 6-annas share of the property to the claimants. When the plaintiff instituted the present suit to get possession of the property as on foreclosure of the mortgage, he made only the mortgagor Goono Monee a defendant. But the claimants to whom she had given up the 6-annas under the compromise were subsequently added as defendants; and the Lower Appellate Court, apparently considering the plaintiff bound by the compromise, gave the plaintiff a decree for only a 10-annas share of the property mortgaged.

Baboo Romesh Chunder Mitter contends that the Lower Appellate Court was wrong, inasmuch as the suit brought against Goono Monee by the heirs of the younger brother of her husband was no evidence against the plaintiff, as he was not a party to that suit. It may be that this is so, but we think that the mortgagee cannot be heard to take the objection now by way of cross-appeal under the circumstances under which this case comes before us. The mortgagee having been plaintiff in the Court below, and the claimants of the 6-annas share being defendants, and the plaintiff's suit as regards the six annas being dismissed, it was for the plaintiff to appeal against the decree of the Lower Court, if he was dissatisfied with it. He did not appeal, and the only person who did so was the mortgagor, who appealed in respect of the 10-annas share for which the plaintiff obtained a decree. The claimants of the 6-annas share have been made respondents, but have not appeared in this appeal. It has been repeatedly decided (*see* VII. Weekly Reporter, page 39) that a respondent cannot be heard by way of cross-appeal under Section 348, Act VIII. of 1859, as against a co-respondent; and for this rule there are very substantial reasons. The object of Section 348 is merely to ensure justice being done between the immediate parties to an appeal, who are contending before the Appellate Court.

If a decree is passed partly in favor of, and partly against, a plaintiff, as in the present instance, it may well be that one defendant is dissatisfied with the judgment, and wishes to appeal; while the other defendant is perfectly satisfied, and does not wish to appeal. If the dissatisfied defendant alone appeals, seeking relief as against the decree which the plaintiff has obtained, his making the other defendant a respondent is no reason why the latter should appear or interest himself in any way in the result of the appeal. Nor because one defendant appeals against a decree which the plaintiff has obtained against him is that any reason why the plaintiff, who has not himself appealed, should be allowed at the hearing to raise objections to his suit having been dismissed as against another defendant.

It is quite unreasonable to construe Section 348 in such a manner as to make it absolutely requisite for every body who has been made, properly or otherwise, a respondent, to appear, even although he has nothing to say against the claim of the appellant, merely in order that he may be present to support the judgment of the Lower Court so far as it was favorable to himself, against any objection which may possibly be taken at the hearing of the appeal by the plaintiff, who has never chosen to give notice of his intention to ask the Court to interfere with the decree of the Lower Court.

I think, on the whole, the defendant's appeal ought to be dismissed with costs, and that the plaintiff's cross-appeal ought also to be dismissed.

Bayley, J.—I concur.

The 28th August 1868.

Present:

The Hon'ble J. B. Phear and C. Hobhouse, *Judges.*

Joint Hindoo family—Purchase by a member—Presumption.

Case No. 867 of 1868.

Special Appeal from a decision passed by the Additional Principal Sudder Ameen of Dacca, dated the 10th January 1868, reversing a decision of the Moonsiff of Naraingunge, dated the 23rd March 1867.

Kisto Chunder Kurmokar and others (Plaintiffs), *Appellants,*

versus

Rughoonath Kurmokar and others (Defendants), *Respondents.*

Baboos Chunder Madhub Ghose and *Ashootosh Chatterjee* for Appellants.

Baboos Romesh Chunder Mitter and *Nubo Kishen Mookerjee* for Respondents.

Where property is purchased by a member of a joint Hindoo family, the fact of his living jointly or in commensality with others affords no presumption as to the source of the purchase-money.

Phear, J.—I THINK that, on the judgment of the Lower Appellate Court, the decree of that Court ought to have been given in favor of the plaintiffs. The Principal Sudder Ameen finds that the property was acquired in the name of the plaintiff's grandfather. He also finds—indeed, it is, as I understand, admitted by the other side—that there is possession (of 4 annas at least) on the part of the plaintiffs at the present time, excepting so far as it was disturbed by the decision in the Revenue Court. There is also the finding that, according to the documentary evidence, Modun Mohun, father of one set of the plaintiffs, was in possession of the howalah at an antecedent time; and against this there is, as I understand the case, absolutely no evidence at all to show that the right which *primâ facie* appears to belong to the plaintiffs and their ancestors was rebutted, and that the defendants were entitled either to a share of the property or to the whole of the property as against the plaintiffs. The alleged admission of Modun Mohun really amounts to nothing. It is a mere statement that his brothers were jointly with himself possessors of a certain howalah, which he does not name or describe in any way, and which cannot otherwise than by conjecture be identified with the howalah in dispute.

The Principal Sudder Ameen considered that it lay upon the plaintiffs, not only to show that the property stood in the name of their grandfather, and to show a possession and enjoyment of the property on behalf of themselves and their predecessors, but further to show that the property was acquired by their grandfather out of his own funds as distinguished from the funds of the family. It seems to me that the Principal Sudder Ameen was wrong in this view. The plaintiffs and the defendants are certainly not now members of one joint family. I believe that there is nothing in the evidence to indicate that, when the plaintiff's grandfather apparently acquired this property, he and his brothers (the defendants' ancestors) formed a joint family. But, even assuming that they were at that time thus living joint, I do not think that that fact alone affects the force of the title-deeds as evidence of ownership. In my opinion, it has more than once in effect been laid down by this Court that there is no presumption as to the source of the funds which constituted the purchase-money, arising merely from the circumstance that the person in whose name the property was acquired was living jointly or in commensality with others. I have on other occasions explained what I conceived to be the two presumptions which are made with regard to the *continuation* of *joint* property and *joint living*, but I do not understand that any presumption arises by law against the plaintiff's title merely on the ground of his having been, at the time of the purchase, a member of a joint family.

Under the circumstances which the Principal Sudder Ameen has found to exist in this case, as I have already said, I think that the judgment of the Lower Appellate Court ought to have led to a decree in favor of the plaintiff's. Accordingly, I would reverse the decision of the Lower Appellate Court, and confirm the decision of the first Court, with costs both here and in the Court below.

Hobhouse, J.—I agree in the decision of Mr. Justice Phear that the decree should have been in favor of the appellant to this Court, mainly for the reasons that he has given. And my judgment is so far a stronger judgment than his, that I hold that it was not the intention of the Court below to find that Modun Mohun Kurmokar was in possession under the *bundobustee* papers which are alluded to by the Lower Court; still I think that, for the reasons given, the decree of the Lower Court ought to be reversed.

The 28th August 1868.

Present :

The Hon'ble J. B. Phear and C. Hobhouse, *Judges.*

Res adjudicata—Section 84, Act XX., 1866.

Case No. 863 of 1868.

Special Appeal from a decision passed by the Additional Principal Sudder Ameen of Chittagong, dated the 9th January 1868, modifying a decision of the Moonsiff of that District, dated the 27th June 1867.

Ram Chunder Paul (one of the Defendants), *Appellant,*

versus

Becharam Dey (Plaintiff), *Respondent.*

Baboo Bama Churn Banerjee for Appellant.

Baboo Sreenath Banerjee for Respondent.

A suit to have a registered kobalah declared fictitious and void as against plaintiff was held to disclose no good cause of action, seeing that, on a petition preferred according to the provisions of Section 84, Act XX. of 1866, a competent Court had already decided that the defendant was entitled to obtain registration of the deed.

Phear, J.—We think that the plaint, as we have had it explained to us, does not disclose a good cause of action against the defendant. The plaintiff simply complains that the defendant had fabricated a certain kobalah as if executed by the plaintiff, and has obtained registration of it; and on that ground he seeks to have the kobalah declared fictitious and void as against him. But there has been already a decision of a competent Court as between the plaintiff and the defendant, namely, on a petition preferred according to the provisions of Section 84, Act XX. of 1866, and by this decision it has been declared that the defendant was entitled to obtain registration of this deed. So that, as to the wrongful act upon which the plaintiff in this suit relies, it has been already declared to be right and proper as between these parties by a competent Court. The whole foundation of the plaintiff's suit seems to us to fail him. It will be time enough for him to bring an action against the defendant, or to resist an action brought by the defendant, whenever he is really hurt by this document. He cannot now complain that what the defendant has done is wrongful against him. We decree the appeal, and reverse the decision of the Lower Appellate Court with costs of both Courts.

The 29th August 1868.

Present:

The Hon'ble G. Loch and F. A. Glover,

Judges.

Rent on account of newly-formed land—Notice under Section 13, Act X. of 1859—Intervention.

Cases Nos. 1040 and 1042 of 1868 under Act X. of 1859.

Special Appeals from a decision passed by the Officiating Judge of Moorshedabad, dated the 31st December 1867, affirming a decision of the Deputy Collector of that District, dated the 22nd July 1868.

Messrs. Watson and Co. (Defendants),

Appellants,

versus

Neel Kant Sircar and another (Plaintiffs),

Respondents.

Mr. R. T. Allan for Appellants.

Baboo Sreenath Doss for Respondents.

In a suit brought by a zemindar for two years' rent on account of newly-formed land which had accreted to the defendants' old jote, but had since diluviated, wherein the Civil Court decreed the rent, allowing defendants to retain possession as tenants—Held that no notice was necessary under Section 13, Act X. of 1859, before rent could be demanded by the zemindar in the case.

Held also that intervention could not be allowed in such a case, as no question could arise as to the person to whom the rents of previous years had been paid, no rents having been previously realized.

Loch, J.—This suit is brought by the zemindar Neel Kant Sircar for the rent of 1270 to Assin 1271 on account of certain newly-formed lands which accreted to the old jote lands of the defendants, but which have since diluviated. It is admitted that they were in existence during the period for which rent is demanded.

The defendants, Watson and Co., demur as to the right of the plaintiff to claim the whole rent, alleging that a moiety is payable to Monohurra Dossee from whom they hold a farm. They object that no notice of demand of rent was served upon them; they object also to the rates at which rent is demanded, and that the area in their possession is undetermined, no measurement of the land having taken place.

Monohurra Dossee intervened, claiming a moiety of the rent as joint proprietor with Neel Kant Sircar; but as she has given her share in farm to Watson and Co., we think the Lower Court was right in not allowing her to intervene, and we reject her appeal to this Court with costs.

It appears that, after these lands had accreted, the zemindar brought a suit against Watson and Co. to evict them, and to get actual possession of this newly-formed land. In that case the lands were measured, and the Court held that the defendants were entitled to retain possession as tenants, thereby indicating the right of the zemindar to claim rent.

The Judge, in appeal, has given a decree for the rent claimed against the defendants, who, therefore, come up in special appeal; and they urge that, before a demand for rent could be made upon them, a notice under Section 13, containing the ground for enhancement as prescribed by Section 17, Act X., 1859, should have been served upon them.

We do not think that the Sections quoted have any bearing on this case. The lands are admittedly newly formed, for which no rent has heretofore been paid. The case contemplated in Section 13 is, where a person has been paying rent, and a higher rent is demanded under one or other of the grounds mentioned in Section 17. The right of the zemindar to demand rent is clearly to be inferred from the judgment in the civil suit between the parties above referred to. The defendants, being allowed to retain possession of the lands as tenants, must have clearly understood that they were liable to pay rent; and it does not seem necessary, under the circumstances of this case, for the zemindar to serve a notice upon them, claiming rent for the use and occupation of the land before bringing the suit for rent. Act X. does not provide for a case of this kind.

It is urged that Watson and Co. hold the lands in the double capacity of tenant and farmer, and, in the latter capacity, they are entitled to intervene. But in this suit they have appeared simply as defendants; nor could they or even Monohurra Dossee appear as an intervenor in this case, because no question could arise as to whom the rents of previous years had been paid, as no rents on account of these lands were previously realized.

The Lower Appellate Court has accepted the rates, and that being a matter of evidence cannot be interfered with by this Court in special appeal.

The case resolves itself into a simple demand for rent, which the defendant alleges is not wholly payable to the plaintiff. The Lower Appellate Court must decide this point. It is clear that Monohurra is a joint owner of the property, and her right cannot be ignored; for the witness called by plaintiff in case No. 1041, just disposed of, acknowledges that collections are made and accounts kept and receipts drawn up in her name jointly with that of the plaintiff. The Judge must, therefore, determine, for the purpose of this suit, whether plaintiff is entitled to the whole of the rent demanded, or to a moiety, as pleaded by the defendant; for if the defendant's averment be proved, plaintiff cannot get more than he is legally entitled to. The case is remanded for the determination of this point, and costs of this appeal will follow the result of the trial.

The 29th August 1868.

Present:

The Hon'ble G. Loch and F. A. Glover, *Judges.*

Intervention—Joint proprietorship—Right of suit.

Cases Nos. 1041 and 1044 of 1868 under Act X. of 1859.

Special Appeals from a decision passed by the Officiating Judge of Moorshedabad, dated the 31st December 1867, affirming a decision of the Deputy Collector of that District, dated the 22nd July 1867.

Messrs. Watson and Co. (Defendants), *Appellants,*

versus

Neel Kant Sircar and another (Plaintiffs), *Respondents.*

Mr. R. T. Allan for Appellants.

Baboo Sreenath Doss for Respondents.

In a suit for rent of lands held by defendants as tenants in plaintiff's zemindary, in which it was pleaded that the rent was not due solely to plaintiff, as a moiety was payable to a third party who had given defendants a farm of her share—HELD that such party could not be allowed to appear as an intervenor in the case, as she had made over to the defendants her right to collect the rents.

HELD, too, that, as the third party was recognized as joint proprietor, and the collections were made in the joint names of the plaintiff and herself, the mere payment of the rents to plaintiff's sircar could not entitle plaintiff to sue for the whole rent in his own name.

Loch, J.—THE zemindar Neel Kant Sircar sued Messrs. Watson and Co. for rent for lands held by them as tenants in his zemindary.

The defendants pleaded that the rent was not due solely to the plaintiff, who was only entitled to have the rent he claimed, the other moiety being payable to Monohurra Dossee.

Monohurra Dossee intervened, and stated that she had a right to a moiety of the rent from Watson and Co., to whom she had given a farm of her share of the estate.

The Judge held—and we think properly—that Monohurra could not be allowed to appear as an intervenor in the case, as she had made over her right to collect the rents from the tenants to Watson and Co. We confirm this decision, and dismiss the appeal of Monohurra with costs.

Watson and Co. hold the land in the twofold capacity of tenants cultivating the lands and farmers entitled to recover the rent due to their lessor Monohurra. They appear in

this case, however, only as defendants, and therefore the question between the parties is limited to one point, *viz.*, whether the plaintiff has heretofore realized the rents he now claims.

The Judge finds on the evidence that the plaintiff has realized the whole rent, and gave him a decree.

In special appeal, it is contended that the rent was realized in the names of Neel Kant and Monohurra jointly, that the accounts produced by the servant of Neel Kant exhibit the name of Monohurra as well as Neel Kant, and the witness called by plaintiff to prove his allegation admits that all the receipts are given by him in the joint names of Neel Kant and Monohurra, though he pays the collections to the former. This contention appears to be correct. Monohurra is evidently recognized as a joint proprietor of the estate, and the collections are made in her name; and though the witness says he pays the collections to Neel Kant Sircar, this payment cannot entitle Neel Kant to ignore Monohurra, and sue for the whole rent in his own name. We think, therefore, that the case should go back to the Judge to ascertain for the purposes of this suit what is the share of the rent to which Neel Kant is entitled. Costs of this appeal will follow the result of the suit.

The 29th August 1868.

Present:

The Hon'ble F. B. Kemp and A. G. Macpherson, *Judges.*

Objection first raised in appeal.

Case No. 3125 of 1867.

Special Appeal from a decision passed by the Principal Sudder Ameen of Rajshahye, dated the 26th August 1867, reversing a decision of the Officiating Sudder Ameen of Pubna, dated the 2nd March 1867.

Chunder Coomar Roy (Plaintiff), *Appellant,*

versus

Moulvie Kubeerooddeen and others (Defendants), *Respondents.*

Baboos Sreenath Doss and *Bungshee Dhur Sein* for Appellant.

Mr. R. E. Twidale for Respondents.

A plaintiff who had purchased a factory from the Official Assignee sued for the recovery of money on a bond alleged to have been an asset of his purchase, and obtained a decree. In appeal it was objected for the first time that plaintiff had not filed any evidence to prove that the bond formed part of the assets of the factory, and his suit was dismissed.

HELD that plaintiff ought to have had an opportunity given him of adducing the requisite proof.

Kemp, J.—THIS is a suit to recover Rupees 96-8-8 under a bond. The plaintiff had purchased the Bhanna Baria Concern from Messrs. Wills Earle & Co., or rather from the Official Assignee of their estate.

Two parties were made defendants. Originally the suit was decided *ex-parte* against Jamalooddeen Khandkar alone. He applied under the provisions of Section 119 of the Code of Civil Procedure, and the case was revived, and a decree again passed against him alone.

It does not appear that any objection was taken in the Court of first instance to the right of the plaintiff to sue upon the bond in question. For the first time this objection was raised in the Lower Appellate Court, and the plaintiff's suit was dismissed, because he had not filed any evidence to prove that the bond in question formed part of the assets of the factory purchased by him.

We think that the plaintiff has been taken by surprise, and he ought to have an opportunity given him of proving that the bond in question formed part of the assets of the factory purchased by him, and for this purpose we remand the case for re-trial.

It appears that Moulvie Kubeerooddeen, who was heir of the female defendant who was absolved from the claim of the plaintiff by the first Court, although no appeal was filed by the claim of the plaintiff as against her, has been unnecessarily made a respondent in this appeal. His costs, therefore, must be paid by the appellant.

The 31st August 1868.

Present:

The Hon'ble L. S. Jackson, *Judge.*

Jurisdiction—Removal of a pleader from one Court to another.

Petition of Mahomed Manaff, praying that the order of the Judge of Purneah, transferring him from Kishengunge to Gundwarah, be set aside.

A Zillah Judge has no authority to oblige a pleader to leave a Court in which he has been practising, and to proceed to another.

THE Judge had no authority whatever to oblige a pleader to leave the Court in which he has been practising, and to proceed

to another Court. The paucity or the absence of vakeels in that other Court probably arises from there being little or no business, and the injury inflicted by removing the vakeel from the place where he had business, to a place where he would perhaps find none, is very serious, and is wholly unwarranted by law. The Judge will be directed to withdraw the order he has made, and to allow the petitioner to return to the Court where he previously practised.

The 2nd September 1868.

Present:

The Hon'ble G. Loch and Dwarkanath Mitter, *Judges.*

Joint Hindoo family—Acquired property—Presumption—Onus probandi.

Case No. 1335 of 1868.

Special Appeal from a decision passed by the Judge of Sylhet, dated the 28th February 1868, reversing a decision of the Principal Sudder Ameen of that District, dated the 17th May 1867.

Khelut Chunder Ghose (Defendant), *Appellant,*

versus

Koonj Lall Dhur (Plaintiff), *Respondent.*

Baboo Molly Lall Mookerjee for Appellant.

Baboo Grish Chunder Ghose for Respondent.

Where the purchaser of the rights and interests of one member of a Hindoo family, in suing for possession, claimed a share of certain property which had been originally purchased by another member, on the ground that it had been purchased from joint funds -

HELD that, before it could be presumed from the fact of the members having lived in commensality that the property was purchased from joint funds, plaintiff was bound to show that there were joint funds, or other ancestral property, from which such funds could be derived.

Loch, J.—IT appears that the Judge has thrown the *onus* of proof on the wrong party. He required the defendant to prove that the property in dispute was purchased by Bholanath out of his own means. It appears that one Bholanath purchased the property connected with this case in execution of a decree. His rights and interests were subsequently sold and purchased by one Unnoda, who sold it to the defendant. The plaintiff in this case has purchased the rights and interests of Bhoyrubnath, a brother of Bholanath, in this property, and sued to recover possession of his share. The first point before the Lower Court was whether the property was the sole property of Bholanath, or the joint property of Bholanath, Bhoyrubnath, and Brojonath. It appears to have been admitted that the three brothers, Bholanath, Bhoyrubnath, and Brojonath, lived in commensality; and the Lower Appellate Court has considered this fact sufficient to warrant the presumption of Hindoo law that a property purchased by one member of a family was purchased for the benefit of all the members, without ascertaining whether there was any ancestral property from which funds were derived for the purchase of this property, and he has required the defendant, who is the representative of the auction-purchaser of Bholanath's share, to prove that Bholanath purchased from his separate funds. The plaintiff, respondent in this case, alleges that the property was purchased by Bholanath and Bhoyrubnath from joint funds. We do not, however, find that any evidence has been given on the part of the plaintiff to show that there were other properties from which the funds for the purchase of this property could have been derived; and before calling on the defendant, as the Judge has done, to prove that this property solely belonged to Bholanath, and was purchased by him, the plaintiff should have started his case, and shown that there was some joint source from which funds were available for the purchase of this property for the family. The Judge appears to have thrown the *onus* on the defendant, special appellant in this case, and has given a decree to the plaintiff, because the defendant has failed to prove his case. We think that the case should be remanded to the Judge to come to a finding on the plaintiff's evidence, and to determine whether there was any joint fund, from which means could be derived for the purchase of the property. Should the plaintiff make out his case, he will then look to the evidence of the defendant. Costs of this appeal will follow the ultimate result.

Mitter, J.—I concur. Under the circumstances stated by my learned colleague, the paintiff is bound to start his case. There can be presumption of joint ownership from the mere fact of commensality.

The 2nd September 1868.

Present:

The Hon'ble G. Loch and Dwarkanath Mitter, *Judges.*

Jurisdiction—Appeal—Review.

Case No. 1411 of 1868 under Act X. of 1859.

Special Appeal from a decision passed by the Officiating Judge of Moorshedabad, dated the 8th April 1868, reversing a decision of the Deputy Collector of that District, dated the 28th February 1867.

Troyluckhnath Chuckerbutty, gomashtah of Gooroo Pershad Roy (Plaintiff), *Appellant,*

versus

Jhabboo Shaikh (Defendant), *Respondent.*

Baboos Shamlall Mitter and *Mohendro Lall Seal* for Appellant.

Baboo Mohinee Mohun Roy for Respondent.

In a case decided by a Deputy Collector, an appeal was preferred to the Collector, who rejected it as having no jurisdiction. An appeal was then preferred to the Judge, who also rejected it on the ground of want of jurisdiction, and referred the parties to the Collector. The Collector accordingly tried the case; but his proceedings were quashed by the High Court as having been taken without jurisdiction. The parties then applied to the Judge for a review of his order, which he refused to grant, suggesting an appeal. They accordingly filed an appeal, and the Judge reversed the order of the Deputy Collector.

HELD that the Judge might have admitted the application for review; but, not having done so, he was at liberty to treat the appeal as one filed after time on having sufficient reasons assigned for the delay.

Loch, J.—THIS case was originally decided by the Deputy Collector under Act X. of 1859. An appeal was preferred by the defendant to the Collector, who rejected it as having no jurisdiction. The parties then appealed to the Judge, who also rejected the appeal on the ground of want of jurisdiction, and referred the parties to the Collector. The Collector, admitting the appeal, tried the case, but on an application to the High Court by motion, the proceedings of the Collector were quashed as having been taken without jurisdiction. The parties then applied to the Judge for a review of his previous order. The Judge refused to comply with their request, but suggested that they might file an appeal, and, acting on that suggestion, they did file an appeal, which was disposed of by the Judge, and the order of the Deputy Collector was reversed. In special appeal, it is urged that the Judge had no authority, after having once rejected the appeal of the defendant, intervenor, to admit a second appeal. It may be said that the order of the High Court, quashing the proceedings of the Collector, virtually set aside the order of the Judge, and declared that he had jurisdiction. Therefore, there was no bar to an appeal being preferred in this case to him.

We think that he might have admitted the application for review; but, not having done so, we think he was at liberty to treat this petition of appeal as an appeal filed after time, on having sufficient reasons assigned for the delay.

In regard to the judgment come to by the Lower Appellate Court, we see no grounds for interference; for even if this case does come under Section 77, and the intervenor had failed to prove receipt of rent previous to the institution of the suit, yet the plaintiff was bound to prove his right to recover rent from the defendant. The defendant denied his right, and the Judge has found that for the time for which plaintiff demanded the rent he had no interest, and therefore was not entitled to the rent, that the intervenor was the purchaser of the property, and from the time of his purchase he had been in possession and receipt of rent.

We think that this appeal must be dismissed with costs.

Mitter, J.—I concur. I do not think that the rejection of the first appeal under the circumstances admitted by the parties could have prevented the Judge from admitting a fresh appeal against the judgment of the Deputy Collector. That appeal was not even registered, and no notice was served upon the special appellants, then respondents, before the order of rejection was passed. I look upon this order as something similar to the rejection of an appeal, on the ground that the memorandum of appeal has not been properly drawn up. The Judge had refused to try the appeal, and therefore, strictly speaking, there was no "decision" upon it within the meaning of Section 372, Act VIII. of 1859. The other grounds are equally untenable. I would dismiss this special appeal with costs.

f

The 2nd September 1868.

Present:

The Hon'ble F. B. Kemp and E. Jackson, *Judges.*

Jurisdiction — Alluvion.

Case No. 3406 of 1867.

Special Appeal from a decision passed by the Officiating Judge of Rungpore, dated the 5th September 1867, reversing a decision of the Moonsiff of that District, dated the 15th April 1867.

Rance Surno Moyee (Defendant), *Appellant,*

versus

Doorga Monee Dossee and others (Plaintiffs), *Respondents.*

Baboos Sreenath Doss, Bhuggobutty Churn Ghose, and *Motee Lall Mookerjee* for Appellant.

Baboo Debendro Narain Bose for Respondents.

In a suit as to land, where the Court of first instance, finding for the plaintiff that the land was in Rungpore, gave him a decree, and the Judge of that District in appeal found, in reversal of the decree, that the land was an accretion to an estate in Gowalparah —

HELD that the first question for the Judge was whether the land was within the local jurisdiction of his Court. If it is not, the plaint ought to be returned to the plaintiff that he might file it in the proper Court.

Jackson, J.—THIS suit has been brought within the district of Rungpore. The plaintiff alleges that the land which is in dispute belongs to the district of Rungpore, Pergunnah Baherbund. The defendant, on the other hand, alleges that the disputed land belongs to Pergunnah Kurooeebaree in the district of Gowalparah. The first Court found for the plaintiff that the land was in the district of Rungpore, and that the plaintiff was entitled to it. The Appellate Court has found, in reversal of the decree of the first Court, that the land is an accretion to Pergunnah Kurooeebaree, and that the plaintiff has never been in possession of it, and is not entitled to it. The first question to be decided by the Appellate Court was whether the land was included within the local jurisdiction of the Court. But the Appellate Court does not seem to have kept this issue before it. The finding apparently of the Lower Appellate Court is that the land lies within Gowalparah; but still the Appellate Court has decided the case. If the land is included within the local jurisdiction of Gowalparah, neither the Judge nor the Moonsiff had any jurisdiction to try the case, and the Judge should, under such circumstances, have proceeded strictly under the provisions of Section 14 of Act VIII. of 1859.

We think that the case should be remanded to the Judge, in order that he should first distinctly try whether the land is, according to Section 14 of Act VIII. of 1859, included within the local jurisdiction of the Rungpore Courts. It does not at once follow that, because the land is an accretion to Pergunnah Kurooeebaree, the land is included within the jurisdiction of Gowalparah. It is said that there is a certain line drawn, and that, according to that line, the Courts take jurisdiction. If the land lies within Rungpore, the Court of Rungpore can go on and determine the suit. If the land does not lie within Rungpore, the Rungpore Courts should return the plaint to the plaintiff that he should file it in the proper Court. We consider that the Judge has not properly tried the point of jurisdiction. We, therefore, remand the case, in order that this point may first be tried, and then orders be passed for the case either to proceed to determination and decision, or the plaint to be returned to be filed in the proper Court.

The 2nd September 1868.

Present:

The Hon'ble J. B. Phear and C. Hobhouse, *Judges.*

Appeal—Limitation.

Case No. 970 of 1868.

Special Appeal from a decision passed by the Officiating Principal Sudder Ameen of Shahabad, dated the 24th January 1868, affirming a decision of the Moonsiff of Arrah, dated the 21st August 1867.

Rughoonundun Pershad Singh (Plaintiff), *Appellant.*

versus

Chuttur Saul Singh and another (Defendants), *Respondents.*

Baboo Kishen Succa Mookerjee for Appellant.

Baboo Obinash Chunder Chatterjee for Respondents.

In a case remanded to the Lower Appellate Court for trial, by the Court of first instance, of the issue of limitation, which the appellant had not been allowed the opportunity of meeting, it was ruled that, upon the decision of that issue, it would be open to the parties to appeal upon the whole case, notwithstanding the appeal already had.

Phear, J.—We think that the Lower Appellate Court was wrong in deciding the question of limitation without giving the appellant the opportunity of adducing evidence specially directed to meet that issue. We, therefore, reverse its decision, and remand the case to the Lower Appellate Court, with directions that it send it to the Court of first instance for trial of the issue of limitation. Upon the decision of the case by the first Court upon this issue, it will be open to the parties, if they desire it, to appeal upon the whole case, notwithstanding the appeal which has already been had. Both parties will be allowed to adduce in the first Court such evidence relevant to the issue of limitation as they may be advised. Costs of this Court and of the Lower Appellate Court will abide the event.

The 3rd September 1868.
Present:
The Hon'ble H. V. Bayley and Dwarkanath Mitter, *Judges.*

Partition (Private)—Survey-proceedings—Collector's sanction.

Case No. 2376 of 1867 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of Sarun, dated the 26th July 1867, affirming a decision of the Deputy Collector of that District, dated the 17th November 1865.

Hunooman Chowbay (Plaintiff), *Appellant,*
versus
Bindhoo Toraba (Defendant), *Respondent.*

Baboos Mohesh Chunder Chowdhry and *Nil Madhub Sein* for Appellant.

Baboo Kalee Kishen Sein for Respondent.

A private partition of a joint estate is not inconsistent with subsequent survey-proceedings, and does not take away their legal effect.

To make a survey-demarcation effective, it is not absolutely necessary that there should be any more special sanction by the Collector than a general acceptance of the survey-proceedings as correct.

Bayley, J.—In this case, the plaintiff sued certain tenants for rent.

The tenants admitted the plaintiff's demand.

A third party intervened, stating that he was a co-sharer, and that the land, the rents of which were sued for, was held in coparcenary with him.

Both the Lower Courts in the first instance dismissed the plaintiff's suit.

The plaintiff appealed specially; and this Court, on the 2nd May 1867, remanded the case to the Lower Appellate Court with an order that it should consider the legal effect of the survey-proceedings put in by the plaintiff.

The Lower Appellate Court now states that it always had considered the legal effect of the survey-proceedings; that the plaintiff alleged a previous private partition; and that the survey-proceedings were inconsistent with that allegation; and further that the survey-proceedings were incomplete and insufficient, inasmuch as they were not sanctioned by the Collector. The Lower Appellate Court then goes on to say that the survey-proceedings showed an *attempt* at partition, and that, although it is quite true that the two separately demarcated parcels (red and blue in the survey-map) have since formed distinct mehals on the rent-roll, still, according to the custom in that part of the country, that was not incompatible with the fact of the mehals being joint. The Lower Appellate Court then concludes by stating that, the defendant having given full evidence of the fact of joint collection by him in the land, the Lower Appellate Court can come to no other conclusion than that the allegation of the special respondent being joint owner was made out.

The plaintiff, still dissatisfied with this decision, appeals upon the general ground that the order of remand has not been carried out, inasmuch as the Lower Appellate Court has not judicially considered the legal effect of the survey-proceedings, but has erred in the consideration of this point so much that, in fact, the error would necessarily affect the decision of the case on its merits.

We think this is so, because the Lower Appellate Court was wrong in saying that private partition is inconsistent with survey-proceedings, and so takes away any legal effect from them. There might well have been an anterior private partition as alleged by the plaintiff, and subsequently, when the survey-officers came to demarcate the lands, the representatives of the parties concerned might have indicated one parcel to be separately demarcated, and marked in one color as one portion of the property, and another parcel to be separately demarcated and marked in another color as another portion. In order to make this demarcation effective, it was not absolutely necessary that there should be any more special sanction by the Collector than a general acceptance of the survey-proceedings as correct; but

besides this, had not the survey-proceedings been, in fact, subsequently sanctioned by the Collector, it would be inconsistent that the lands so separately demarcated should bear two distinct numbers on the Collectorate rent-roll.

Further, although the Lower Appellate Court says that it is the custom in Sarun to have joint collections from separate mehals, it certainly was necessary for the Court to show, by something more distinct than its assertion, that this custom prevailed in respect to *these two mehals*. Ordinarily, separate collections would be made from separate mehals, and although the Lower Appellate Court does find that the evidence for the intervenor (the special respondent before us and a relative of the former proprietor of the mehal which the plaintiff has recently purchased at a sale in execution) shows joint collections to have been made by him, that finding has been come to by the Lower Appellate Court erroneously in law, because the Lower Appellate Court has, as above shown, failed to try the plaintiff's case properly with reference to the survey-proceedings, before he acted upon the evidence in favor of the special respondent.

It is with reluctance we remand the case, but the remand is necessary in order to do justice to the parties. The Lower Appellate Court should now, with reference to these remarks, again try what is really the legal effect of the survey-proceedings when considered in the light indicated. We, accordingly, remand the case to be re-tried, with costs to follow the eventual result. As this suit was first decided in 1865, it is expedient that the case should be immediately taken up out of its turn, and re-decided without delay.

The 3rd September 1868.

Present:

The Hon'ble H. V. Bayley and Dwarkanath Mitter, *Judges*.

Court of Rajah of Tipperah—Section 2, Act VIII., 1859.

Case No. 2959 of 1867.

Special Appeal from a decision passed by the Principal Sudder Ameen of Tipperah, dated the 1st July 1867, reversing a decision of the Moonsiff of that District, dated the 12th December 1866.

Mahomed Ahmed (Plaintiff), *Appellant*,

versus

Alibur Gazee and others (Defendants), *Respondents*.

Baboo Rajendernath Bose for Appellant.

Baboo Otool Chunder Mookerjee for Respondents.

The Court of the Rajah of Independent Tipperah is not a competent Court within the meaning of Section 2, Act VIII. of 1859.

Bayley, J.—THE order of the Lower Appellate Court must be reversed. The Court has held that this suit is barred under the provisions of Section 2, Act VIII. of 1859. That Section says: "The Civil "Courts shall not take cognizance of any suit "brought on a cause of action which *shall* "*have been heard and determined* by a "Court of competent jurisdiction in a "former suit between the same parties or "between parties under whom they claim."

It is quite clear that, in this case, no suit has been *heard* and *determined* by the Court of the Rajah of Independent Tipperah. The Lower Appellate Court, therefore, could not apply Section 2. The case must be decided on its merits, unless the parties agree that the case shall be heard and determined either by the Zillah Court of Tipperah or by the Court of the Independent Territory of the Rajah of Tipperah.

We may add that, looking to the terms of the Code of Civil Procedure, we are of opinion that the Court of the Rajah of Independent Tipperah is not a competent Court within the meaning of Section 2. Act VIII. of 1859.

The 4th September 1868.

Present:

The Hon'ble G. Loch and F. A. Glover, *Judges*.

Proceedings to keep alive a decree—Sections 285 and 286, Code of Civil Procedure—Section 20, Act XIV., 1859.

Case No. 507 of 1867.

Miscellaneous Appeal from a decision passed by the Officiating Judge of Shahabad, dated the 26th July 1867.

Mr. William Francis Leake (Decree-holder), *Appellant*,

versus

Mr. William Daniel (Judgment-debtor), *Respondent*.

Baboo Otool Chunder Mookerjee for Appellant.

Baboo Mohinee Mohun Roy for Respondent.

The transmission by the Court of one district to the Court of another of a copy of its decree and a certificate, under the provisions of Sections 285 and 286 of Act VIII. of 1859, with a view to execution in that other district, is a "proceeding" within the meaning of Section 20, Act XIV. of 1859.

Loch, J.—In this case, application is made for execution of a decree passed by the Court of Azimghur previous to 1859. Steps appear to have been taken for the execution of the decree up to March 1859, by which the decree was properly kept alive. On the 24th of June 1859, and again on the 13th of September 1859, petitions were presented to the Azimghur Court. No step appears to have followed the former application; but on the application of 13th September 1859, we find that the Court of Azimghur, on 19th September, transmitted a copy of the decree and a certificate under the provision of Section 285 and the following Section of Act VIII., 1859, to the Court of Sarun to enable the decree-holder to execute his decree in that district. Nothing beyond this appears to have done by the decree-holder till August 1862, when we find a fresh petition presented by the decree-holder to the Court of Azimghur, in which it was stated that he had not taken steps at Sarun, because the person could not be found; and as the execution-case of 19th September had been struck off, he applied that a fresh notice be served on the judgment-debtor. Subsequently, a certificate was sent to Zillah Shahabad for the execution of this decree; and on the decree-holder's applying to the Judge of Shahabad for execution, the Judge held that execution was barred by the law of limitation, as nothing effectual to keep the decree alive had been done between March 1859 and August 1862. An appeal has been preferred against this order, the decree-holder urging that limitation does not apply, inasmuch as the *bond-fide* application for execution was made on the 13th September 1859, and proceedings were taken upon that application.

Looking to the words of Section 20 of Act XIV. of 1859, we find that it is laid down that no process of execution shall issue to enforce any judgment, decree, or order, unless some proceeding shall have been taken to enforce such judgment, decree, or order, or to keep the same in force within three years next preceding the application for such execution. We have, therefore, to see whether the act done by the Court of Azimghur in transmitting the copy of the decree and certificate to Sarun is such a proceeding as is sufficient to keep the decree alive. Looking to the judgment of the Full Bench, reported in page 98 and the following pages of Volume 6, Weekly Reporter, bearing date the 11th of September 1866, we find this explanation given to the words "some proceeding" in Section 20 of Act XIV. of 1859. "We think that the words 'some proceeding' "in Section 20 include applications for execution *bond fide* made under Section 207 "of the Code of Civil Procedure, and all acts "done either by the Court or by an officer "of Court, or *bond fide* made by the applicant, for enforcing the decree or to keep "it in force." Now, we think that the transmission of the copy of the decree and of the certificate to the Sarun Court is an act which comes under the meaning of the words "some proceeding," as explained by the Full Bench; and though there is no evidence on the record, we may assume that those copies could not have been made or transmitted to another Court without the expense of making such copies and of transmitting them being incurred by the decree-holder.

We think, therefore, that the decree-holder did take sufficient steps to keep his decree alive, and the order of the Judge of Shahabad must be reversed. The decree-holder will get his costs.

The 4th September 1868.

Present:

The Hon'ble G. Loch and F. A. Glover, *Judges.*

Evidence—Copies—Maps.

Case No. 1002 of 1868.

Special Appeal from a decision passed by the Judge of Dacca, dated the 22nd January 1868, reversing a decision of the Moonsiff of Naraingunge, dated the 30th March 1864.

Sreemutty Gour Monee (Defendant), *Appellant,*

versus

Huree Kishore Roy and others (Plaintiffs), *Respondents.*

Baboos Hem Chunder Banerjee and *Umbica Churn Banerjee* for Appellant.

b

Baboos Bama Churn Banerjee and *Nursingh Chunder Mitter* for Respondents.

A copy of a document cannot be admitted as evidence, unless the absence of the original is properly accounted for; the mere fact of the latter being in another Court is not a sufficient reason.

A map is not evidence of title, but only of possession, even though prepared by the gomashtas of both plaintiff and defendant.

Loch, J.—We think the Judge is wrong in saying that the objection raised by the defendant with regard to the copy of the chittah is a frivolous objection. It is clear that, unless the absence of the original is properly accounted for, a copy cannot be made use of. It is clear from the Judge's own showing that the absence of the chittah has not been satisfactorily accounted for; and the mere fact of the original having been in the Judge's Court or in another Court is not a sufficient reason for admitting secondary evidence regarding it. Furthermore, with regard to the map, we think that the defendant is right in objecting to the map as evidence of title. Even if the map be prepared by the gomashtas of both parties, it does not take a higher position than evidence of possession at the time it was made. The Judge, after disposing of these two objections in what the Court must consider a very unsatisfactory manner, has gone into the evidence on the record, and he comes to the conclusion from the evidence of plaintiff's witnesses, chittahs, and kubooleuts, that there is conclusive proof that the land in question belongs to the plaintiff. In this finding he does not refer to the map, but he refers to the chittahs. These, however, cannot be considered as evidence. Leaving out those, there is the evidence of witnesses upon which the Judge rests his decision. We cannot say that that evidence does not support the plaintiff's case; and though the Judge's decision is not satisfactory, yet the finding is a finding on the evidence which, in special appeal, we cannot disturb, and we, therefore, dismiss the special appeal with costs.

The 4th September 1868.

Present:

The Hon'ble G. Loch and F. A. Glover, *Judges.*

Remand—Additional finding—Damages—Section 3, Act VI., 1862.

Case No. 1342 of 1868 under Act X. of 1859.

Special Appeal from a decision passed by the Officiating Judge of Mymensingh, dated the 24th February 1868, modifying a decision of the Deputy Collector of that District, dated the 29th September 1866.

Ram Chunder Surma Chowdhry (Plaintiff), *Appellant,*

versus

Dagoo Khan and others (Defendants), *Respondents.*

Baboo Grish Chunder Ghose for Appellant.

Baboo Nil Madhub Sein for Respondents.

A rent-case having been remanded to a Lower Appellate Court with a view to its being ascertained whether an ammulnamah produced by the plaintiff was the same as a pottah filed in a survey-case, the Judge found that it was the same; but that the pottah was not the one which the defendant had given to the plaintiff to file in the survey-case. He accordingly reversed his predecessor's decree for rent and adjudged plaintiff to pay damages under Section 3, Act VI. of 1862.

Held that the additional finding was not opposed to the order of remand, that the whole case was re-opened, and that the Judge had authority to award the damages without appeal on that point.

Loch, J.—This case was remanded to the Judge by order of this Court of the 30th of August 1867. The Judge has found that the ammulnamah filed by the plaintiff in this suit was filed before the Deputy Collector in the survey-case; but he also finds that this ammulnamah was not the pottah which the defendant admitted he had given to the plaintiff to file in that case; so that it appears that plaintiff has dishonestly filed the ammulnamah as the original document received from the defendant, when it was no such thing. We do not think that this finding of the Judge is at all opposed to the remand-order. That order required the Judge to ascertain whether the ammulnamah now produced and the pottah mentioned in the list of documents filed by the plaintiff in the survey-case were one and the same. This is found to have been the case; but finding this, there remained behind the question whether the ammulnamah was the document given by the defendant to the plaintiff, and the Judge found that it was not. The case of the defendants could not have been disposed of till this was determined.

It is urged in special appeal that no secondary evidence was given to establish the defendant's mokurruree title; but we find that the defendant holds these lands also from the co-partners of the plaintiff, a statement apparently admitted, and he holds it from them as a mokurruree. We think that every thing must be presumed against the plaintiff as a wrong-doer, who, it appears, has kept back the original

document entrusted to his case. On these two points, we see no ground for interference.

It is further urged that, though the Judge, when the case was first before him in appeal, gave a decree for the rents of 1270 to 1272 at the old rates, the present Judge has reversed that order though the order of remand did not re-open that question, and he has besides adjudged the plaintiff to pay damages under the provisions of Section 3, Act VI. of 1862; that this order, reversing the judgment of his predecessor is illegal, and also that an Appellate Court has no authority to impose damages when there is no appeal on the part of the defendant on that point. Looking at the order of remand, it appears to us that the whole case was re-opened; but, at the same time, we find that the Judge apparently passed his order without taking into consideration the evidence upon which his predecessor considered that the rents of 1270 to 1272 were due to the plaintiff; and we think that, before imposing a penalty as that prescribed by Act VI. of 1862, he should have carefully weighed the evidence, and assigned reasons why he thought those arrears are not due. With regard to the power of the Appellate Court to award damages under Section 3 of Act VI. of 1862, we think that it has that authority, should the Judge, after considering the whole evidence in the case brought before him in appeal, find that there are no grounds whatever for plaintiff's case.

We think that this case should be remanded to the Judge to determine whether there are arrears due from 1270 to 1272. The costs will be given in proportion according to the result.

The 4th September 1868.

Present:

The Hon'ble H. V. Bayley and Dwarkanath Mitter, *Judges.*

Documents—Testimony of subscribing witnesses—Evidence—Chittas—Section 58, Act III., 1851.

Case No. 44 of 1868.

Special Appeal from a decision passed by the Judge of Chittagong, dated the 31st October 1867, reversing a decision of the Sudder Ameen of that District, dated the 29th April 1867.

Mahomed Fedye Sirdar (one of the Defendants), *Appellant,*

versus

Ozeeooddeen and others (Plaintiffs), *Respondents.*

Baboo Kishen Dyal Roy for Appellant.

Moulvie Syud Murhamut Hossein for Respondents.

Where a document is found, on independent evidence, to have been in existence long prior to the institution of the suit, and also to be genuine, it is not necessary to insist on the testimony of subscribing witnesses.

Under Section 58, Act III. of 1851, Government chittahs are admissible as evidence in cases in Chittagong.

Mitter, J.—There is no ground for a special appeal in this case.

The objection that the Judge was wrong in accepting the pottah produced by the plaintiff as a genuine document, merely upon the ground that it purports to be thirty years old, is not correct in fact. The Judge has found upon independent evidence that the document had been in existence long prior to the institution of this suit, and he has also gone upon other evidence admissible in law, and then found that the document in question is a genuine instrument. We do not think it was necessary for the Judge to insist upon the plaintiff to prove the document further by testimony of the subscribing witnesses.

It is said that the Government chittah of Nowabad mehals in Chittagong have been improperly received in evidence. The special appellant did not raise any objection to the admission of these chittahs in either of the Courts below; but even if he had taken such an objection, we think it ought to have been overruled. These Government chittahs, we may observe, have been always used as evidence in Chittagong cases, as far as we can speak from our knowledge, and their contents are, in our opinion, very important for determining disputes regarding lands in the Nowabad mehals of that district. Under the provisions of Section 58, we hold that these chittahs are admissible as evidence. The fact that the special appellants were not present at the time when the measurement was made is, therefore, immaterial.

Section 58 says: "Nothing in this Act "contained shall be so construed as to render "inadmissible in any Court any evidence "which, but for the passing of this Act, "would have been admissible in such Court;" and we therefore think that the Judge was

perfectly justified in using the chittahs as legal evidence in the case.

It has been contended that the Judge was wrong in looking into the evidence adduced by the defendants before he had examined the evidence adduced by the plaintiff. This contention is manifestly untenable. Whether the *onus* was on the plaintiff or on the defendants, it was the duty of the Judge in this case to look into the evidence produced by both parties; and we cannot hold that, in performing this duty, the Judge has committed an error in law for which his decision ought to be reversed. The Judge has found that the plaintiff has got a valid title to the lands in dispute, and that his suit, under that title, is not barred by limitation; and this he has found upon the admission made by the former zemindar at a time when it is not denied the tenure set up by the defendant had not come into existence. The Judge has also found that the title set up by the defendent is fraudulent and collusive.

Under such circumstances, it is clear that this special appeal ought to be dismissed with costs.

The 5th September 1868.

Present:

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble Dwarkanath Mitter, *Judge*.

Jurisdiction — Execution — Revenue Courts—High Court's powers—Attachment for arrears of rent—Sections 105 and 109, Act X. of 1859.

Rule Nisi on the motion of Deanutoollah and others, *Petitioners*,

versus

Nowab Nazim Sidhee Nuzzer Ali Khan Bahadoor, *Opposite Party*.

Baboo Bhowanee Churn Dutt for Petitioners.

Baboo Ashootosh Dhur for Opposite Party.

Act X. of 1859 confers upon the Revenue Courts merely a limited jurisdiction, and the High Court, under its general power of control, has the right to prevent them exceeding that jurisdiction.

A decree for arrears of rent of a saleable under-tenure cannot be executed by the attachment of any immoveable property, except the tenure itself, before it is shown that satisfaction of the decree cannot be obtained by execution against the person or moveable property of the debtor; and it is only after sale of the under-tenure that the other immoveable property becomes attachable.

Peacock, C. J.—We are of opinion that this rule ought to be made absolute, and that the attachment of the pucca houses, that is to say, the brick-built houses, and of the doors and windows belonging to the same, should be set aside, and the order directing the sale and all subsequent proceedings thereon.

This is a case in which the Collector had no jurisdiction to attach the property, and in which this Court, under its general power of control, ought to prevent the Lower Court from doing that which it has no jurisdiction to do. The attachment and sale was not in the exercise of a power which belonged to the Collector, but in the exercise of a power which was not at all within his jurisdiction. The Revenue Courts have merely a limited jurisdiction conferred upon them by Act X. of 1859, and this Court, under its general power of control, has the right to prevent them exceeding that jurisdiction. The Full Bench case, which was cited from 7 Weekly Reporter, page 520, was a case in which the High Court ordered a Revenue Court to exercise a jurisdiction which belonged to it, and which that Court had refused to exercise. The present is a converse case, in which the High Court is asked to prevent the Revenue Court from exercising a power which is not within its jurisdiction.

The property has been attached by the Collector of the 24-Pergunnahs under an order from the Deputy Collector of Busseerhaut in that zillah. A decree had been obtained by the plaintiff against the defendant in the Court of the Deputy Collector of Busseerhaut for arrears of rent payable in respect of a saleable under-tenure, and in execution of that decree the Deputy Collector requested the Collector of the 24-Pergunnahs to sell any moveable property belonging to the plaintiff. The decree itself, as I understand, was not sent by the Deputy Collector to the Collector to be executed, but there was a mere request from the Deputy Collector to the Collector to execute the decree by seizing the moveable property. If the Collector acquired jurisdiction in consequence of that request, it was merely a jurisdiction to attach moveable property, and not to attach and sell immoveable property. But, independently of that, I am of opinion that the decree of the Deputy Collector could not be executed by the attachment of any immoveable property, except the tenure, before it was shown that satisfaction of the decree could not be

obtained by execution against the person or moveable property of the debtor.

Section 86 of Act X. of 1859 enacts that process of execution may be issued against either the person or the property of a judgment-debtor; but process shall not be issued simultaneously against both person and property. That Section has been repealed, but substantially re-enacted by Section 17 of Act VI. of 1862 of the Bengal Council.

Having laid down that general rule, Section 107 enacts that, in the execution of any decree for the payment of money under this Act, not being money due as arrears of rent of a saleable under-tenure, the judgment-creditor may apply for execution against any immoveable property belonging to his debtor, if satisfaction of the judgment cannot be obtained by execution against the person or moveable property of the debtor within the district in which the suit was instituted.

This decree, being for money due for arrears of rent of a saleable under-tenure, falls within the exception in Section 109; and we must, therefore, ascertain how the money may be obtained by execution.

Section 109 shows clearly that, as a general rule, process of execution for a money-decree under Act X. is not to be levied in the first instance by attachment of immoveable property. The Legislature seems to have been anxious to guard against the sale of immoveable property in execution of decrees of the Revenue Courts under Act X. of 1859 until the moveable property should have been first exhausted.

Section 105, however, forms an exception to that rule, and provides that, "if the decree "be for arrears of rent in respect of an "under-tenure, which, by the title-deeds or "the custom of the country, is transferable "by sale, the judgment-creditor may make "application for the sale of the tenure, and "the tenure may thereupon be brought to "sale in execution of the decree, according "to the rules for the sale of under-tenures "for the recovery of arrears of rent due in "respect thereof contained in any law for "the time being in force."

But then it provides that "no such appli-"cation shall be received when a warrant of "execution has been previously issued "against the person or moveable property of "the judgment-debtor, so long as such war-"rant remains in force;" from which I infer that the Legislature considered that, under the provisions of Act X. of 1859, no other execution could be issued before the application to sell the under-tenure, except an execution against the person or moveable property of the debtor. I can scarcely conceive that the Legislature, if they had considered that an attachment of the general immoveable property of the debtor might be made in the first instance, would not have provided that the under-tenure should not be sold so long as a warrant should remain in force against the other immoveable property, as well as when a warrant should remain in force against the moveable property.

I, therefore, think that, even for arrears of rent of a saleable under-tenure, the other immoveable property of the debtor cannot be attached in the first instance.

The Legislature then proceeds in Section 105: "If, after the sale of an under-tenure, "any portion of the amount decreed remains "due, process may be applied for against any "other property, moveable or immoveable, "belonging to the debtor, and any such "immoveable property may be brought to "sale in the manner provided in Section "110 of this Act."

The only exception, then, which the Legislature intended to make to the general provisions contained in Section 109 was that, in the case of arrears of rent in respect of a saleable under-tenure, the under-tenure itself might be sold in the first instance, although it was immoveable property, and that, if after the sale of the under-tenure any portion of the debt might remain due, execution might issue against other property, moveable or immoveable. It did not prevent, even in the case of arrears of rent due in respect of a saleable under-tenure, execution against the person or moveable property of the debtor in the first instance.

It appears to me, therefore, that the Collector, not having been satisfied that the decree could not be levied upon the moveable property of the debtor or by execution against his person, had no jurisdiction to attach the debtor's immoveable property.

It was contended that there was a proviso in the under-tenure that the tenure would become void upon a decree for rent being obtained and remaining unsatisfied for 15 days, and that consequently, at the end of the 15 days, the under-tenure ceased to exist, and was not saleable. I am of opinion, however, that the under-tenure did not become absolutely void and at an end at the expiration

of 15 days, but that it was only voidable at the election of the grantor. But even if it were at an end, that would not justify an attachment of the general immoveable property of the debtor, because it is only after a sale of the under-tenure that the immoveable property, by virtue of Section 105, becomes attachable. If the immoveable property cannot be attached by virtue of Section 105, it cannot be attached except under the provisions of Section 109, and then it can only be attached if satisfaction of the debt cannot be obtained against the person or the moveable property of the debtor. If, therefore, the Collector had been acting under a decree of his own Court, and not in pursuance of the request of the Deputy Collector to attach the moveable property, it appears to me that he had no jurisdiction in the first instance to proceed against immoveable property other than the tenure itself.

The rule will be made absolute with costs.

The 7th September 1868.

Present:

The Hon'ble H. V. Bayley and Dwarkanath Mitter, *Judges.*

Evidence—Survey-maps—Pencil-memoranda thereon — Loazima and thaka papers.

Cases Nos. 384, 391, and 392 of 1868.

Special Appeals from a decision passed by the Additional Principal Sudder Ameen of East Burdwan, dated the 25th November 1867, reversing a decision of the Moonsiff of Kytee, dated the 30th July 1866.

Shusee Mookhee Dossee and others (Defendants), *Appellants.*

versus

Bissessuree Debee (Plaintiff), *Respondent.*

Baboos Chunder Madhub Ghose and *Otool Chunder Mookerjee* for Appellants.

Baboo Kalee Mohun Doss for Respondent.

Pencil-memoranda on a Government survey-map held to be admissible as evidence.

Survey-maps prepared under the authority of Government are evidence of possession, and, therefore, also of title.

Loazima and thaka papers are legal evidence *quantum valeat.*

Bayley, J.—The ground taken, in the very words of Baboo Chunder Madhub Ghose, in special appeal, is: "The Lower "Appellate Court has found the plaintiff's "title upon no legal evidence thereof." Now, the Lower Appellate Court has decreed the plaintiff's case on the following grounds: that, although the survey-paper had been construed by the first Court as against the plaintiff on account of its containing no reference to the *chitta-chuck* lands, which the plaintiff claims as his own, though locally within the defendant's talook, still, on looking to the original papers from the Collectorate record, the Lower Appellate Court finds a memorandum in pencil that there are such *chitta-chuck* lands. The Lower Appellate Court also strictly sets forth its reliance upon the evidence of witnesses produced by the plaintiff. The Lower Appellate Court further notices, as in support of the plaintiff's case, the thaka and loazima papers and Ameen's report.

Arguing *seriatim* on the general ground taken by the special appellant, Baboo Chunder Madhub contends that the survey-map was no evidence of title, and quotes 2 Weekly Reporter, page 210, in support of this plea; but that decision has no bearing on the present case. It was merely ruled by Mr. Justice Loch that a survey-map was *per se* no *sufficient* evidence of title.

Baboo Chunder Madhub also argues that the Lower Appellate Court has proceeded chiefly upon the evidence of a series of mehalwaree papers and upon the pencil-marks regarding the existence of *chitta-chuck* lands of the plaintiff in the defendant's talook, and that the pencil-marks are no legal evidence. On this, we have to observe that all survey-maps, being records of Government, are, under Act II. of 1855, evidence to a certain extent of the facts recorded therein. Although the pencil-memorandum might of itself not be sufficiently satisfactory, still in this case we have the evidence of witnesses and Ameen's report as the independent evidence relied upon by the Lower Appellate Court.

Objection is taken to the Ameen's report, to the effect that the Ameen had no authority to decide to whom the lands in dispute appertained; but he had authority to see what were the boundaries and bearings, so

as to assist the Court to determine whether the plaintiff's claim to these *chitta-chuck* lands was true. Considering the way in which the Lower Appellate Court has treated the report, we do not think it has committed any error in law.

The loazima and thaka papers are legal evidence *quantum valeat*, that is to say, they show that such and such papers are kept in the sherishta of land-owners. It is not, however, upon any single isolated item of evidence that the Lower Appellate Court has come to its conclusion of facts. It has found on legal evidence the plaintiff's possession. Possession is more or less some evidence of title.

According to the circumstances of this case, and looking to the facts found by the Lower Appellate Court on the testimony of witnesses and on the Ameen's report, we are not in a position to say that the Lower Appellate Court has come to a finding of fact upon no legal evidence, and has, therefore, erred in law.

The three special appeals, therefore, will be dismissed with costs.

Mitter, J.—I concur. I think that evidence of possession, however short, is evidence of title, and it is for the Court which deals with such evidence to decide whether it is sufficient or not.

I am also of opinion that survey-maps prepared under the authority of Government, and not made for the purpose of litigated questions, are receivable as evidence. It is said that survey-maps are evidence of possession only, and not of title; but if they are evidence of possession, I think they are also evidence of title.

Section 13, Act II. of 1855, distinctly says:—

"All maps made under the authority of "Government or of any public Municipal "body, and not made for the purpose of "any litigated question, shall, *primâ facie*, "be deemed to be correct, and shall be ad-"mitted as evidence without further proof."

The Principal Sudder Ameen, therefore, was perfectly justified in considering the survey-map as evidence in the case; and after going through his judgment carefully, I do not feel the slightest hesitation in declaring that the argument that he has proceeded on no legal evidence is altogether untenable.

The 8th September 1868.

Present:

The Hon'ble H. V. Bayley and Dwarkanath Mitter, *Judges.*

Estoppel—Act IV. award against benameedar—Res adjudicata.

Case No. 190 of 1868.

Special Appeal from a decision passed by the Judge of Burdwan, dated the 10th August 1867, affirming a decision of the Additional Principal Sudder Ameen of that District, dated the 24th April 1867.

Mohendronath Mullick and another (Plaintiffs), *Appellants,*

versus

Rakhal Doss Sircar and others (Defendants), *Respondents.*

The Advocate General and *Baboos Onookool Chunder Mookerjee* and *Sham Lall Mitter* for Appellants.

Baboos Kishen Kishore Ghose, Grija Sunkur Mojoomdar, and *Sreenath Doss* for Respondents.

In a suit for property, it was held that the plaintiffs were not bound by an Act IV. award passed against a person in whose name the property had been purchased by the father of the plaintiffs, but who had not either title or interest in the property, and did not conduct the Act IV. proceeding with any authority from the plaintiffs.

HELD, too, that plaintiffs were not estopped by statements made by them as parties in another suit, which did not affect their status; nor by their failure to set forth their title in a former suit brought against them for mesne-profits of the land in dispute.

Mitter, J.—WE are of opinion that the decision of the Lower Appellate Court ought to be reversed.

The first question to be determined is whether the suit now brought by the plaintiff is barred by the provisions of Clause 7, Section 1, Act XIV. of 1859. The mere fact that the Act IV. award in question was passed against a benameedar for the present plaintiff does not, in our opinion, suffice to show that the present plaintiffs are bound by that award. If the allegations in the plaint are correct, there is no doubt that the plaintiffs do not claim this property through the benameedar. On the other hand, their case is, that Hurry Narain, the alleged benameedar, had no right or title in the property, but was merely the person in whose name the property was purchased by their father.

If the defendants had succeeded in showing that the Act IV. proceeding was conducted by Hurry Narain on the authority, express or implied, of the plaintiffs, the suit now brought to recover property comprised in the award might have been barred by Clause 7 of Section 1 of the Act. But it is not disputed that there is no legal evidence to show that any such authority was given by the plaintiffs to Hurry Narain; and, in the absence of such evidence, we cannot hold that the plaintiffs are barred, simply because Hurry Narain, the benameedar, was a party to the Act IV. proceeding in question.

It is said that the plaintiff Khugendro was made a party to this Act IV. proceeding. It is very true that the name of Khugendro appears in the petition filed by the defendants in the Act IV. case; but on referring to the proceedings of the Magistrate, we find that the award of that officer was confined to a case between the present defendant on the one side, and Hurry Narain and two other parties, no way connected in law with the plaintiffs, on the other. It is clear, therefore, that Khugendro was not a party to this proceeding, and in the absence of any evidence to show that Khugendro was summoned by the present defendants to appear in the Act IV. case, we cannot even infer that he was aware of that proceeding, merely because his name was mentioned in the petition.

It is also urged on behalf of the respondents that the plaintiffs are estopped by a certain petition which they filed in a suit instituted by one Mrino Moyee Dossee against the present defendants and the present plaintiffs. We do not, however, think that the plaintiffs are estopped by any statements which they may have made in that case. The defendants are unable to show that their status has been affected by the statements in question; and no plea of estoppel, therefore, can be based upon those statements. On the other hand, we find that the statements referred to were rejected by the Court itself.

Lastly, it is contended that the plaintiffs ought to have set forth their title in a former suit brought against them by the defendants for the mesne-profits of the land now in dispute, and that their failure to do so ought to be taken as sufficient to bar the present action. This contention does not appear to us sound. Whatever statements might have been made by the plaintiffs in that case, they can only be taken as evidence; but these statements cannot preclude the plaintiffs from maintaining the present action. It cannot be said that the decree for mesne-profits binds the title to the land, and the present action is consequently not barred by Section 2, Act VIII. of 1859. Under such circumstances, this last plea also ought to be rejected.

The decision of the Lower Appellate Court is accordingly reversed, and the case is remanded to the first Court for adjudication upon the remaining issues.

The 8th September 1868.

Present:

The Hon'ble H. V. Bayley and F. A. Glover, *Judges.*

Review—Section 367 of the Code of Civil Procedure—Jurisdiction—Execution.

Case No. 38 of 1868.

Application for review of judgment passed by the Hon'ble Justices Bayley and Glover, on the 19th May 1868, in Special Appeal No. 1208 of 1867.

Deen Dyal Puramanick, Plaintiff (Appellant), *Petitioner,*

versus

Ram Coomar Chowdhry and others, Defendants (Respondents), *Opposite Party.*

Baboo Otool Chunder Mookerjee for Petitioner.

Baboo Nil Madhub Bose for Opposite Party.

Section 367 of the Code of Civil Procedure authorizes reviews of judgment in respect to decrees of Court, and also in respect to orders which are not decrees.

Where a Deputy Collector, who had decreed a suit for ejectment on proof of arrear due, held afterwards in execution that as the arrear had been paid up within 15 days, the tenant could not be ejected in accordance with Section 78, Act X., 1859, his order in execution was declared to be *ultra vires* and illegal.

Glover, J.—The circumstances under which this application for review is made are somewhat peculiar.

The original suit under Act X. of 1859 was for ejectment on proof of arrear due, and the Deputy Collector decided in favor of the plaintiff. Afterwards, however, on execution being applied for, he held that as the arrear had been paid up within 15 days of the passing of the decree, the tenant could

not be ejected in accordance with Section 78 of the Act.

This order was appealed to the Judge and upheld by that officer.

A special appeal was then made to this Court, and a Division Bench (Phear and Mitter, JJ.) held that the Judge had no jurisdiction to hear the appeal, the Deputy Collector's order being one passed in execution of decree; but they likewise held that the proceedings of the Deputy Collector in execution were illegal, and pointed out to the special appellant a remedy by applying to this Court under its extraordinary powers of revision.

An application was made to us on the 11th of May last, but no copy of the Division Bench's judgment was filed, nor were we in any way given to understand what was the nature of the order of the learned Judges. Nor was the nature of the defendant's tenure properly stated to us, and we were led to suppose that it was an ordinary ryot's holding, to which the provisions of Section 78 were applicable; and that being so, we declined to interfere.

This is the order which it is now sought to review.

We had at first some doubt as to whether, with reference to the terms of Section 376, Act VIII. of 1859, our order not being in any shape "*a decree*," could be made the subject of a review; but on further consideration, and adverting to a Full Bench decision of this Court (Háradhon Mookerjee *versus* Chunder Mohun Roy, Special No., Weekly Reporter, 66), we think that although Section 367 of the Procedure Code makes mention only of reviews of judgment in respect *to decrees* of Court, it has always been held to authorize reviews of orders, which are not, strictly speaking, decrees.

We think, therefore, that this application for review can be entertained; and that being so, and it having been shown us that our former order, passed under a mistaken view of the facts of the case, was erroneous, we annul that order, and take up the application *de novo* as it was made to us on the 11th of May 1868.

On the facts of the case, we have no doubt that the order of the Deputy Collector in execution was *ultra vires* and illegal; and under the power of revision above alluded to, we annul that order, and direct that execution be carried out in the terms of the decree.

The 8th September 1868.

Present:

The Hon'ble H. V. Bayley and Dwarkanath Mitter, *Judges.*

Amended application for execution—Section 20, Act XIV., 1859.

Case No. 297 of 1868.

Miscellaneous Appeal from an order passed by the Judge of Tipperah, dated the 18th April 1868, reversing a decision of the Sudder Ameen of Soodharam, dated the 7th December 1867.

Mahomed Samee Bhooya (Judgment-debtor), *Appellant,*

versus

Alahee Buksh Chowdhry (Decree-holder), *Respondent.*

Baboos Romesh Chunder Mitter and *Nulteil Chunder Sein* for Appellant.

No one for Respondent.

A *bond-fide* application for execution held to be a proceeding within the meaning of Section 20, Act XIV. of 1859, even though it had to be amended by order of Court.

Mitter, J.—There is no ground of appeal in this case. It appears that three persons applied to the Lower Court on the 18th July 1866 for execution of decree. The application was received; but on the 1st August 1866, the Court passed an order for an amendment of the application, on the ground that it was signed by three persons, two of whom were not mentioned in the decree. On the 6th August following, the necessary amendment was made, and proceedings were directed to be taken for the satisfaction of the decree.

It is now contended before us in appeal that the amendment being made on the 6th August last, and the period of limitation prescribed by Act XIV. having expired on that date, the right to execute the decree was barred by limitation.

We are of opinion that this contention is not sound. It is admitted that the petition of 18th July 1866 was in time, and what was done on the 6th August was merely to amend the mistake committed by the decree-holders in the first petition which was filed in time.

There is no reason to infer that the petition of 18th July was not a *bond-fide* petition, and it was, therefore, a proceeding within the meaning of Section 20, Act XIV. of 1859. The objection of the appellant appears to be a mere technical objection, no way affecting the proper adjudication of the Court below on the merits.

We reject this application without costs, as the respondent's pleader is not before us.

The 9th September 1868.

Present:

The Hon'ble L. S. Jackson and Dwarkanath Mitter, *Judges.*

Hindoo Law—Adoption of an only son.

Case No. 75 of 1868.

Regular Appeal from a decision passed by the Officiating Judge of Midnapore, dated the 14th November 1867.

Rajah Opendur Lall Roy (Plaintiff), *Appellant,*

versus

Ranee Bromo Moyee (Defendant), *Respondent.*

Mr. R. T. Allan and *Baboos Bama Churn Banerjee* and *Bhowanee Churn Dutt* for Appellant.

Baboo Ashootosh Chatterjee for Respondent.

The adoption of an only son is contrary to the Hindoo Law, and is therefore invalid.

Mitter, J.—We are of opinion that the Judge below was wrong in dismissing this suit on the ground that the plaintiff was a minor. Instead of dismissing the suit upon such a ground, the Judge ought to have, in our opinion, allowed the suit to stand over pending the appointment of a guardian or next friend to conduct it on behalf of the plaintiff. It is unnecessary for us, however, to say anything further on this point. It is admitted on all sides that the plaintiff is now a major; and as the case is otherwise ripe for decision, we will proceed at once to try it on the merits.

We think that the plaintiff has succeeded in showing that he was adopted by the late Rajah Nund Lall Roy. But it is unnecessary for us to enter into the evidence bearing on this point. It appears that the plaintiff was the only son of his natural father; and as the adoption of an only son is contrary to the Hindoo Law, the title set up by the plaintiff must necessarily fail. That the adoption of an only son is prohibited by the Hindoo Shasters, is beyond all controversy. The two leading authorities on the subject, namely, the Duttuka Mimansa and the Duttuka Chundrika, are unanimous in declaring that such an adoption should never be made.

"By no man having an only son is the gift of that son ever to be made." (Duttuka Mimansa, Section 4, Verse 1.) "He who has an only son, or one having an only son, the gift of that son *must never be made;* for, as Vishnoo declares, 'An only son let no man give.'" Therefore, a prohibition against acceptance is established by the text in question. Accordingly, Vishnoo says: "Let no man give or receive," &c. (Ditto, Verse 2.) To this he subjoins a reason: "For he is destined to continue the line of his ancestors. His being destined for lineage being thus ordained in the gift of an only son, extinction of lineage is implied. Now, this is incurred by the giver and the receiver also." (Ditto, Verse 3.)

"By no man having an only son is the gift of that son ever to be made." (Duttuka Chundrika, Verse 29, Section 1, Chapter I.)

The passages cited above are sufficient to show that the adoption of an only son is forbidden by the Hindoo Law. It has been said that the prohibition contained in these passages amounts to nothing more than a mere religious injunction, and that the violation of such an injunction cannot invalidate the adoption after it has once taken place. We are of opinion that this contention is not sound. It is to be remembered that the institution of adoption, as it exists among the Hindoos, is essentially a religious institution. It originated chiefly, if not wholly, from motives of religion, and an act of adoption is, to all intents and purposes, a religious act, but one of such a nature that its religious and its temporal aspects are wholly inseparable. "By a man destitute of male issue only," says Menu, "must the substitute for a son of some one description always be anxiously made for the sake of the *funeral cake, water, and solemn rites.*" (Duttuka Chundrika, Section 1, Verse 3.) It is clear, therefore, that the subject of adoption is inseparable from the Hindoo religion itself, and all distinctions between religious and legal injunctions must be necessarily inapplicable to it.

Suppose, for instance, that a son has been adopted by a childless widow without the permission of her husband, the prohibition

against such an adoption is contained in the following passage:—

"Let not a woman give or receive a son in adoption, unless with the assent of her husband." (Duttuka Chundrika, Section 1, Verse 7.)

Can it be said that such an adoption would be valid in law? It will be observed that the language employed in the preceding text is precisely similar to that employed in the text prohibiting the adoption of an only son; and it would be difficult to suggest a reason why an adoption invalidated in the one case for temporal purposes upon considerations arising out of the religious view of the matter, should not be equally invalidated in the other case upon similar grounds. One of the essential requisites of a valid adoption is that the gift should be made by a competent person; and the Hindoo Law distinctly says that the father of an only son has no such absolute dominion over that son as to make him the subject of a sale or gift. (See the text of Vishnoo quoted in Verse 5, Section 4 of the Duttuka Mimansa.) Such a gift, therefore, would be as much invalid as a gift made by the mother of the child without the consent of the father. It is to be borne in mind that the prohibition in question is applicable to the giver as well as to the receiver, and both parties are threatened with the offence of "extinction of lineage" in case of violation. Now, the perpetuation of lineage is the chief object of adoption under the Hindoo Law; and if the adoptive father incurs the offence of "extinction of lineage" by adopting a child who is the only son of his father, the object of the adoption necessarily fails. It is true that the doctrine of *factum valet* is to a certain extent recognized by the lawyers of the Bengal School; but if we were to extend the application of this doctrine to the law of adoption, every adoption, when it has once taken place, will be, as a matter of course, good and valid, however grossly the injunctions of the Hindoo Shasters might have been violated by the parties concerned in it. The case reported in 1 Stokes's Madras Reports, page 54, is no doubt in favor of the appellant; but for the reasons stated above, we are unable to concur with the learned Judges who decided that case. On the other hand, we find two cases in our own Presidency which are directly in favor of the view we have taken, and, what is of still greater importance, both these cases have been cited with approbation by Sir William Macnaghten himself. The first case is reported in page 178, Volume II. of his work on the Hindoo Law, and the second is to be found in page 179 of the same volume. We may also observe that the learned translator of the Duttuka Chundrika and the Duttuka Mimansa is of the same opinion.

For the foregoing reasons we are of opinion that the plaintiff's suit must be dismissed, but without costs. The late Rajah had, in point of fact, adopted the plaintiff; and if the title set up by the plaintiff has failed, it is for no fault of his.

The 10th September 1868.

Present:

The Hon'ble H. V. Bayley and A. G. Macpherson, *Judges.*

Ex-parte judgment—Review—Special appeal.

Case No. 139 of 1868 under Act. X. of 1859.

Special Appeal from a decision passed by the Judge of Dinagepore, dated the 11th November 1867, reversing a decision passed by the Deputy Collector of Maldah, dated the 10th October 1866.

Beejoy Gobind Sircar (Plaintiff), *Appellant,*

versus

Radha Benode Misser and others (Defendants), *Respondents.*

Baboos Kishen Kishore Ghose and *Grija Sunker Mojoomdar* for Appellant.

Baboo Sreenath Doss for Respondents.

Where, in the absence of a plaintiff's pleader, the case was decided *ex parte*, his proper course was held to be an application for review, not a special appeal.

Bayley, J.—The pleas taken in this special appeal are, *firstly*, that the Lower Appellate Court ought not to have struck off the case on default, but should have, under the provisions of Section 346, decided the case *ex parte; secondly*, that the plaintiff's pleader being sick, and having intimated this to the Lower Appellate Court, that Court should not have decided the case in his absence.

In the first place, we think that although the exact expression "decreed *ex parte*" is not used, yet it is quite clear that the case was practically decreed *ex parte*, and with the same result as before.

On the second point, it is admitted by the special appellant that there is no evidence to show that he intimated to the Court that his pleader was sick; and even if it were so, the proper course was certainly to apply for a review of the judgment, and not come up in a special appeal.

The 12th September 1868.

Present:

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice*, and the Hon'ble Dwarkanath Mitter, *Judge*.

Social agreements—Jurisdiction.

Reference to the High Court by the Judge of the Small Cause Court at Dacca.

Nitye Shaha and others, *Plaintiffs*,

versus

Shoobul Shaha and others, *Defendants*.

An agreement to remain for ever in a particular community cannot be enforced by a suit in Court.

Case.—DEFENDANTS, having associated with certain of their own caste considered guilty in some social point of view amongst their class of people, were fined by their zemindar. On this, they joined the society of the plaintiffs, executing in favor of the latter the agreement in question. It runs thus: "We "shall eat and sit in your community and "move therein, and therefore you pay the "above fine for us. We shall not, without "your permission, join any other community. "If we do, shall pay Rupees 50 with "interest." This may lead to a supposition that plaintiffs' demand is on account of contribution towards the fine alluded to. But their case is not, in fact, one for any such contribution or the like. Nor do they utter even a word about the previous fine, or their having paid aught for the defendants, or what the amount of fine or payment was. They can neither prove that now. They sue the defendants simply on the ground of breach of contract, *i. e., for their joining another community;* and this, in my humble opinion, is suing only for a penalty which is not recoverable under law.

It should further be observed that plaintiffs have not only refrained from making the case as one for contribution or damages, but they cannot sue for a contribution towards a fine imposed by a zemindar, and that for a purpose, as it seems to me, repugnant to the moral as well as social liberty of man—that he shall not eat with this man or move that way. These are the facts of the case.

The point on which I solicit the opinion of the Hon'ble Court is, however, simply one of law—*viz.*, can an agreement (thus to remain for ever in a particular community of men) be enforced, or a penalty, as above, allowed for breach of that agreement?

Permit me to add that the suit, as I have alluded to in my letter of reference, is brought after 6 years 5 months, and there is no due date stated in the agreement. It makes the demand recoverable at any time the defendants would join any other society; and it, instead of having an effect of keeping time for suing to the length of a man's life, makes the agreement, I am inclined to think, inoperative.

Judgment of the High Court.

Peacock, C. J.—We are of opinion that such an agreement cannot be enforced, and that the suit ought to be dismissed.

The 12th September 1868.

Present:

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice*, and the Hon'ble Dwarkanath Mitter, *Judge*.

Summons by post—Sections 65 and 66, Act VIII., 1859—Special bailiff—Foreign territory.

Reference to the High Court by the Recorder of Rangoon, dated the 13th August 1868.

Cassim Azim Dooplay, *Plaintiff*,

versus

Cassim Mahomed Baroocha and another, *Defendants*.

A summons cannot be sent by post to any place to which letters are not registered by a Post Office in India (Sections 65 and 66, Act VIII., 1859).

A special bailiff cannot be sent to serve civil process in a foreign territory.

Case.—I HAVE the honor, under the provisions of Act XXI. of 1863, Section 22, to request the opinion of their Lordships the Judges of the High Court at Fort William, upon the questions (1) whether a summons to appear and answer to a suit in the Court of the Recorder of Rangoon can be served upon a defendant residing at Mandalay, in the territories of the King of Ava, through the Post Office, under Section 60 of Act VIII. of 1859; and (2) if so, whether proof of the letter having been duly posted is sufficient *primâ-facie* proof of service of the summons.

The following evidence taken in the case will show the nature of the communication by post between Rangoon and Mandalay:—

August 5th and 7th, 1868.

Richard Samuel Edwards, sworn, states: I am Collector of Customs of Rangoon. There is a dâk post between this place and Mandalay, and there has been such a post for several years. The post belongs to the King

of Ava. The packets are always brought to me, and I give them to the head boat-man. For the last year or two, this communication has been regular once a week. I have never had any complaint of a missing letter. There is a small box in the Custom House, and the people come and put the letters in of their own accord. It is a safe mode of communication. Most important letters go by the boat. The communications between the Burmese Court and the Chief Commissioner of British Burmah go that way. The King of Ava maintains this dâk boat.

To me: The late Chief Commissioner authorized me to take charge of the mails for Ava. He did not give me an authority in writing. It was an arrangement made when I was up at Amarapoora with the late Chief Commissioner. It was not inserted in the *Gazette*, and had nothing to do with the Post Office. The Post Office authorities occasionally send letters posted for Mandalay over to me for transmission.

Alexander Charles Boyd, sworn: I am Post Master of Rangoon. Letters are posted for Mandalay in the Post Office. We send them over to the Collector of Customs after they are stamped. We do not register letters for Mandalay. There is no branch of the Post Office at Mandalay, or anywhere in the territories of the King of Ava.

I would state as my own opinion that I have some doubt upon the first question, that is to say, whether the summons can be served through the post. Section 60 does not define the word "post," and it may be that the post between Rangoon and Mandalay would come within the meaning of the Section. But on the second question I apprehend that there is no doubt that mere proof of the posting of the letter without proof of registration cannot constitute *primâ-facie* proof of service of the summons under Section 66.

I have been requested by the Advocate for plaintiff to make this reference on the two points already mentioned, and I would further ask the opinion of their Lordships (3) whether, supposing it to be impossible to effect a service of summons on a defendant residing at Mandalay through the Post Office, it can be done by a special bailiff. Section 47 seems to me to preclude this. No officer of the Court can execute process without the jurisdiction of the Court (Tagore *versus* Ram Chunder, 1 Hyde 136). Much less, I should suppose, can the Court give authority to do so to a person not an officer of the Court.

It has been the custom in Rangoon to send process up to Mandalay by a special bailiff, but I do not think the practice is warranted by the law. The late learned Recorder held, it seems, a different opinion from my own on the point, and I would, therefore, desire to refer it to their Lordships.

Judgment of the High Court.

Peacock, C. J.—We are of opinion that a summons cannot be sent by post to any place to which letters are not registered by a Post Office in India (Sections 65 and 66); 2nd, that a special bailiff cannot be sent to serve civil process in a foreign territory.

The 12th September 1868.

Present:

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble Dwarkanath Mitter, *Judge*.

Lord's Day Act—Abkarry rules—British Burmah.

Reference to the High Court by the Recorder of Rangoon, dated the 28th August 1868.

D. Abraham, *Prisoner*.

The Lord's Day Act does not extend to criminal cases in British Burmah; and a conviction is not bad by reason of the accused having been arrested on a Sunday.

The Abkarry Acts (XXI. of 1856, XXIII. of 1860, and XX. of 1864) not having been extended to British Burmah, and no power being vested in the Chief Commissioner to make rules containing penal clauses, the Abkarry rules passed by that functionary have not the force of law.

Case.—THE appellant, D. Abraham, a Jew, has been convicted by the Town Magistrate of a breach of Abkarry rules, a copy of which rules are attached to this reference. The 28th rule is the one under which the charge was laid, and the fine inflicted was 400 rupees, the offence being a second offence.

The first question upon which I would ask the opinion of their Lordships is whether the proceedings ought to be quashed, the appellant having been arrested on a Sunday?

The Advocate for the appellant cites the Lord's Day Act of 29 Car. 2, Section 6, and the case of Taylor and Phillips, 3 East 155.

It is contended that this Act applies to the case, because Section 21 of 1863 declares that, in all suits cognizable by the Recorder's Court, all questions as well of fact as of law

or equity shall be dealt with and determined according to the law administered by the High Court of Judicature at Fort William in Bengal in the exercise of its ordinary original civil jurisdiction.

Assuming that the Lord's Day Act was in 1863 a part of the law administered in the High Court at Fort William in its ordinary original civil jurisdiction, I do not think that it applies, therefore, in a criminal appeal in the Recorder's Court in Burmah. Section 21 refers, in my opinion, to civil suits alone; and as the Criminal Procedure Code, which, I think, is the law which must guide me, is silent upon the point, I see no reason why the proceedings should be quashed, because the appellant was arrested on a Sunday.

The second question is, whether the Abkarry rules under which the appellant has been convicted and fined 400 rupees have the force of law; and if not, whether the conviction can be supported?

Upon this point I have very considerable doubts; and when it arose in the case, I desired the Government Advocate, who did not in the first instance appear for the Crown, to ascertain under what authority those Abkarry rules were passed. The case was adjourned for the purpose of ascertaining this; and on its coming on for hearing again, the Government Advocate informed me that he could point to no authority under which the Chief Commissioner of British Burmah, who appears to have issued the rules in question, had power to do so.

The Abkarry revenue is collected in the Bengal Presidency under Act XXI. of 1856, amended by Act XXIII. of 1860 and Act XX. of 1864. Power is given to the Governor-General in Council to extend those Acts to places under their immediate administration. I conceive that British Burmah is a place under the immediate administration of the Governor-General in Council.

I find, however, that the Abkarry Acts have not been extended to British Burmah; but that the rules which I enclose are quite independent of the Acts of the Governor-General in Council, relating to Abkarry, and are entirely different in principle to the rules applying in Bengal. They are modified to a certain extent every year, but similar rules have been in force in the province for about fifteen years.

It appears to me that if these rules have any legal effect, it must be by virtue of some power vested in the Chief Commissioner as representing in British Burmah the Board of Revenue. The powers of the Chief Commissioner are defined in a Resolution printed in the *Gazette of India*, Extraordinary, January 31st, 1862.

But it appears to me that the powers of the Chief Commissioner as a Board of Revenue cannot extend so far as to enable him to pass rules containing penal clauses, such as are contained in the rules in question.

The subject appeared to me to be of so much importance that I requested the Chief Commissioner to cause a search to be made for any document which might give him any power in the matter; and as I am now informed by the Government Advocate that no such document can be found, I beg to refer the matter to their Lordships.

It seems to me that there is no power at present vested in any one but in the British Parliament or the Legislative Council of the Governor-General to make laws for this province, and that laws can only be extended to the provinces by the Local Government, that is, the Governor-General in Council, or by the Chief Commissioner exercising the powers of a Local Government under Act XXXI. of 1867. These Abkarry rules have not been made or extended by any of these authorities, and I would, therefore, express my own opinion that they have not the force of law, and consequently that the conviction in this case cannot be supported.

Judgment of the High Court.

Peacock, C. J.—We are of opinion that the Lord's Day Acts do not extend to criminal cases in British Burmah, and that the conviction is not bad, because the defendant was arrested on a Sunday.

We are of opinion that upon the facts stated, the Abkarry rules passed by the Chief Commissioner have not the force of law, and that the conviction cannot be supported.

The 12th September 1868.

Present:

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice*, and the Hon'ble Dwarkanath Mitter, *Judge*.

Bond—Repudiation—Premature suit.

Reference to the High Court by the Officiating Judge of the Small Cause Court at Patna, dated the 13th August 1868.

Sujeewun Singh, *Plaintiff*,

versus

Runpal Singh, *Defendant*.

Defendant having denied in a Criminal Court the execution of a bond, plaintiff sued him for the amount payable under the bond, before the time specified therein for payment had arrived.

HELD, that the suit could not be maintained.

Case.—THE plaintiff sues the defendant for Rupees 106-8-0 under a bond, dated 26th October 1865, payable on the 26th October 1870, the defendant having repudiated his part of the contract by denying the execution of the bond and the receipt of the money therein alluded to in his deposition before the Deputy Magistrate of Patna on the 24th December 1867 in a criminal case pending before him.

The defendant denies the authenticity of the bond, and also urges that the suit is premature, inasmuch as the time for the payment of the bond-money has not yet arrived.

The question that arises in this suit is whether the suit can be maintained before the expiration of the term mentioned in the bond; if so, whether the plaintiff is entitled to a decree for the immediate recovery of the money covered by the bond, or to wait till the due date.

I am of opinion that the defendant having denied in the Criminal Court the execution of the bond, as well as receipt of the bond-money, the plaintiff has now the right to bring a suit to establish the authenticity of the bond, and, in the event of the genuineness of the bond being proved, to obtain a conditional decree declaring his right to recover the amount covered by the bond after the expiration of the term of payment agreed to. I do not consider the defendant's repudiation of the transaction as a sufficient reason for the plaintiff to urge that he is no longer bound by his own part of the contract regarding the time of payment stipulated in the bond, and that he is entitled to have a decree for the immediate recovery of the money claimed.

Judgment of the High Court.

Peacock, C. J.—It is clear that the suit cannot be maintained.

The 12th September 1868.

Present:

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice*, and the Hon'ble Dwarkanath Mitter, *Judge*.

Jurisdiction—Small Cause Courts.

Reference to the High Court by the Officiating Judge of the Small Cause Court at Santipore, dated the 17th August 1868.

Bama Soonduree Debee, *Plaintiff*,

versus

Kaminee Bewa and others, *Defendants*.

Baboo Buroda Prosunno Shome for Plaintiff.

No one for Defendants.

A suit to set aside a decree of a Small Cause Court when no defect of jurisdiction is manifest on the face of the proceeding, and where there is no reason to suppose that the decree was obtained by fraud or collusion, cannot be maintained in a Court of Small Causes.

Case—PLAINTIFF sues to set aside what she calls an illegal and collusive decree of this Court, and to recover the amount of that decree which has been realized by the sale of property alleged to belong to her minor son. Plaintiff was no party to the suit in which that decree was passed, it having been instituted by defendant against defendant No. 3 and others, for money belonging to defendant No. 1 and appropriated by defendant No. 3. The case was decreed against defendant No. 3 in September 1868. Execution was taken out against certain immoveable property alleged to belong to defendant No. 3, but claimed by plaintiff as the property of her son. Plaintiff's suit to establish her title thereto was dismissed by the Moonsiff in January of the present year. Plaintiff contends that the decree ought to be set aside, if she can show (1) that it was obtained by fraud or collusion, or (2) that it was given in a case where the Court had no jurisdiction.

I find, on referring to the records, that there is no ground whatever to suppose that there was any collusion between defendant No. 3, against whom alone the decree was given, and any of the other parties to that suit; nor is there any want of jurisdiction apparent on the face of the proceedings, the claim being of the nature of those ordinarily cognizable in a Small Cause Court. The decree was given for money said to belong to defendant No. 1, and to have been forcibly taken from her by defendant No. 3; but plaintiff states in the present case that she is prepared to show that the circumstances were such that defendant No. 1 could have had no claim to the money, the facts being that it was the consideration for the marriage of a niece of defendant No. 3's, who was stolen and given away in marriage by defendants Nos. 1 and 2, No. 2 being the brother of defendant No. 3, and No. 1 the paramour of No 2, they receiving Rupees 125 in consideration thereof from the bridegroom; and that, inasmuch as the bride had been hitherto nurtured by defendant No. 3, he alone was entitled to give her away in marriage, and was the sole party entitled to the marriage-

money usually given by the husband on such occasions.

Plaintiff contends that these facts, which she is prepared to prove, would take away the jurisdiction of this Court, a suit of that nature not being cognizable under Section 6 of Act XI. of 1865. The questions which I have to propose for the decision of the High Court are (1) whether this Court has jurisdiction to set aside a former decree, on the ground of its having been passed without jurisdiction, such want of jurisdiction not being apparent on the proceedings of the suit, but to establish which fresh evidence must be gone into; and (2) whether the facts, as stated above by plaintiff, are sufficient to take away the jurisdiction of this Court. There is no doubt that a decree can be set aside when defect of jurisdiction is *manifest on the face of the proceedings* (*vide* 8 Weekly Reporter, Civil Rulings, p. 89); also when the decree has been obtained by *fraud or other improper means* (Sections 90 and 272 of the Civil Procedure Code); but the present case cannot, I think, come under either of these specifications, nor in its present shape does it seem possible to bring it within any of the definitions of suits cognizable under Section 6 of the Small Cause Court Act.

I am myself of opinion that plaintiff's suit cannot lie in this Court, her proper remedies being, *first*, a claim to the property which she alleges to belong to her son under Section 246 of Act VIII. of 1859; and, *secondly*, in the event of its rejection, a regular suit to establish her title. Finally, she had still a right of appeal from an adverse judgment in the latter case, as the property claimed was immoveable.

Judgment of the High Court.

Peacock, C. J.—We are of opinion that the view taken of this case by the Judge of the Small Cause Court is correct, and that the plaintiff's suit cannot be maintained in the Small Cause Court.

The 12th September 1868.

Present:

The Hon'ble G. Loch and F. A. Glover, *Judges.*

Attachments (before and after judgment)—Official Assignee.

Case No. 319 of 1868.

Miscellaneous Appeal from an order passed by the Officiating Judge of Dinagepore, dated the 24th April 1868.

Indro Chunder Doogur, *Appellant,*

versus

Mr. John Cochrane, Official Assignee, *Respondent.*

Baboos Kishen Kishore Ghose and *Khettur Mohun Mookerjee* for Appellant.

Mr. R. E. Twidale and *Baboo Tarucknath Dutt* for Respondent.

Attachments made before judgment, though perfected by judgment, and not requiring fresh process, do not prevent possession of the attached property from being taken by the Official Assignee, should it not have been sold before that officer is appointed to the charge of the property. As attachment does not divest the debtor of ownership in the property, attachment after decree does not put a creditor in a better position than attachment previous to judgment.

Loch, J.—The appellant in this case, in execution of his decree, attached the property of his judgment-debtor situated in Zillah Dinagepore in January 1868, and it was sold in execution on 19th March 1868.

On the 6th March, the debtor was declared insolvent, and by an order of the High Court, original side, of that date, his property was placed in the charge of the Official Assignee.

On the 19th March, the Official Assignee sent a petition to the Judge of Dinagepore, praying that the property might be released from attachment, and that any assets belonging to the insolvent might be remitted to him.

The petition of the Official Assignee did not reach the Judge till after the sale of the insolvent's property had taken place, and after the expiry of the thirty days prescribed by law, the Judge confirmed the sale and remitted the sale-proceeds to the Official Assignee.

The decree-holder claims these sale-proceeds, on the ground that, as the property had been attached by him in execution of his decree before it was made over to the charge of the Official Assignee, he is entitled to the sale-proceeds, and he supports his claim by reference to a Circular Order of the late Sudder Court of 25th August 1837, circulating an opinion of the then Advocate-General on the subject.

There has been a great change in the law since 1837, and certain judgments passed by Judges on the original side of the High Court, reported in the Indian Jurist (New Series, Volume I., page 325 and page 373) have been quoted by the opposite party to show that attachments made before judgment, though perfected by judgment, and not requiring fresh process of attachment to be taken out, do not prevent possession of the attached property from being taken by the Official Assignee,

should it not have been sold before that officer is appointed to the charge of the property. It is pointed out to us (*see* Broughton's Procedure Code, 2nd edition, page 154, Section 232, Act VIII., 1859) that the High Court of Bombay have ruled differently, and have held that, where property has been attached before judgment, and a decree obtained before the Official Assignee was appointed, such creditors were entitled to be satisfied before the Official Assignee; but though all deference is due to the opinion of the High Court of Bombay, we think the ruling of this High Court should be followed till it be shown to be erroneous.

As the attachment does not divest the debtor of the ownership in the property, we think that attachment after decree does not put a creditor in a better position than attachment previous to judgment, and we, therefore, consider the order of the Judge is correct, and dismiss this appeal with costs.

The 12th September 1868.

Present :

The Hon'ble J. B. Phear and C. Hobhouse, *Judges.*

Execution—Costs of advertising.

Case No. 300 of 1868.

Miscellaneous Appeal from an order passed by the Judge of the 24-Pergunnahs, the 25th April 1868, affirming an order of the Principal Sudder Ameen of that District, dated the 8th February 1868.

Kisto Kishore Ghose (Decree-holder), *Appellant,*

versus

Soorjonath Sircar (Judgment-debtor), *Respondent.*

Baboo Gopal Lall Mitter for Appellant.

Baboo Tarucknath Paleet for Respondent.

It is not within the discretion of a Court charged with the execution of a decree to withhold execution, and abstain from selling, because the decree-holder refuses to pay the cost of advertising. The Procedure Code does not require the decree-holder to pay such costs in advance.

Phear, J.—We entirely agree with the Judge of the Lower Appellate Court that the order requiring the sale to be advertised is a reasonable order, and we further concur with him in thinking that it is for the interests of all parties concerned, or, at any rate, of the public generally, that the practice of advertising intended sales should be upheld, if possible. At the same time, we are unable to say that, in the event of the provisions of the Procedure Code being in all respects complied with, it is within the discretion of the Court charged with the execution of the decree to withhold execution and abstain from selling because the decree-holder refuses to pay the costs of such advertising. However reasonable it may be, in our opinion, to advertise sales in execution about to take place in this city and its suburbs, we think the Procedure Code has not provided that the decree-holder should be compelled to pay the costs of such advertisement in advance. Entertaining this view, we feel ourselves compelled with some reluctance to reverse the decision of the Lower Appellate Court, and to direct that the execution-proceedings be carried out, provided that the conditions prescribed in Act VIII. of 1859 have been in all respects complied with. Inasmuch as this appeal has arisen solely out of an act of the Court—an act which was substantially, as we think, reasonable, although it was not strictly in accordance with the Procedure Act; and as the charge for the advertisement was a trivial sum, we do not think it is right that we should award costs to the appellant.

The 12th September 1868.

Present :

The Hon'ble J. B. Phear and C. Hobhouse, *Judges.*

Execution—Adjustment of a decree—Sections 206 and 208, Act VIII., 1859.

Case No. 266 of 1868.

Miscellaneous Appeal from a decision passed by the Principal Sudder Ameen of the 24-Pergunnahs, dated the 23rd May 1868.

Bharut Chunder Roy (Decree-holder), *Appellant,*

versus

Nawab Nuzir Ali Khan Bahadoor (Judgment-debtor), *Respondent.*

Mr. R. T. Allan and *Baboo Anund Chunder Ghossal* for Appellant.

Baboo Ashootosh Dhur for Respondent.

A decree-holder, who was not barred by lapse of time, in seeking to execute his decree, was opposed by the judgment-debtor, on the ground that the decree had been seized and sold by the Deputy Collector in execution of a decree of that functionary's Court, and hat he himself (the judgment-debtor) had become the pturchaser thereof.

b

HELD that these proceedings amounted to an adjustment out of Court, which, under Section 206, Act VIII. of 1859, could not be recognized by the Court unless certified to it by the judgment-creditor himself.

HELD, also, that a Court charged with the execution of a decree has no other discretion with regard to noticing a transfer thereof, than that which is given to it by Section 208, which only applies to cases where the transferee can, and does come forward to claim execution for himself, instead of the original decree-holder.

Phear, J.—IN this case, the plaintiff has obtained a decree against the defendant in the Court of the Subordinate Judge, and is seeking to have execution thereof. It is admitted that he is not barred by lapse of time from suing out execution of his decree, and there is nothing whatever on the record to show that he is not entitled to all the benefit in the matter of the suit, which a competent Court intended to give him by its judgment. However, the defendant at this stage resists the execution of the decree upon the allegation that something has taken place elsewhere out of Court, which has had the effect of depriving the plaintiff of the right to proceed to execution of that decree. What the defendant says is this, namely, that he had a decree against the plaintiff in the Deputy Collector's Court, and that, in execution of that decree, the decree in the present suit was seized and sold by the Deputy Collector, and he himself, *viz.*, the present defendant, became the purchaser thereof; and he argues from this that the plaintiff has thereby lost all rights under that decree, and is not now entitled to obtain execution of it. If this argument be just, it seems to us an inevitable conclusion that the express provisions of Section 206 of Act VIII. of 1859 have been successfully set at naught in this matter. For the result is, that the defendant, by purchasing the decree at the sale in execution held in the Deputy Collector's Court for the sum of 1,600 rupees, has got quit of a judgment-debt, which he owed by virtue of this decree to the plaintiff to the amount of 14,000 rupees.

It seems to us that, if he is so quit, then the whole transaction amounts to nothing essentially different from an adjustment out of Court, such as Section 206, Act VIII. of 1859, expressly directs shall not be recognized by the Court, unless it it certified to the Court by the judgment-creditor himself. The only difference is, that the judgment-creditor himself is here no party to the adjustment, it having been effected through a third person against his will. But this surely cannot place him in a worse position than that in which he would have been had he actually arranged the adjustment, and in that case he would undoubtedly have carried out the execution in disregard of it. Whether on the purchase by the defendant in the Deputy Collector's Court the defendant really obtained any rights as against the plaintiff or did not, we do not now think it necessary to consider. If he did, some other mode of realizing the fruit of that transaction ought to have been pursued than that which he has here taken. It seems to us clear that, as there is nothing on the record to prevent the plaintiff from getting the benefit of his decree, so there is nothing outside the record which should oblige a Court of Equity to refuse to give him that benefit.

We think that the Court which is charged with the execution of the decree has no other discretion with regard to noticing a transfer of the decree, than that which is given to it by Section 208 of the Civil Procedure Code; and clearly that Section only applies to cases where the transferee can, and does, come forward to claim process of execution for himself in the stead of the original decree-holder. It has no place where the transferee and the judgment-debtor are the same person in the same character, and where consequently an application for execution by the transferee could never be seriously made.

We are, therefore, of opinion that the Lower Court was wrong in refusing to give the plaintiff execution. We think that the decision of the Lower Court must be reversed, and the case must be sent back to it with the direction that the plaintiff is entitled to get execution of his decree from the defendant, with costs in both Courts.

The 12th September 1868.

Present:

The Hon'ble L. S. Jackson, *Judge.*

Mookhtears—"Appearance" within the meaning of Act XX., 1865.

Appeal from an order passed by the Judge of Tirhoot, dated 30th June 1868.

Gujraj Singh and others, *Appellants.*

Mr. R. E. Twidale for Appellants.

There is nothing in the provisions of Act XX. of 1865 which restrains any person from coming into the presence of the Judge and supplying information to the vakeels. The word "appearance" does not mean actual presence before the Judge in Court, *e. g.*, of a mookhtear standing behind the pleader.

Jackson, J.—THE petitioners complain of an order in the Urdu language promulgated

by the Judge of Tirhoot on 30th June last, which he has explained by an English order dated the 24th July. In this, it is further ordered that (speaking of the previous order) "all that it prescribed was that none but "mookhtears qualified and enrolled under "Act XX. of 1865 should appear and act "in Court, and that in every case in which a "mookhtear might be appointed by a party, "a mookhtearnamah should be filed. But in "regard to the appointment of pleaders and "their instruction out of Court, the order "complained against was silent. No doubt, "any one may appoint a pleader, and the "pleader may be instructed by his client "directly, without the intervention of a "mookhtear at all. But all that this Court's "order prescribed was that, if a mookhtear "appeared in a Court, and instructed a "pleader at the hearing of a case, it should "be none but a mookhtear enrolled under "the Act." Again, he says: "With the "appointment or existence of old recognized "agents, the Court does not interfere, except "to prevent them from appearing in Court "in the character of mookhtears" These words are used by the Judge to explain an expression used in his previous order, *viz.*, the Urdu words "*wasti pairuvi hazir hoe*," which mean, as I understand, come into Court for the purpose of looking after the case.

The Court has had frequent difficulties in answering inquiries as to what the Legislature appeared to contemplate as the functions or privileges of mookhtears under the Pleaders' and Mookhtears' Act. It is very doubtful how far the provisions of that Act control the Sections of Act VIII. of 1859 relating to the appearance of the parties in the Mofussil Courts. It may be that the persons before those Courts are the persons spoken of in the first Clause of Section 17. The persons holding general powers-of-attorney may be limited to persons qualified under the Pleaders' Act, XX. of 1865. By the word "appearance," the Judge seems to mean the actual presence of any person before the Judge in Court. He thinks that the mookhtears standing behind the pleader and giving him information is an appearance, and a contravention of the provisions of Act XX. of 1865. This is clearly a mistake. There is nothing in the provisions of that Act which restrains any person from coming into the presence of the Judge, and supplying information to the vakeels. A person not enrolled must not "appear" or practise within the meaning of the Act, but the restriction goes no further. Therefore, the Judge's order complained of, so far as it restrains any person from coming into the Court-house, and instructing the pleaders, must be set aside.

The 14th September 1868.

Present:

The Hon'ble G. Loch and Dwarkanath Mitter, *Judges.*

Mahomedan law—Pre-emption—Separate estates.

Case No. 1320 of 1868.

Special Appeal from a decision passed by the Judge of Sylhet, dated the 24th February 1868, reversing a decision of the Officiating Principal Sudder Ameen of that District, dated the 12th June 1867.

Abdool Azim (Plaintiff), *Appellant,*

versus

Khondkar Hamid Ali and others (Defendants), *Respondents.*

Baboo Debendro Narain Bose for Appellant.

Baboo Grish Chunder Ghose for Respondents.

According to the Hedaya, the right of *shufa* (pre-emption) is limited to parcels of land, houses, &c., and does not contemplate the right to purchase a separate estate because a part of it is continuous with that of the *shufi*; the law being intended to prevent vexation to holders of small plots of land by the introduction of a stranger among them.

Loch, J.—The Judge holds in this case that the right of pre-emption cannot be exercised by the party claiming it, because the quantity of land (about 90 beegahs more or less) is too extensive, and he quotes a judgment of the High Court reported in II. Weekly Reporter, page 261, which ruled that a claim to the right of pre-emption on the ground of vicinage alone would not lie in the case of large estates, but only when houses or nearest holdings of land made parties such small neighbours as to give a claim on the ground of convenience and mutual servience. Baillie in his work on Mahomedan Law, p. 471, defines the right of pre-emption as follows: "The original meaning of *shufa* is conjunc-"tion. In law, it is a right to take possession "of a purchased parcel of land, for a similar "(in kind and quantity) of the price that "has been set on it to the purchaser. The "cause of it is the junction of the property "of the *shufi*, or person claiming the right, "with the subject of the purchase." And in

a note, he states "that in the *Moontaha ul* "*Urub* the word 'parcel' above is rendered "by the Persian word '*parah-zameen*,' a "piece or fragment of land."

It is probable that originally the right of pre-emption extended only to houses, gardens, and small plots of land, and this view is supported by the illustrations of what may be the subjects of pre-emption as given by Baillie; but on looking at the Hedaya, we find it stated at page 591 of Volume III. that "*shufa* takes place with regard to all lands or houses." The meaning of this is clear on reference to the context. It had been stated in a previous part of the paragraph that according to the doctrine of *shufi* nothing is subject to *shufi* but what is capable of being divided; but the Prophet held differently, and adds the writer: "Besides, according to "our tenets, the grand principle of *shufa* is "the conjunction of property, and its object "to prevent vexation arising from a dis-"agreeable neighbour, and this reason is of "equal force whether the thing is divisible or "otherwise." The writer of the Hedaya then assigns the reason why the right is not applicable to moveables, "Because of the "saying of the Prophet, '*shufa* affects "only houses and gardens,' and also because "the intention of *shufa* being to prevent "the vexation arising from a bad neigh-"bour, it is needless to extend it to "property of a moveable nature." Looking at the chapter on *Shufa* in the Hedaya, the right appears to be limited to parcels of land, houses, &c., and does not contemplate the right to purchase a separate estate, because a part of it is continuous with that of the *shufi*. It is true that a person may have a bad neighbour as a zemindar, and so suffer as much vexation from him as from a bad neighbour next door or holding the next field;-but still it appears to me that the law was intended to prevent vexation to holders of small plots of land who might be annoyed by the introduction of a stranger among them. I think I would apply the ruling laid down in the judgment of the Court quoted above to the present case, and allow the judgment of the Lower Court to stand, for the property to which the right of pre-emption is claimed is a separate estate paying revenue to Government. I would dismiss the appeal with costs.

Mitter, J.—The property in dispute is an estate paying revenue to Government, and I am not prepared to say that this case is not governed by the decision relied upon by the respondent.

The 9th November 1868.

Present:

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice*, and the Hon'ble Dwarkanath Mitter, *Judge*.

Jurisdiction—Execution—Sale of decree.

Case No. 314 of 1868.

Miscellaneous Appeal from an order passed by the Principal Sudder Ameen of Beerbhoom, dated the 18th May 1868.

Ram Buksh Chuttangee and others, *Appellants*,

versus

Maharajah Bunwaree Gobind Bahadoor, *Respondent*.

Baboos Kalee Prosunno Dutt and *Romanath Bose* for Appellants.

No one for Respondent.

Where *A* obtained a decree in a District Court against *B*, who had previously obtained a decree in a different district against another party—HELD that the District Court had jurisdiction to sell *B's* right, title, and interest in his decree, and that the purchaser becoming assignee of that decree had a right to apply for execution in the district where it was passed.

Peacock, C. J.—THE plaintiff obtained a decree against Judoonath Roy in the Court of the Subordinate Judge of Nuddea, within the jurisdiction of which Court Judoonath Roy resided. Judoonath Roy had obtained a decree in the Beerbhoom Court against Bunwaree Gobind, which was attached by the Nuddea Court under the decree of the plaintiff, and sold to the plaintiff himself under the execution. It appears to us that the Nuddea Court had jurisdiction to sell Judoonath's right, title, and interest in that decree; and having done so, the plaintiff, who purchased under that execution, became the assignee of the decree, and as such assignee has a right to apply to the Beerbhoom Court to have execution of it.

Under these circumstances, we think that the order of the Subordinate Judge must be reversed without costs.

The 9th November 1868.

Present:

The Hon'ble F. B. Kemp and E. Jackson *Judges*.

Paupers—Sections 308 and 309, Act VIII., 1859 —Penalty under Stamp Act.

Case No. 52 of 1868.

Regular Appeal from a decision passed by the Principal Sudder Ameen of Rungpore, dated the 7th August 1867.

Golam Guffoor (Plaintiff), *Appellant*,

versus

Ekram Hossein Chowdhry and others (Defendants), *Respondents*.

Baboos Onookool Chunder Mookerjee and *Romesh Chunder Miller* for Appellant.

Baboos Unnodą Pershad Banerjee, *Kalee Mohun Doss*, and *Grija Sunkur Mojoomdar* for Respondents.

Under Sections 308 and 309 of Act VIII. of 1859, a pauper cannot claim exemption from liability to pay any further stamp-duty or penalty in respect of a document on which he relies, and which, owing to a defect in the stamp, is inadmissible as evidence in the suit.

It is not the duty of a Civil Court to receive and submit to the Board of Revenue an application from a pauper plaintiff for remission or mitigation of penalty under the Stamp law; the pauper should himself make timely application under Clause 6, Section 15, Act X. of 1862.

Kemp, J.—THIS suit was in *formâ pauperis* for declaration of a right to obtain possession of certain property, moveable and immoveable, valued at Rupees 33,695 and odd annas.

The Principal Sudder Ameen of Rungpore, without going into the merits of the case, and after disposing of two pleas in bar in favor of the plaintiff, dismissed the plaintiff's suit on these grounds, *viz.*, that the document on which the suit is based, *viz.*, a hibbanamah, or deed of gift, was engrossed on a stamp of inadequate value; that the plaintiff had failed to make good the penalty on payment of which the document became admissible in evidence; that the Principal Sudder Ameen was of opinion that the Civil Court was not vested with any authority to remit or mitigate the penalty, the said authority being vested with the Board of Revenue; that the plaintiff ought to have applied to the Board of Revenue, and not to have made use of the Civil Court as a channel of communication to the Board of Revenue.

On appeal to the Court, the first argument taken is that the document on which the suit is based is an ikrarnamah, and not a deed of gift; and that as an ikrarnamah, it was sufficiently stamped.

2ndly.—That if the document be held to be not an ikrarnamah, but a deed of gift, the Court ought to have proceeded to hear and decide the suit, charging the plaintiff with the costs, including the penalty, and making the same recoverable by Government on the termination of the suit.

3rdly.—That the Court below should have allowed the appellant time to apply to the Board of Revenue for the remission of the penalty.

On the first point, after hearing the document read, we have no hesitation in stating our opinion to be that the document in question, if genuine—a question which has not been tried—was intended to operate as a deed of gift. There can be no question that if this document was executed, the parties to the document deliberately evaded the Stamp law. The plaintiff has been allowed to date the time for bringing his suit from his 18th year, and he did not bring his suit until very nearly three years had elapsed from the date of his arriving at majority. Even supposing that the Lower Court was right in deciding that the plaintiff attained his majority in his 18th year—and on this point as there is no cross-appeal on the part of the defendant, we need give no opinion—still it is clear from the evidence of the plaintiff recorded in the Court below that he has been in the habit of residing in the lodgings of the Meer Moonshee, the Nazir, the Kazee, and the Moulvie of Bogra, and it is idle to say that he was not well aware, or could not be well-advised as to the nature of the document on which his suit is based. His conduct throughout in the suit has been that of a party not willing to make up for any defect in the stamp under a wrong impression as to the nature of the document, but of a party deliberately and persistently doing his utmost to evade the Stamp law.

As to the second ground of appeal, the Sections applicable to the recovery of stamp duties in pauper suits are Sections 308 and 309 of Act VIII. of 1859. In cases in which the application of a pauper to be permitted to sue in *formâ pauperis* is admitted, such plaintiff is not liable to any further stamp-duty in respect of any petition, appointment of a pleader, or other proceeding connected with the suit, or with the execution of any decree passed on it. Under these Sections, the pauper cannot claim exemption from liability to pay any further stamp-duty or penalty in respect of a document on which he relies, and which, owing to a defect in the stamp, is inadmissible as evidence in the suit.

On the third and last ground, we think that the Principal Sudder Ameen was right in saying that it was not for his Court to receive and submit to the Revenue Board any application on the part of a pauper for the purpose of obtaining the authority of the Board to remit or mitigate the penalty under the stamp law. It was the duty of the plaintiff to make timely application to the Board for the above purpose under Clause 6, Section 15 of Act X. of 1862.

We do not find that the plaintiff distinctly asked the Court for time to enable him to make such application, but sought to make use of the Court as a channel of communication to the Revenue Board. At the last moment, we have been asked to give the plaintiff time, either to endeavour to raise funds to pay the penalty or to apply to the Sudder Board of Revenue to remit it. Looking to the circumstances of this case and the conduct of the plaintiff in the Court below, we do not think it a case in which we ought to accede to the request made at the very last stage of the case. We, therefore, confirm the decision of the Principal Sudder Ameen, and dismiss this appeal with costs. The Government will be entitled to recover the stamp duties.

The 9th November 1868.

Present:

The Hon'ble F. B. Kemp and E. Jackson, *Judges.*

Hindoo widow—Right of maintenance.

Case No. 1213 of 1868.

Special Appeal from a decision passed by the Principal Sudder Ameen of Hooghly, dated the 7th February 1868, affirming a decision of the Moonsiff of that District, dated the 31st July 1867.

Wooma Churn Chowdry (one of the Defendants), *Appellant,*

versus

Nitumbinee Debia (Plaintiff) and another (Defendant), *Respondents.*

Baboo Poorno Chunder Shome for Appellant.

Baboos Obenash Chunder Banerjee and *Prosunno Coomar Roy* for Respondents.

Where property had descended to the possession of the brothers of a deceased Hindoo—HELD that his widow had a right of subsistence from them on condition of her residing with them as a member of their family.

Jackson, J.—THIS was a suit by a Hindoo widow to obtain a monthly allowance as maintenance from the brothers of her deceased husband; the family property having descended to the possession of the said brothers.

The Moonsiff has decreed to the plaintiff a right of subsistence from the said brothers on condition that the plaintiff returns to and resides with them as a member of the family. The Principal Sudder Ameen on appeal has decreed to the plaintiff a monthly allowance in money, considering that it is immaterial whether the plaintiff resides with her husband's family or not. From this decision this special appeal is preferred.

We are of opinion that under the ruling of the Full Bench on this subject, the decision of the Principal Sudder Ameen cannot be sustained. The decision of the Moonsiff is, however, in accordance with many of the decisions passed on the occasion of the Full Bench trial above alluded to, and it is also in accordance with the admission of the defendants themselves in this case, who have in their answer to the plaintiff's claim stated that the plaintiff is entitled to subsistence at their hands, and that they are willing to maintain her, if she is willing to reside with them as a member of their family.

We therefore reverse the decision of the Principal Sudder Ameen, and restore that of the Moonsiff with the exception of the decree for a money allowance.

Each of the parties to pay their own costs of this litigation.

The 10th November 1868.

Present:

The Hon'ble F. B. Kemp and E. Jackson, *Judges.*

Mortgage—Notice of foreclosure.

Cases Nos. 1310 and 1311 of 1868.

Special Appeal from a decision passed by the Judge of Hooghly, dated the 24th February 1868, affirming a decision of the Second Principal Sudder Ameen of that District, dated the 10th June 1867.

Buzloor Ruheem (one of the Defendants), *Appellant,*

versus

Abdoollah and another (Plaintiffs), *Respondents.*

Mr. G. C. Paul and *Baboo Romanath Bose* for Appellant.

Mr. R. E. Twidale for Respondents.

After notice of foreclosure, and shortly before the expiry of the year of grace, a mortgagee allowed the mortgagor six months to redeem the mortgage. The mortgagor subsequently died, and the mortgagee sued his legal representative to recover the property.

HELD that it was not necessary that fresh notice of foreclosure should be issued.

Jackson, J.—IN these two cases, the mortgagee having issued notice of foreclosure on the mortgagor, allowed the mortgagor six months' time within which to redeem the mortgage shortly before the expiry of the year of grace. The mortgagor subsequently died, and the mortgagee now sues to recover the mortgaged property. The legal representative of the mortgagor objects that fresh notice of foreclosure has not been served upon him, and it was argued before the Lower Court, and it has been argued again in special appeal before this Court, that under the circumstances it was necessary under the law that fresh notice should be issued.

We concur with the Lower Court in the opinion that such fresh notice was not necessary. The subsequent agreement may possibly have had its effect in delaying the date upon which a Court would give effect to the foreclosure proceeding; but on the expiry of the additional time which had been agreed to between the parties, we think the foreclosure would stand good. The law does not say that the mortgagee is bound, on the expiry of the year of grace, at once to take proceedings under the mortgage, but it requires that a notice of foreclosure shall be given, and distinctly declares that within one year from the date of the notification, as far as the law is concerned, the mortgage will be finally foreclosed. The parties as between themselves may enter into any other agreement, but the requirements of the law will, on the issue of the notice and the expiry of the year of grace, have been finally complied with.

Holding this view, we dismiss both these appeals with costs.

The 10th November 1868.

Present:

The Hon'ble L. S. Jackson and Dwarkanath Mitter, *Judges.*

Registration—Right of suit.

Case No. 473 of 1868.

Special Appeal from a decision passed by the Principal Sudder Ameen of Patna, dated the 24th December 1867, reversing a decision of the Moonsiff of that District, dated the 17th May 1867.

Ahsuna Begum and others (Defendants), *Appellants,*

versus

Kheerun Singh and others (Plaintiffs), *Respondents.*

Baboos Kishen Succa Mookerjee and *Nil Madhub Sein* for Appellants.

Mr. R. E. Twidale for Respondents.

A suit does not lie to compel registration of a lease executed when there was no law in force by which registration was necessary to give effect to such lease, and where there has been no express covenant to register.

Jackson, J.—MR. TWIDALE, who appears for the respondent, has not attempted to support this decision which is clearly erroneous.

It was quite irregular to remit the case to the Court of first instance in order that the plaintiff might have the opportunity of making a fresh case.

Mr. Twidale, however, contends that the suit might have been entertained as a suit simply to compel registration.

But there was no express covenant to register, nor at the time of executing the alleged lease was there any provision of law in force by which registration was necessary in order to give effect to such lease, from which an implied agreement to register might have been inferred.

We think the Moonsiff was right in dismissing the suit, and we restore his decree, reversing that of the Principal Sudder Ameen with costs.

The 10th November 1868.

Present:

The Hon'ble L. S. Jackson and Dwarkanath Mitter, *Judges.*

Tenant rights—Occupancy.

Case No. 480 of 1868.

Special Appeal from a decision passed by the Principal Sudder Ameen of Patna, dated the 12th December 1867, affirming a decision of the Moonsiff of that District, dated the 3rd May 1867.

Jorawur Singh (one of the Defendants), *Appellant,*

versus

Hakeem Khyrat Ali and others (Plaintiffs), *Respondents.*

Mr. R. E. Twidale for Appellant.

Mr. C. Gregory for Respondents.

In a suit to recover possession of land which defendant alleged himself to have held for more than 12 years under a mokurruree lease, where the Lower Appellate Court, finding that defendant failed to prove his mokurruree right, declared he had no title to hold as a squatter—

HELD that the Lower Court ought to have found what was the nature of the occupancy, and how long it had subsisted.

Jackson, J.—IT appears to us that the judgment of the Lower Appellate Court in this case is not satisfactory. The plaintiff alleged that he had a lease of certain lands from the proprietor, and that the defendant was holding possession of such lands without any title. He, therefore, sued to recover possession of the lands. The defendant set up a mokurruree lease under which he alleged himself to have been in possession of the land since the year 1276 Fuslee. The proprietor and lessor, who was also a party to the suit, denied the alleged mokurruree lease; and both the Courts below have found on this point against the defendant. And the Principal Sudder Ameen, observing that the burthen of proving his mokurruree right rested on the appellant, that is, the defendant, and that he had failed to discharge this burthen to the satisfaction of the Court, went on to say that he has no title by holding his possession as that of a squatter, and that such possession cannot be given effect to by a Court of justice. He then dismissed the appeal and affirmed the judgment of the Court below.

It is contended before us by the special appellant that, admitting the defendant to have failed in proof of his mokurruree right, yet, by reason of long continued possession as a tenant, he had acquired the right of occupancy, and therefore ought not to have been ejected from the lands.

It appears to us that the Principal Sudder Ameen ought to have found what the nature of this occupancy was, and how long it had subsisted, and if he found defendant to have really a right of occupancy by reason of his having held the land for 12 years and paid rent therefor, he ought not to have dispossessed the defendant, but left the plaintiff to take such steps as he might be advised, and as he lawfully might against a tenant having such right.

We think, therefore, that the judgment of the Lower Appellate Court must be set aside and the proceedings returned to that Court with a view to the case being dealt with as pointed out.

The 11th November 1868.

Present:

The Hon'ble F. B. Kemp and E. Jackson, *Judges.*

Sections 9 and 10, Act VI. (B.C.) 1862—Survey and measurement—Lakheraj lands

Case No. 896 of 1868 under Act X. of 1859.

Special Appeal from a decision passed by the Officiating Judge of Mymensingh, dated the 14th January 1868, affirming a decision of the Collector of that District, dated the 25th June 1867.

Prosunno Moyee Debia (Plaintiff), *Appellant,*

versus

Chundernath Chowdhry and others (Defendants), *Respondents.*

Baboos Chunder Madhub Ghose and *Sreenath Banerjee* for Appellant.

No one for Respondents.

Section 9, Act VI. (B. C.) 1862, gives a proprietor the right of making a general survey or measurement of lands comprised within his estate or tenure, not of lakheraj lands held under an independent title, for these until resumed and assessed, form a distinct and separate estate.

Kemp, J.—THE special respondent is not present in this appeal. We have heard the pleader for the special appellant, and are of opinion that the appeal must be dismissed without costs. The decision turns upon the construction to be put upon Section 9 of Act VI. of 1862, Bengal Council.

The plaintiff (special appellant) is a putneedar. The defendant holds land within his putnee, paying rent to the plaintiff; he also holds or alleges to hold certain lakheraj lands. The plaintiff (special appellant) applied to the Collector for permission to make a survey and measurement of the lands of his putnee. He was opposed by the special respondent who objected to any survey being made of the lakheraj land. Both the Collector, and the Judge on appeal, have considered this objection to be valid, and have refused to permit the plaintiff to survey and measure the lakheraj land, observing that he was at liberty to take such steps, as he might be advised to do, to resume and assess the lakheraj lands.

We think that the Lower Courts have put a proper interpretation upon the Section in question. The Section gives to whoever is the proprietor of an estate or tenure, the right of making a general survey or measurement of the lands comprised in such estate or tenure. Now, it cannot be said that these lakheraj lands are comprised in the plaintiff's

putnee: they are lands held under an independent title, and, until resumed or assessed, form a distinct and separate estate. Further, it is clear under the provisions of Section 10 of the law, that the policy of the law was to assist parties who were unable to ascertain the persons liable to pay rent to them, and it was for the purpose of enabling them to arrive at this information that the power was given them to measure under the control of the Collector. The present suit is, in our opinion, brought simply to harass the defendant (the special respondent). The plaintiff has his remedy in his own hands; he can sue to resume and assess the alleged lakheraj land in the occupation of the defendant. His present application under Section 9 of Act VI. of 1862 to measure these lakheraj lands has been properly rejected. The special appeal is dismissed, but without costs as the defendant is not present.

The 11th November 1868.

Present:

The Hon'ble J. B. Phear and C. Hobhouse, *Judges.*

Sale—Execution—Fraud.

Case No. 1153 of 1868.

Special Appeal from a decision passed by the Principal Sudder Ameen of Chittagong, dated the 10th February 1868, affirming a decision of the Moonsiff of that District, dated the 24th April 1867.

Chundee Churn Chuckerbutty (one of the Defendants), *Appellant,*

versus

Korban Ali (Plaintiff) and others (Defendants), *Respondents.*

Mr. G. A. Twidale for Appellant.

Baboo Kishen Succa Mookerjee for Respondents.

In a suit to recover property claimed by one of the defendants as having been purchased by him at an auction-sale in execution of a decree, which the Lower Courts found to have been obtained fraudulently with intention to defraud the present plaintiff who had been left out of that suit—

HELD, that the title of the purchaser was without valid foundation as against the present plaintiff.

Phear, J.—IT seems to us clear, even from the argument of the pleader for the special appellant in this case, that the plaintiff is entitled to recover the property for which she sues, unless the title which the special appellant sets up to it by purchase made at an auction-sale held in execution of a certain decree is a good and valid title against the plaintiff. The decree in execution of which the sale took place was not a decree against the plaintiff himself, and it might give rise to a question of considerable difficulty if we enquired what was the effect of that decree—supposing it were a valid decree between the parties, what was the effect of that decree as regards giving the Court a right to sell the property of the alleged judgment-debtor under the peculiar facts of the case. But we find that both the Courts below, who were Judges of the facts in this case, have found that the decree in question was obtained fraudulently as against the plaintiff in the present suit; that it was in fact brought about by collusion between the parties to the original suit with the express intention to defraud the plaintiff in this suit by the method of a sale in execution; and that he was left out of that suit for the more complete effecting of the purpose. That being so, it is clear that the decree could not give the Court a power to sell the property as against the plaintiff in fraud of whom the suit was especially devised and the decree procured to be passed. It seems to follow conclusively that the title of the purchaser (defendant) is without any valid foundation as against the claim of the plaintiff; consequently, the decisions of the Lower Courts are, on their findings of fact, good in law. This special appeal must be dismissed with costs.

The 11th November 1868.

Present:

The Hon'ble F. B. Kemp and E. Jackson, *Judges.*

Enhancement of rent—Kubooleut.

Case No. 948 of 1868 under Act X. of 1859.

Special Appeal from a decision passed by the Additional Judge of Hooghly, dated the 18th January 1868, affirming a decision of the Deputy Collector of that District, dated the 7th September 1867.

Poorna Chunder Roy (Plaintiff), *Appellant,*

versus

Mr. W. Stalkart and another (Defendants), *Respondents.*

Baboos Issur Chunder Chuckerbutty and *Grish Chunder Mookerjee* for Appellant.

Mr. Mackenzie and *Baboo Mohinee Mohun Roy* for Respondents.

Where a suit for a kubooleut at an enhanced rate of rent was dismissed on the ground that it was not for enhancement of plaintiff's share of the rent, but for a kubooleut at an enhanced rate for the rent of a specific

b

portion of land, although plaintiff's agent in his examination deposed that the suit had reference, not to a specific portion of land, but to a certain jumma.

HELD that the Court below might permit plaintiff to amend or explain his plaint, or, if he had asked too much, might give him what he was entitled to under the law.

Where a plaint asks for a kubooleut for a given term without specifying the date from which the term is to commence, it is in the discretion of the Court to fix the proper term.

Kemp, J.—THIS was a suit for a kubooleut at an enhanced rate of rent. The plaintiff is one of several co-sharers. His plaint is properly framed; it specifies the total quantity of the land jointly held by the whole body of joint proprietors; it states what the plaintiff considers to be proper jumma payable for the whole quantity of land, and asks for a kubooleut for one year for a jumma in proportion to a 5-annas "rukum" of the whole 16-annas jumma. This plaint was filed by the naib or agent of the plaintiff. In his examination, it is true that his statements vary considerably from the statements made in the plaint. In his deposition, he asks for a kubooleut, not for any specific 7 beegahs odd cottahs of land, but for a kubooleut for 7 beegahs odd cottahs at a certain jumma. Both the Courts below have dismissed the plaintiff's suit on the ground that the suit is not for the enhancement of the plaintiff's share of the rent, but for a kubooleut at an enhanced rate for the rent of a specific portion of land; and as it has been ruled by this Court that such a suit cannot be maintained, the suit must be dismissed. The Judge adds that if it had not been for this informality in this suit, it would have been necessary to remand the case to the first Court to ascertain whether the defendant had or had not a right of occupancy, that point not having been tried by the Court of first instance. We have first to dispose of the question whether the Courts below were right in dismissing the plaintiff's suit, and then to decide upon the objections taken by the learned Counsel for the special respondent under the provisions of Section 348 in cross appeal.

On the first point, as already observed, the plaint was perfectly formal and correct. The first Court has found that the plaintiff's agent does not state that the identical 7 beegahs odd cottahs which he claims belong to his share. We are of opinion that taking the plaint and the deposition together, it was not the intention of the plaintiff's agent to ask for a kubooleut for a specific 7 beegahs odd cottahs of lands, but that he alluded to that quantity of land as in explanation of his employer's share over the total area in the estate. Be that as it may, there was nothing to prevent the Court below, if the plaintiff had asked too much, from giving him what he was entitled to under the law, or to have permitted him to amend or explain his plaint if necessary. On this point, therefore, we think that the Court below was wrong in wholly dismissing the plaintiff's suit.

We now come to the objections taken by the learned Counsel in cross-appeal. The first is that the plaintiff sues the defendant on the footing of a ticca ryot or tenant-at-will, and that it has been held by this Court that a plaint claiming a kubooleut from a tenant-at-will must be dismissed. The second objection is that there is no date fixed in the plaint from which the term of the kubooleut was to run.

On the first objection, we find that the defendant in the Court below claimed to be a mokurruree tenant; and the question whether he was so or not, was not disposed of. If he is found to be a tenant-at-will, the suit of the plaintiff must be dismissed. If, on the contrary, he is a tenant with a right of occupancy or a tenant holding under higher rights, the case must be tried.

As to the second objection, the plaint asks for a kubooleut for a term of one year, though the date is not specified from which this term is to commence. Under the terms of the very decision quoted by the learned Counsel, it is in the discretion of the Court to fix the proper term, and such too is the course laid down by Act X.

The case must, therefore, be remanded to be tried with reference to the above remarks, the Judge sending the case to the first Court for re-trial.

The 11th November 1868.

Present:

The Hon'ble L. S. Jackson and Dwarkanath Mitter, *Judges.*

Right of way—User.

Case No. 55 of 1868.

Special Appeal from a decision passed by the Principal Sudder Ameen of Chittagong, dated the 31st October 1867, modifying a decision of the Moonsiff of Howla, dated the 27th April 1866.

Oomur Shah (Plaintiff), *Appellant,*

versus

Rumzan Ali and others (Defendants), *Respondents.*

Mr. G. A. Twidale for Appellant.

Baboo Greeja Sunkur Mojoomdar for Respondents.

A right of way may be created by use continued for many successive years, even though such use is limited to one particular season of the year alone.

Jackson, J.—We have heard Mr. G. A. Twidale in this case; and the objection to the judgment of the Court below which he takes in special appeal is, that the suit was brought to establish a right of way, and that no such right of way can be established by a mere use, although continued for many successive years during one particular season of the year alone.

It is easily conceivable that circumstances might occur which would render it necessary to resort to a particular passage at certain seasons of the year to certain localities, for instance, to lands entirely inundated, which would not be necessary or specially convenient at other seasons.

I see nothing to prevent the creation of such right of way as consists in right of passing over the land of another at particular seasons of the year.

I think, therefore, that the decision of the Lower Appellate Court is not erroneous in this respect, and I would affirm that decision.

Mitter, J.—I concur.

The 11th November 1868.

Present:

The Hon'ble L. S. Jackson and Dwarkanath Mitter, *Judges.*

Enhancement of rent—Presumption of uniform payment—Section 4, Act X., 1859.

Case No. 1046 of 1868 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of Dacca, dated the 23rd January 1868, affirming a decision of the Deputy Collector of that District, dated the 29th June 1867.

Raj Doollub Gomashtah (Plaintiff), *Appellant,*

versus

Mohessur Bhutt and others (Defendants), *Respondents.*

Baboos Chunder Madhub Ghose and *Romesh Chunder Mitter* for Appellant.

Baboos Hem Chunder Banerjee and *Issur Chunder Chuckerbutty* for Respondents.

In a suit for enhancement of rent when defendant claimed the benefit of the presumption arising under Section 4, Act X., 1859, it was held that his sworn declaration that the rent had not varied for more than 20 years, corroborated by the records of the Collectorate which showed that the rent was the same as it had been more than 30 years ago, was sufficient to warrant the presumption, seeing that plaintiff had failed to show any intermediate variation.

Jackson, J.—The question in this case was whether the land which the defendant held had been held by him and his predecessors at an unvarying rent since the date of the Permanent Settlement. In that case the defendant would not be liable to enhancement.

The defendant undertook to show that his rent had not been varied for more than 20 years; and upon his proving this fact, he would be entitled to the benefit of the presumption as provided in Section 4 of Act X. of 1859.

Neither of the Courts below have stated, perhaps with as much logical force as might have been desired, the grounds on which they were satisfied that the defendant's rent had not been varied. But on looking at the record, it is clear that there was evidence (and that evidence which with respect to credibility is perhaps unusually good) that the tenure in question had been so held for much more than 20 years. That evidence consisted chiefly of the sworn declaration of the defendant himself, strongly corroborated by papers taken from the public records of the Collectorate, from which it appeared that the rent at which the defendant is now holding is the same at which he was holding more than 30 years ago.

The plaintiff might, no doubt, have shown by counter-evidence that the rate had been intermediately varied, though it had returned to the original rate; but this he failed to show.

Seeing, therefore, that there was evidence, it appears to us that we ought not to disturb the conclusion of fact, and the consequent finding based on the legal presumption, at which the Lower Court arrived.

The decision of the Court below ought, we think, to be affirmed, and the appeal dismissed with costs.

The 11th November 1868.

Present:

The Hon'ble L. S. Jackson and Dwarkanath Mitter, *Judges.*

Credibility of witnesses—Lower Courts—High Court.

Case No. 1109 of 1868.

Special Appeal from a decision passed by the Judge of Dacca, dated the 31st January 1868, affirming a decision of the Principal Sudder Ameen of that District, dated the 7th January 1867.

Gouree Pershad Koondoo (Plaintiff), *Appellant,*

versus

Prannath Surmah (Defendant), *Respondent.*

Baboos Chunder Madhub Ghose and *Sreenath Banerjee* for Appellant.

Baboo Ashootosh Dhur for Respondent.

The credibility of witnesses is a matter altogether for the Court of first instance and the Court which hears a regular appeal; and if these Courts are satisfied that the witnesses are not to be believed, their decision cannot be set aside by the High Court, even though upon a general view of the case it should think that if it had tried the case originally, it might have come to a different conclusion.

Jackson, J.—In this case, the plaintiff sues the defendant on a bond.

The Principal Sudder Ameen before whom the trial took place considers that the evidence adduced by the plaintiff was unworthy of belief on grounds of certain discrepancies in it.

The Zillah Judge, before whom the case came in appeal, observes that he was not quite sure that he would have arrived at the same conclusion as to the general probabilities of the case, but that as the Court below has pointed out certain discrepancies, to which he refers, in the evidence of the witnesses for the plaintiff, he felt bound to concur in the judgment passed by that Court.

In special appeal, it is contended that the decision of the Judge as to the evidence is not an independent judgment; and that where the Judge does express an opinion of his own, that opinion is in favor of the plaintiff. We are, therefore, urged to remand this case to the Zillah Judge in order that he might record a more distinct opinion than he has hitherto done.

It appears to us that the view taken in this case by the Zillah Judge, though not perhaps very forcibly expressed, is one which this Court is constantly obliged to take in cases which come before it in appeal, *viz.*, that upon a general view of the case we think that if we had tried the case originally, we perhaps might have come to a different conclusion to that arrived at by the Court below; but such impression is not founded upon grounds so conclusive as to justify us in setting aside an opinion formed by a Court which heard the evidence and had the witnesses before it.

We were invited by the special appellant's pleader to express an opinion as to whether the discrepancies referred to by the Court below were such as to invalidate the testimony of the witnesses; but that is a proceeding which we must decline to take. The credibility of witnesses is a matter altogether for the Court of first instance and the Court which hears a regular appeal; and if these Courts are satisfied, and especially when they are concurrently satisfied, that the witnesses are not to be believed, it is impossible for us upon the grounds suggested to set aside their decision upon the question of fact.

We think, therefore, that this special appeal must be dismissed with costs.

The 11th November 1868.

Present:

The Hon'ble L. S. Jackson and Dwarkanath Mitter, *Judges.*

Reviews—Absence of plaintiff—Execution.

Case No. 1081 of 1868.

Special Appeal from a decision passed by the Officiating Judge of Midnapore, dated the 15th January 1868, reversing a decision of the Principal Sudder Ameen of that District, dated the 27th March 1867.

Rajeeb Lochun Sawunt (Defendant),

Appellant,

versus

Mohessuree Dossee and others (Plaintiffs),

Respondents.

Baboos Mohendro Lall Shome and *Bhowanee Churn Dutt* for Appellant.

Baboo Ashootosh Dhur for Respondents.

A suit to set aside an execution-sale of the right, title, and interest of a judgment-debtor in certain property having been decreed by the Court of first instance, and the decree affirmed in appeal, the Lower Appellate Court, on the application of one of the decree-holders, reviewed its own judgment, and ordered the suit to be dismissed.

HELD that the circumstance of the review having been heard in the absence of the plaintiff (though in the presence of all the other parties), was not an irregularity of which defendant was entitled to complain.

HELD (differing from a previous decision, I. Weekly Reporter, p. 55), that there is no authority of law for setting aside an execution-sale of immoveable property on the ground that the party whose right, title, and interest were sold, had no interest at all, or had less interest than was supposed.

Jackson, J.—THE present special appeal arises out of a sale in execution of a decree of the rights and interests of one Radha Mohun Doss, the judgment-debtor, at the suit of Ramanath Rukheet.

The present special appellant purchased these rights, supposing them to comprise an 8-annas share of the property in dispute.

The plaintiff Mohessuree Dossee and another party brought a suit in the Court of the Principal Sudder Ameen to set aside the sale on the ground that the right and interest of the judgment-debtor was not what it had been alleged to be.

The purchaser (the special appellant) and the decree-holder were both parties to this suit; and in their presence, on trial, the Principal Sudder Ameen decreed that the sale should be set aside and the purchaser should receive back his purchase-money. This decision was affirmed on appeal by the Zillah Judge.

But on the application of one of the decree-holders, the judgment on appeal was reviewed by the Judge in the absence, it is alleged, of the plaintiff, but at any rate in the presence of all the other parties. And the Judge finally determined that the sale should not be set aside; and he ordered the suit to be dismissed with costs The purchaser, who, by this decision of the Judge, has lost the advantage which he had at first obtained, seeks to avail himself of the alleged irregularity of the Judge in hearing the review in the absence of the plaintiff in order to have the Judge's decision set aside; and he contends that he is entitled to an annulment of the sale and to the recovery of his purchase-money.

It appears to us that the omission, if any, of hearing the review in the presence of the plaintiff, is not an irregularity of which the special appellant is entitled to complain. He was himself present, and suffered no injury whatever by the absence of the plaintiff.

It appears to us quite clear that, under the circumstances of the case, the sale could not be set aside. Section 258 provides for the refund of the purchase-money when a sale of immoveable property has been set aside under circumstances which, under the provisions of the Procedure Code, authorize such a proceeding; but we are not aware of any authority of law for setting aside a sale on the ground that the party whose right, title, and interest were sold, had no interest at all, or had a less interest than was supposed.

We are referred to a decision in the Weekly Reporter, Volume I., page 55, in which a different doctrine has no doubt been held; and if it were necessary, we should have been obliged to refer the question to the decision of a Full Bench. But such reference is not necessary in the present case. It is sufficient to say that whereas in the case referred to, the sale had been, rightly or wrongly, set aside, and it was held that, in consequence, the purchaser was entitled to a refund of his purchase-money; in this case on the contrary the sale has not been, and in our opinion could not be, set aside. Consequently, the purchaser is not entitled, under Section 258, to a refund.

The special appeal must, therefore, be dismissed.

The 12th November 1868.

Present:

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble Dwarkanath Mitter, *Judge*.

Corporations—Sections 26 and 63, Act VIII., 1859.

Case No. 39 of 1868.

Regular Appeal from a decision passed by the Judge of Beerbhoom, dated the 3rd December 1867.

Ram Dass Sein (Plaintiff), *Appellant*,

versus

Mr. Cecil Stephenson and another (Defendants), *Respondents*.

Baboos Ashootosh Chatterjee and *Romanath Bose* for Appellant.

Baboos Juggadanund Mookerjee and *Bhowanee Churn Dutt* for Respondents.

A corporation must sue and be sued in its corporate name.

Peacock, C. J.—IN this case, Mr. Cecil Stephenson, described as Deputy Agent of the East India Railway Company, and Mr. W. B. Latimer, described as District Engineer of the Districts of Rajmehal and Beerbhoom, are made joint defendants. There is no cause of action against them or either of them. The cause of action, if any, in this case, is against the East India Railway Company. It is un-

necessary for us to enter into the question whether the plaintiff has any valid cause of action against the East India Railway Company or not, because they have not been made defendants in the suit.

It is a clear rule of law that a corporation must sue and be sued in its corporate name. Section 26 of Act VIII. of 1859 points out how a corporation is to be described in the plaint, and Section 63 points out how process is to be served on a corporation.

As regards the Government, it is clear, according to the appellant's own showing, that there was no cause of action against them.

The appeal is dismissed with costs.

The 12th November 1868.

Present:

The Hon'ble L. S. Jackson and F. A. Glover, *Judges.*

Leases—Sub-leases—Right of action.

Case No. 1526 of 1868.

Special Appeal from a decision passed by the Judge of Bhaugulpore, dated the 11th March 1868, reversing a decision of the Principal Sudder Ameen of that District, dated the 9th June 1867.

Bejoy Gobind Singh (Plaintiff), *Appellant,*

versus

Sunkur Dutt Singh (Defendant), *Respondent.*

Mr. R. Twidale for Appellant.

Mr. R. T. Allan and *Baboo Hem Chunder Banerjee* for Respondent.

Plaintiff took a sub-lease of land from a party who was lessee under the proprietor, but who, without ever receiving possession, surrendered his rights under his lease by a deed of *estafa* executed subsequently to the sub-lease.

HELD that plaintiff had no right of action against the proprietor.

Jackson, J.—THE plaintiff in the case took a sub-lease of land from a party who was lessee under the proprietor. The sub-lease, however, had never been acted upon, the lessee not having received possession, and he had, in fact, surrendered all his rights under that lease by a deed of *estafa*, executed however, it is alleged, subsequently to the plaintiff's sub-lease. The plaintiff now sues, not his own lessor, but the proprietor, to obtain possession of the land. The suit has been dismissed by the Lower Appellate Court on the ground that an altogether different lease appears to have been granted to a fourth party who intervened in these proceedings. And the special appeal proceeds on the ground that the Court below had not before it legal evidence of that other sub-lease. It seems to me, however, that the special appellant cannot succeed in this case, simply on the ground that he has no right of action at all against the proprietor with whom he had no contract, and who, moreover, is not bound to look beyond his own lessee. That lessee has given up his own rights, and if he has done so to the detriment of the present plaintiff, and has thereby failed in carrying out the contract, it is to him, and not to the proprietor, the plaintiff must look.

I think, therefore, that the suit ought to have been dismissed. The special appeal must be dismissed with costs.

Glover, J.—I am of the same opinion.

The 12th November 1868.

Present:

The Hon'ble H. V. Bayley and A. G. Macpherson, *Judges.*

Mortgage—Redemption—Accounts.

Case No. 496 of 1868.

Special Appeal from a decision passed by the Additional Judge of Jessore, dated the 13th December 1867, reversing a decision of the Moonsiff of that District, dated the 19th January 1867.

Doorga Debee, mother and guardian of Ram Doss, and others (Plaintiffs), *Appellants,*

versus

Issur Chunder Chatterjee and others (Defendants), *Respondents.*

Baboo Motee Lall Mookerjee for Appellants.

Baboo Bhugobutty Churn Ghose for Respondents.

In a redemption suit under the old law for the possession of land the subject of an usufructuary mortgage, the plaintiff is entitled to an account, even though the terms of the original agreement exempt the defendant from his liability to an account, and although the principal sum advanced is very small.

Macpherson, J.—THE judgment of the Lower Appellate Court is wrong, and must be reversed as regards the land from which Juggut Chunder's aunt got her maintenance, and of which the first Court declared the plaintiff to be entitled to one-third; and the judgment of the first Court is restored and affirmed.

As regards the rest of the subject-matter of the suit, it appears to us that as the transaction

was of the nature of an usufructuary mortgage, the plaintiff, who substantially sues to redeem, is, the case being one under the old law, entitled to an account from the defendant, however much it may be contended that the terms of the original agreement exempt the defendant from his liability to account. The principal sum advanced was only 20 rupees; but however trifling the amount may be, the plaintiff is entitled to an account of the usufruct of the land which has been held by the mortgagee. If it appears on taking the account, that in reality the mortgagee has realized morethan the principal sum with interest at 12 per cent., the plaintiff is entitled to a decree. If, on the other hand, it appears that the mortgagee has not realized the whole debt with principal and interest, the plaintiff's suit will be dismissed.

The case is remanded in order that an account may be taken in the mode in which accounts between mortgagors and mortgagees are usually taken; and the case is to be again decided with reference to the above observations.

The 12th November 1868.

Present:

The Hon'ble F. B. Kemp and E. Jackson, *Judges.*

Kists of revenue—Government rule—Instalment of rent.

Case No. 1353 of 1868.

Special Appeal from a decision passed by the Judge of Tirhoot, dated the 27th February 1868, affirming a decision of the Assistant Collector of that District, dated the 9th July 1867.

Gridharee Singh (one of the Defendants), *Appellant,*

versus

The Court of Wards (Plaintiff), *Respondent.*

Mr. R. E. Twidale for Appellant.

Baboo Juggadanund Mookerjee for Respondent.

In a suit by the Court of Wards on the part of the Durbhunga Rajah for unpaid instalments of rent, where the agreement under which the defendant held his zemindary was, that he should pay his Government revenue into the Collectorate through the Rajah:

HELD that the rule which prevailed in that part of the country amongst ordinary tenants of paying rent month by month, was not applicable to defendant, and that the instalments of rent and interest thereon were to be calculated according to the Government rules for the payment of revenue.

Jackson, J.—IN this suit, the Co Wards on the part of the Durbhunga R have sued one of the relations of the on the allegation that a certain amou rent which was due from him had not paid. They demanded also interest o unpaid instalments of rent, calculati instalments according to the custom i part of the country amongst ordinary te The kists, in fact, have been calc month by month. Both the Lower C have decreed the claim, and the ground on special appeal is that the kists o stalments should have been calculate according to the custom amongst ryot according as the kists fall due to Go ment. There is a question as to w these parties are standing strictly i position of landlord and tenant, but point is not raised. The agreement which the defendant holds his zemind that he shall pay his Government re through the Durbhunga Raj into the C torate. From this it is clear that he i liable to pay the Government revenue falls due, and that the rule which preva the payment of instalments of rent b dinary tenants in that part of the coun not at all applicable to the defendant.

Differing from the Lower Courts, we fy the orders passed by them as regar terest, and direct that in execution o decree the interest on the instalments be calculated only on such instalments due according to the Government rul the payment of Government revenue i Collectorate.

The costs of the appeal to the Judg to this Court must be paid by the Co Wards.

The 13th November 1868.

Present:

The Hon'ble Sir Barnes Peacock, *Kt., Justice,* and the Hon'ble Dwark Mitter, *Judge.*

Intervenor — Section 73, Act VIII., 1859 — homedan widow — Dower — Lien on band's property.

Case No. 368 of 1867.

Regular Appeal from a decision pass the Principal Sudder Ameen of P dated the 23rd September 1867.

h

Ahmed Hossein (Plaintiff), *Appellant*,

versus

assamut Khodeja (Defendant) and others (Intervenors), *Respondents*.

Messrs. J. W. Montriou, R. E. Twidale, and *C. Gregory* for Appellant.

Mr. G. C. Paul and *Baboos Onookool Chunder Mookerjee, Annoda Pershad Banerjee, Kishen Sukha Mookerjee, Gopal Lall Mitter*, and *Kalee Kishen Sein*, and *Moulvie Mahomed Yosoof* for Respondents.

Persons not likely to be affected by the result of a suit have no right to intervene and to be made parties to the suit.

A Mahomedan widow is entitled to a lien for whatever dower remains due to her, although there may be a dispute as to what is the amount actually due, having reference either to the amount originally fixed as dower or to the amount satisfied by payments.

An heir to a share of the estate of a deceased Mahomedan is not entitled to recover possession from the widows so long as any portion of the dower remains unsatisfied, nor can he be entitled to mesne-profits. His proper course is to bring a suit for an account of what is due as dower, and to pray that, on satisfaction of that amount, he may be put into possession of his share of the estate.

Peacock, C. J.—The plaintiff in this suit claimed to be entitled as cousin of the late Moulvie Mahomed Ibrahim to 12 annas out of the whole 16 annas of the entire estate left by the late Moulvie, and he commenced this suit against the two widows of the late Moulvie, to whom a certificate had been granted under Act XXVII. of 1860, to set aside the certificate, and to be put into possession of the said 12-annas share with mesne-profits from the date of the death of the Moulvie. In a schedule to his plaint he detailed the property which he claimed to belong to the estate.

Nusseerun and other persons, who claimed to be entitled to a portion of the property specified in the schedule, and who had not been made defendants in the suit, intervened and asked to be made defendants under Section 73 of Act VIII. of 1859.

It is clear that, if the plaintiff in the suit, which he instituted against the two widows, had recovered a decree for any portion of the property which belonged to the intervenors, and of which they are in possession, he could not have turned the intervenors out of possession under the decree, nor would the rights of the intervenors have been affected by the decree. The intervenors, therefore, were not persons likely to be affected by the result of the suit as originally framed, and they had consequently no right to intervene, and to be made parties to the suit. The Subordinate Judge, however, ordered them to be made parties, the plaintiff not having objected, and he laid down an issue as to what part of the property comprised in the schedule belonged to the estate of Mahomed Ibrahim, and what part of it belonged as of right to, and was in the exclusive possession of, the widows and of the intervening defendants, respectively. In the case of Joygobind Dass *vs.* Goureepershad Sheba and others, reported in the 7th Volume of the Weekly Reporter, page 201, and which was cited by Mr. Montriou in his argument, it was held that a person cannot be made a party to a suit under Section 73, Act VIII. of 1859, unless he is likely to be affected by the result of it. In that case, it was said that it would be most inconvenient and contrary to all principle if every person claiming a title adverse to those set up both by the plaintiff and the defendant in the suit should be allowed to intervene, and be introduced into the suit.

What the plaintiff really wanted to try in this suit was whether he was entitled to succeed to a 12-annas share of the property of the late Moulvie Mahomed Ibrahim, and to recover from the widows the possession of that portion of the property. The widows did not dispute the fact that the property mentioned in the schedule formed part of the estate of the deceased, or that they were in possession of it. The widow Khodeja, however, admitted Nusseerun's title. That admission would have been no ground for allowing the plaintiff to recover it from Nusseerun as part of the estate of Ibrahim. It is clear, therefore, to my mind that the Subordinate Judge ought not to have ordered the intervenors to be made parties to the suit.

Another of the issues raised by the Subordinate Judge was whether, according to the Mahomedan law, the plaintiff was entitled by right of inheritance to 12 annas out of the whole estate of Mahomed Ibrahim, or whether the widows of the said Mahomed Ibrahim on account of dower due to them were entitled to retain possession of the whole estate.

The cases which were cited in argument (special appeal decided on 6th of February

1863 before the 1st Bench, * which is not printed, and the case of Mussamut Janee Khanum against Mussamut Amatool Fatima Khanum, 8 W. R., page 51) held that the widow of a Mahomedan in possession of her husband's estate under a claim of dower has a lien upon it as against those entitled as heirs, and is entitled to possession as against them till her claim to dower is satisfied. The same point was held as regards the Sheea sect by the Privy Council in the case of Ameeroonnissa and others *versus* Mooradoonnissa and others, 6 Moore's Indian Appeals, page 211.

One of the widows, defendants in this suit, Mussamut Amatool Fatima, entered into a compromise with the plaintiff which has been carried into effect by the decree of the Subordinate Judge. The other defendant, Mussamut Khodeja, defended the suit, and, according to the decisions to which I have already referred, I think that she was entitled to a lien upon her husband's estate for the amount of any dower which remained due to her.

The predecessor of the Subordinate Judge who decided this suit laid down an issue as to what was the amount of the dower of the widows; but the Subordinate Judge, Syud Saadut Hossein, by whom this case was decided, subsequently struck out that issue, upon the ground, as I understand, that it was not material to determine what was the amount due on account of dower; and that the material question was whether the widows were entitled to a lien for dower. It was admitted by the parties that some amount of dower was due. Assuming, then, that the plaintiff, as the heir of the deceased Moulvie, was entitled to a 12-annas share of the whole of his estate, he was not, according to the decisions to which I have referred, entitled to recover possession of that estate from the widows so long as any portion of the dower remained unsatisfied, nor could he be entitled to mesne-profits.

I do not concur with the learned Counsel, Mr. Montriou, that, as a matter, of law, a lien cannot be maintained for an amount which is not ascertained. A person may have a lien, as well as be entitled to a mortgage, for a sum the amount of which is not ascertained. If a person were to create a lien for a sum of money advanced, the lien would remain good until the amount should be paid; and the lien would continue so long as any part remained unpaid, although the parties might dispute as to the precise amount, which remained due. So, a widow is entitled to a lien for whatever dower remains due to her, although there may be a dispute as to what is the amount actually due, having reference either to the amount originally fixed as

---

* The 6th February 1863.

Present:

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice,* and the Hon'ble F. B. Kemp, *Judge.*

Case No. 1523 of 1862 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of Patna, dated the 17th May 1862, reversing a decision of the Principal Sudder Ameen of that District, dated the 15th April 1867.

Syud Atahur Ali (Plaintiff), *Appellant,*

versus

Altaf Fatima and others (Defendants), *Respondents.*

Mr. R. T. Allan and *Baboo Kishen Succa Mookerjee* for Appellant.

Moonshee Ameer Ali and *Baboo Unnoda Pershad Banerjee* for Respondents.

Peacock, C.J.—In this case, the plaintiff sues to recover possession of a share of his son's estate as one of his heirs at-law. The son's widow, who is one of the defendants, claims to retain the estate until her dower is satisfied. The plaintiff admitted before the Judge that dower to the extent of 15,000 rupees and 1 gold mohur was assigned by his son to the defendant upon her marriage, but said that, at the time of her husband's death, she gave up her dower looking to her future welfare, and that it was customary for Mahomedan ladies to give up their dower when their husbands were dying. The Judge disbelieved the story that the lady had given up her dower, and dismissed the plaintiff's claim on the ground that the widow's claim to dower preceded all claims to inheritance.

We think that the Judge was right in law, and that the plaintiff could not sue to recover the estate until the dower was satisfied. In Macnaghten's Precedents of Mahomedan Law, page 356, Case 10, the following question and answer is given: –

Question.—"A man dies, being indebted to his wife "for her dower; has she a lien on the personal property left by her husband in satisfaction of such "dower, in preference to the other heirs?

Answer.—"If the other heirs pay the widow the "amount of her dower, she has no claim on the property "left by her husband, except for her legal share of the "inheritance; and, if they do not pay her the amount "of her dower, she has, in the first instance, a prior "claim on account of her dower on the property left "by her husband, whether real or personal. The residue, after her claim of dower is satisfied, will be divided between her and the other heirs, according to "their respective shares of inheritance."

We are now asked to remit the case to the Court below, to find what amount is due for dower, and to decree that, upon payment of that sum, the plaintiff shall be put into possession of his share. But the plaintiff has misconceived his remedy, and brought a wrong form of action, and endeavoured to support it by giving evidence which, assuming, as we must, that the Judge was right in his decision upon the facts, must have been false. If we had the power, which we have not, we should not be inclined to assist the plaintiff under those circumstances, but should leave him to his strict rights. This appeal must be dismissed with costs and interest, and the plaintiff left to commence such other suit (if any) as he may be advised.

dower or to the amount satisfied by payments. Some amount being admittedly due on account of dower, the plaintiff's suit in this case was misconceived; and instead of bringing a suit to turn the widow out of possession so long as she had a lien upon the estate for her dower, he ought to have brought a suit for an account of what was due to the defendant for dower, and prayed that upon satisfaction of that amount he might be put into possession of his share of the inheritance. That is substantially what was decided by the Privy Council in the case of Ameeroonnissa to which I have referred.

That was a suit instituted by Syud Abdoollah, the ancestor of the appellant, in which he claimed as the full brother and heir-at-law of Syud Moostefah, and sought to recover very considerable real as well as personal estate belonging to his deceased brother Syud Moostefah, with mesne-profits. The respondent Mooradoonnissa was in possession, and she claimed a lien upon the same as the widow of the deceased, under a deed of dower executed by Syud Moostefah in her favor to the amount of Rs. 64,000.

The Lords of the Judicial Committee in delivering their judgment, say: "Lastly, there "remains the question of the distribution "and administration of the deceased's estate. "No such relief is asked by the plaint. The "claim made by the plaintiff is as sole heir "against the defendants, charging them with "collusion in keeping him out of possession. "He does not claim in the alternative, that if "the marriage of the respondent Mooradoon-"nissa and the deed of dower are proved, then "that he may have his share of the estate. It is "possible it might have been competent to the "Court below in their discretion to have en-"tertained such a question, but it was a matter "of discretion for the Judges of the Sudder "Dewanny Adawlut. Independently of this, "Mooradoonnissa was in possession by the "consent of the local authorities, a possession "very analogous to that of a testatrix here. "That fact, however, is not sufficient to decide "the point of right, but the plaintiff has not "asked for an account. Again, he has bur-"thened the record with a number of unne-"cessary parties who ought not to have been "there, and that would have created very "considerable inconvenience in taking ac-"counts. He has also excluded all the move-"able estate and that portion of the immove-"able estate of which he himself obtained "possession. We are of opinion, therefore, "that the Judges before whom the case has "been heard in India took the right and con-"venient course in dismissing his suit and "leaving him to bring another suit to obtain "an account; that, no doubt, was the effect of "their decision, though not in terms."

It appears to me that according to the principle of that decision, this suit which seeks to obtain possession and mesne-profits before payment of the dower, ought to be dismissed, and that the plaintiff ought to have sued for an account of the dower due to the widow, and to be let into possession upon payment of that amount.

Having decided in favor of the defendant's claim of lien for dower which disposes of the plaintiff's suit, it is unnecessary for us to enter into the question of heirship or any of the other questions raised between the plaintiff and the defendant Khodeja, or to determine what part, if any, of the property mentioned in the schedule belonged to Khodeja in her own right or formed part of the estate of her late husband. Whether it was her own private property or formed part of the estate of her husband, is wholly immaterial for the determination of this suit; for whether it is the one or the other, the plaintiff is not entitled to recover possession and mesne-profits so long as any portion of the dower is due.

It is unnecessary for us, therefore, to enter into the questions raised in the cross-appeal or into the questions which have been raised between the plaintiff and the intervenors. The latter ought never to have been made parties to this suit. No decision of ours in this suit could be binding upon the widow Khodeja with reference to the question as to whether any portion of the property mentioned in the plaint belonged to her husband's estate or to the intervenors.

We are of opinion that the decision of the Subordinate Judge as regards the widow Khodeja's lien on the estate for her unpaid dower ought to be affirmed, and the plaintiff's suit dismissed as regards Khodeja with costs in the Lower Court. With regard to the intervening defendants, they were volunteers: they asked to be made parties to the suit, and the costs they have incurred have been brought upon them solely by their own act of petitioning to be made parties to the suit. We think that the suit as against them ought to be dismissed without costs, and the decree of the Subordinate Judge awarding costs to them reversed. The decision of the Subordinate Judge as to their rights in the property will then fall to the ground and cease to have any effect.

The decree as to the other widow will stand, there being no appeal here with regard to it. The appellant will pay the costs of this appeal as regards Khodeja, but not those of the other respondents.

The 13th November 1868.

Present:

The Hon'ble H. V. Bayley and A. G. Macpherson, *Judges.*

Fraud on a minor—Party exposing it—Locus standi.

Case No. 326 of 1868.

Miscellaneous Appeal from an order passed by the Judge of East Burdwan, dated the 26th June 1868.

Hossein Ali Khan, *Appellant,*

versus

Syud Burkut Ali, *Respondent.*

Baboos Chunder Madhub Ghose and *Mohendronath Mitter* for Appellant.

Baboos Hem Chunder Banerjee and *Nil Madhub Sein* for Respondent.

Where a gross fraud is being practised on a Court with the object of evading an order which the Court has made directing a minor's guardians to account, any person who appears before the Court and exposes the fraud, undertaking also to prove it, has a *locus standi* in Court, and has a right to be heard.

Macpherson, J.—We have heard all the evidence taken in this case, and have considered the position in which the parties were when before the Judge. It appears to me we should do wrong if we were to interfere with the decision of the Judge. The question before us now is not whether the Judge was right in making the order of the 11th March last that the guardians should render accounts. The only question before us is a perfectly different one, *viz.*, whether or not on the 20th April, the alleged minor had attained his majority. The Judge having on the 11th March ordered the guardians to file full accounts before the 13th June, the alleged minor and the guardians respectively appeared by petitions on the 20th April, and stated that the minor having attained his full age, the guardians had accounted to him to his entire satisfaction, and they prayed that the guardians might be discharged from their guardianship. Thereupon, it was suggested to the Court by the respondent Burkut Ali that the application was collusive, that the minor had not in fact attained his full age, and that the object of the guardians was merely to avoid rendering the accounts which the Judge had on the 11th March ordered them to render. The issue as to whether the minor was, or was not, of full age was thus raised, and the Judge deputed the Subordinate Judge to enquire and take evidence as to it, and the latter officer having taken evidence, arrived at the conclusion that the minor had not attained his full age, at which conclusion the Judge himself also arrived.

It is contended before us in the *first* place that the respondent Burkut Ali had no right to appear before the Court in the matter at all, and in the *second* place, on the evidence, that the Judge was wrong in finding that the minor had not attained his full age. It appears to me that Burkut Ali was rightly allowed to appear before the Court, and call the Court's attention to that which he subsequently proved to be the fact—that the statement of the guardians and the minor that the latter had attained his full age, was not true. It appears to me that the fact of Burkut Ali having no very special connection with the minor, in no way prevented his acting on this application as he has done, whether he be called a next friend or a well-wisher of the minor or by whatever other appellation he may be designated. I am aware that in a previous matter pending against the guardians, another Division Bench of this Court was of opinion that, under the circumstances, it did not appear proper that Burkut Ali should be allowed to drive the guardians to an account. That decision may have been, and no doubt was, perfectly right; but it in no degree decides, or leads me to conclude, that there is any thing irregular or improper in the interference of Burkut Ali in the present instance.

If a gross fraud was being practised on the Court in the matter of a minor, and if the object of that fraud was to evade an order which the Court had made directing the minor's guardians to account, I think that *any* person who appeared before the Court and exposed the fraud and undertook to prove it, had a *locus standi* in Court and had a right to be heard.

* * * * * * *

Bayley, J.—Concurred.

The 16th November 1868.

Present:

The Hon'ble J. B. Phear and C. Hobhouse, *Judges.*

Withdrawal of claim—Jurisdiction—Costs.

Case No. 1542 of 1868 under Act X. of 1859.

Special Appeal from a decision passed by the Officiating Judge of Backergunge, dated the 13th March 1868, affirming a decision of the Deputy Collector of Dowlutkhan, dated the 25th May 1867.

Ram Churn Bysack and another (Plaintiffs), *Appellants,*

versus

Mrs. Ripsimah Harmi and others (Defendants), *Respondents.*

Baboos Onookool Chunder Mookerjee and *Chunder Madhub Ghose* for Appellants.

Baboos Kalee Mohun Doss and *Hem Chunder Banerjee* for Respondents.

A plaintiff is free at any moment from the time of instituting his suit until that of the decree being made which judicially determines the merits of his claim, to withdraw that claim, and to say that he no longer desires a decision, and his doing so deprives the Court of authority to entertain the claim. It should then confine itself to the question of costs.

Phear, J.—In this case the plaintiffs are the special appellants. It seems that they sued the defendants in the Collector's Court to recover from them certain alleged arrears of rent. On the day appointed for trial, the plaintiffs' mookhtear applied to the Court for permission to withdraw the suit. The Deputy Collector refused to grant this application, considering that he had no power to do so; and as the plaintiffs declined to offer any evidence, he proceeded with the trial by taking the testimony of the principal defendant. The record, indeed, discloses reason for supposing that the plaintiffs were not present either in person or by attorney when the case was called on, and that the Deputy Collector consequently, dealing with it as if it were properly governed by Section 55 of Act X. of 1859, was actually engaged in taking the deposition of the defendant, when the plaintiffs' mookhtear came in to make the application which we have mentioned. Be this, however, as it may, the Deputy Collector, after refusing his permission for the withdrawal of the suit, eventually ordered "that "agreeably to the admission of the defendant "an amended decree be passed in favor of "the plaintiffs in an *ex-parte* manner for the "original rent of 21 rupees 5 annas 7 pie 10 "krants without costs or interest." Against this decree the plaintiffs appealed, and the Judge dismissed the appeal.

On the facts which we have set out, it appears to us that both the Lower Courts came to conclusions which were erroneous in law. The claim which the plaintiff in any suit makes against the defendant, together with the collateral question as to the liability to pay the costs of the litigation, constitutes generally the whole matter which the Court has to determine by its decision. If the claim be withdrawn, of course nothing but the question of costs remains. Now, the preferring of the claim is clearly a voluntary act on the part of the plaintiff; he need not put it forward unless he likes. But, having put it forward, and having once asked the Court to decide upon it as between himself and the defendant, must he persist in it until a judicial decision is arrived at, even though he himself sees that it is not maintainable, or for any other reason is desirous of giving it up? It is argued very forcibly on the part of the respondents that at any rate if the plaintiff has persisted in his claim up till the day of trial, the interests of justice require that he should not be allowed at that late hour, after having perhaps harassed his adversary to the utmost, to evade a final decision by withdrawing his claim. We do not think, however, that considerations of this kind alone, in the absence of legislative enactment, afford the defendant any equitable right to have as against the plaintiff a control over the suit. He can only look to an award of costs in his favor for compensation in respect of the charges which he has been at. It seems to us that, except so far as any act of legislature rules to the contrary, a plaintiff is by the nature of the case free at any moment from the time of instituting his suit until that of the decree being made, which judicially determines the merits of his claim, to withdraw that claim from the consideration of the Court, and to say that he no longer desires to ask for any decision upon it. And we think that in the event of his doing so, whether the defendant consents thereto or not, the Court is immediately deprived of authority further to entertain the claim, and should then confine itself solely to the question of costs.

Mahomedan gentleman, found the will to be not *bonâ fide*. The Principal Sudder Ameen, a Hindoo gentleman, found that it was *bonâ fide*, and dismissed the plaintiffs' suit in both cases.

In special appeal, the argument of Mr. Twidale, pleader for the special appellant, is, first, that the Court below ought not to have allowed the son to intervene, nor to have tried the question of the *bona fides* or otherwise of the will, but to have decided the case as between the vendees and vendors; that, if it were necessary to decide upon the will, the validity as well as the *bona fides* of the will ought to have been tried; and on this point the pleader contends, and in support of his contention quotes from the Hedaya and Macnaghten's Mahomedan Law, to the effect that a bequest by a Mahomedan of one-third of his estate, without the consent of the heirs, is wholly invalid. The pleader further contends that there has been no finding by the Principal Sudder Ameen, even granting that the will was *bonâ fide*, whether the plaintiff's vendors, the daughters of Shamshere Ali, the testator, had any share in the residue of the property which remained over, after providing for the endowment, and which passed under the deed of sale to his client.

I do not think that the Principal Sudder Ameen was wrong in allowing the son to intervene in this case, for a simple decree as between the vendors and vendees, without going into the question of the will, would have been wholly infructuous, even if obtained by Mr. Twidale's client, and would inevitably have brought about further litigation; but I think that, as the vendors had, under the ordinary rules of succession, laid down in the Mahomedan law the right to inherit a share in the testator's estate, the plaintiffs were fully justified in suing simply to have their right under the purchase established; but as the will has been put in issue, I think that the Principal Sudder Ameen should have found whether the plaintiff's vendors were consenting parties to this will, for, unless they were consenting parties, the will would, under the Mahomedan law, be invalid; and even if it be found that the vendors were consenting parties, there still remains the question to be decided whether the share in the properties which passed under these bills of sale formed any portion, and what portion of the residue of the estate of Shamshere Ali which remained to be divided against his heirs, including the vendors, according to the rules of succession laid down in the Mahomedan law.

I, therefore, remand the case for the Principal Sudder Ameen to re-try the suit with reference to the remarks contained in this order of remand.

Jackson, J.—I concur in the remand. The point for decision upon which my learned colleague would remand this case is one which arises out of the litigation in the suit, though it does not appear to have been previously raised in the Courts. The remand will bar further litigation.

The 18th November 1868.

Present:

The Hon'ble F. B. Kemp and E. Jackson, *Judges.*

Agency—Credit.

Case No. 686 of 1868.

Special Appeal from a decision passed by the Judge of Tirhoot, dated the 23rd December 1867, affirming a decision of the Principal Sudder Ameen of that District, dated the 31st May 1867.

Beebee Misrain (Defendant), *Appellant,*

versus

Gopal Lall Doss (Plaintiff), *Respondent.*

Mr. C. Gregory for Appellant.

Mr. R. T. Allan and *Baboo Onookool Chunder Mookerjee* for Respondent.

A native lady, possessing an estate in a district in which she did not reside, opened an account with a banker, through her son as her agent, to provide for the punctual payment of Government revenue, and to meet current expenses.

HELD that such a course of dealing did not of itself warrant the banker in advancing to the son as the accredited agent of his mother large sums of money on bonds.

Jackson, J.—THIS was a suit preferred by Baboo Gopal Doss, a banker in the town of Mozuffurpore, against Beebee Misrain for a sum of money alleged to be due on an account stated. The defendant admitted the greater portion of the account, but denied that certain sums which it was stated had been advanced to the defendant's son upon bonds and rokahs were authorized by her, or were chargeable against her account.

Both Courts have decreed the whole claim, including these disputed items, against the defendant. The Judge states that the defendant admits the plaintiff's "*khata-buhee*" to be correct, admits that her son Wali Alum managed her business, and admits that she had a "*chita-buhee*" or pass book in which all sums taken on her account were entered, and failed to produce that book when called

upon to do so; and that these circumstances evidently prove the justness of the plaintiff's demand, and accordingly decrees his suit. The special appeal is on the point that these facts do not prove that her son had authority to draw large sums of money—one of the amount of 3,000 rupees, another of the amount of 800 rupees—from her account so as to make her liable.

This appeal is also on the point that the defendant was unable to produce his pass-book, and alleged that it was in the hands of her son, and that the plaintiff had not taken steps to enforce its delivery by the son. We are of opinion that the facts found by the Judge do not warrant the decision at which he has arrived. It does not follow that, even if the defendant's son was acting as her man of business, and was in the habit of drawing small sums for current expenses, that such a course of dealing would, of itself, authorize the plaintiff, a banker, to advance him such a sum as 3,000 rupees on a bond, and still less that he should be in the habit of habitually advancing large sums of money on bonds.

Then, there does not appear to have been any evidence filed in this case to prove the authority under which the plaintiff acted in advancing these large sums. The defendant called upon the plaintiff to appear in Court, and to state the circumstances under which he advanced these sums of money, and to state whether he advanced them to the son for the son on his own account, or to the son on his mother's account. The very circumstance that they were advanced on bonds lends some weight to the fact that they were advanced on account of the mother. The banker should, under the circumstances, be called on to depose to the circumstances under which these items or sums of money were advanced. The statement of the mother is that the son had been drawing these sums without authority, and the banker who had been advancing them to the son, being unable to realize them from him, charged them against her account. The statement of the banker is that the mother and son are colluding to defraud him. It is for the Court to decide which story is the true one, but it is impossible to arrive at the truth without some evidence of the facts connected with these transactions. As regards the pass-book, the plaintiff apparently admits that it is in the son's possession, and calls upon the son to produce that document. It is the conduct of the son in this case which is impugned, and whether his keeping back the book is in collusion with the mother, or in collusion with the banker, is by no means certain; and it is not right that the conduct of the son should be at once taken against the mother, when her own objection is that the son has been acting against her interests.

It is quite possible that the son may be keeping back the book in order to escape the payment of the debt himself, and to throw it upon his mother. I give no opinion upon the facts, but I think that the evidence adduced before the Lower Courts was not sufficient to decide the point at issue, and that the admissions made by the defendant were not sufficient to prove that this money was taken on her account, and was paid on sufficient authority, and was due from her.

I would, therefore, remand this case to the Judge with directions that he will call upon the plaintiff, or his gomashtah, or any one acquainted with these transactions, to give full particulars regarding them, and to state the authority under which they advanced such sums to the defendant's son, and after taking any further evidence that the parties may wish to give in the case, more especially with reference to the enforcement of the production of this pass-book, will again decide this case.

Kemp, J.—I concur in remanding this case, but wish to add a few words with reference to the arguments of Mr. Allan, the pleader for the special respondent.

As I understand the pleader's argument, it is this, that because the lady, the defendant, admits certain items in the account-book, which items were drawn out of the firm by her through her mooktear or son Wali Alum, that therefore Wali Alum became the accredited agent of his mother, and the plaintiff, the mahajun, in treating him as such, was justified in advancing these large sums of money which are not claimed, and that his mother, the defendant, is liable.

I cannot assent to this proposition of law. The account was opened in the name of the mother. It appears that the mother possessed an estate in the Mozuffurpore district, residing herself in the Patna district. The object of opening an account and making a deposit was to provide for the punctual payment of the Government revenue. Some items which are admitted by the lady, the defendant, are payments on that account, that is to say, on account of payments of Government revenue; some items are for some minor expenses, and, as before mentioned, and as would be natural, the lady herself being a secluded female, these payments were made through the agency of the son, or "Marfut" the son, or through the agency of her mooktear; but when we come

to an advance of 3,000 rupees on one occasion and of 800 rupees on another occasion, to the son upon bonds, and apparently in excess of the amount to the credit of the lady-defendant, it becomes necessary to inquire whether there is evidence that the plaintiff did not know, or could not be reasonably expected to know, that he was not advancing these large sums to Wali Alum as the agent of the mother, but on his own account. This point in the case has been entirely overlooked by the Courts below.

A further enquiry on the suggestions thrown out by Mr. Justice E. Jackson in his judgment will doubtless lead to a proper decision on the merits of the case. I, therefore, entirely concur in remanding the case.

The 18th November 1868.

Present:

The Hon'ble J. B. Phear and C. Hobhouse,

Judges.

Remand—Additional evidence—Section 351, Act VIII. of 1859.

Case No. 1269 of 1868.

Special Appeal from a decision passed by the Second Principal Sudder Ameen of the 24-Pergunnahs, dated the 31st March 1868, reversing a decision of the Moonsiff of Manicktollah, dated the 10th September 1867.

Joog Maya Debia (one of the Defendants),

Appellant,

versus

Ram Chunder Chatterjee (Plaintiff),

Respondent.

Baboos Romesh Chunder Mitter and *Annund Chunder Ghossal* for Appellant.

Baboo Kalee Mohun Doss for Respondent.

An Appellate Court ought not to receive and consider additional evidence which was not before the Court of first instance, without special reason for doing so, which reason it is bound, by the provisions of Act VIII. of 1859, to record.

An Appellate Court is not justified in sending back a case for re-trial under Section 351 of the Code of Civil Procedure, merely because the Lower Court has disposed of it upon a preliminary point, unless such point has been so disposed of as to exclude evidence of fact which appears to the Appellate Court essential to the rights of the parties.

Phear, J.—The Appeal Court ought not to receive and take into consideration evidence which was not before the Court of first instance without special reasons for so doing. And if a special reason does exist such as to induce the Court to take additional evidence, it is bound by the provisions of Act VIII. of 1859 to record that reason. In this case, the Subordinate Judge has in his judgment expressly stated that an exhibit filed by the appellant with his grounds of appeal, and also four cases of foreclosure sent for by himself, did form part of the materials upon which he had arrived at a conclusion of fact different from that which the Court of first instance had formed. We think that this circumstance invalidates the judgment of the Lower Appellate Court, and that consequently it must be reversed.

We think it right also to add that it appears to us that neither the exhibit filed by the appellant, nor the four other cases of foreclosure which were sent for by the Judge, even had they been rightly upon the record, were proper evidence on the matters in issue between the parties.

It further seems to us that, even had the conclusion of the Lower Appellate Court been founded upon legal evidence, the course taken by that Court in remanding the case was not a correct one. The Subordinate Judge says that he "remands the case because the Lower "Court had disposed of it upon a preliminary "point." That alone is not sufficient to justify him in sending back the case for re-trial under the provisions of Section 351. It is only when the Lower Court has so disposed of a preliminary point as to exclude evidence of fact which appears to the Appellate Court essential to the rights of the parties that he has authority to do so. As far as we can gather from the record and from the pleaders who have appeared before us, there was no such defect of evidence as Section 351 refers to. The Court of first instance did not apparently stop the trial midway, and decide the case upon a preliminary point. It seems that the parties were allowed to adduce evidence upon all the issues in the case, and it was only after all the evidence had been taken which the parties offered that the Court of first instance came to the judgment which the Lower Appellate Court reversed. If this be a correct view of what took place in the Court of first instance, we think that the duty of the Lower Appellate Court, upon reversing the decision of the Court of first instance, was itself to try the whole case upon its merits.

We reverse the decision of the Lower Appellate Court, and direct that Court to try the case upon the legal evidence which is on the record, excepting that which was adduced after the trial in the Court of first instance. Costs must abide the event.

b

The 18th November 1868.

Present:

The Hon'ble J. B. Phear and C. Hobhouse, *Judges.*

Mahomedan law—Pre-emption.

Case No. 1416 of 1868.

Special Appeal from a decision passed by the Principal Sudder Ameen of Sarun, dated the 13th March 1868, affirming a decision of the Moonsiff of Pursah, dated the 25th April 1867.

Rughoo Nundun Sing (Intervenor, Defendant), *Appellant,*

versus

Mujbooth Singh (Plaintiff), *Respondent.*

Baboo Romesh Chunder Mitter for Appellant.

Baboo Issur Chunder Chuckerbutty for Respondent.

A person entitled to pre-emption under the Mahomedan law has a right to take over a bargain in its entirety, but not to have it divided, and the consideration apportioned between the severed lots of the property.

Phear, J.—We think that the right of pre-emption is a right to take over the bargain which has been made. We do not think that a person claiming to be entitled to a right of pre-emption under the Mahomedan law can ask to have a bargain divided, and the consideration, which the original parties have agreed upon as an entirety, to be apportioned between the severed lots of the whole property to which it referred. This appeal must be decreed, the decrees of both the Lower Courts reversed, and the plaintiff's suit for pre-emption dismissed with costs in all the Courts.

The 18th November 1868.

Present:

The Hon'ble L. S. Jackson and Dwarkanath Mitter, *Judges.*

Limitation—Suit relative to mortgaged property—Clause 12, Section 1, Act XIV. of 1859.

Case No. 1211 of 1868.

Special Appeal from a decision passed by the Officiating Judge of Patna, dated the 18th December 1867, affirming a decision of the Principal Sudder Ameen of that District, dated the 13th February 1867.

Munnoo Lall (Plaintiff), *Appellant,*

versus

Mr. T. W. Pigue and others (Defendants), *Respondents.*

Baboo Debendro Narain Bose for Appellant.

Mr. C. Gregory and *Baboo Ashootosh Chatterjee* for Respondents.

Following a Full Bench ruling (IX. Weekly Reporter, p. 171), it was HELD that a suit for a sum of money to be recovered by the sale of mortgaged property, in which plaintiff asked for a decree to be enforced both against the person of the borrower and against the property pledged, came within the provisions of Clause 12 (not Clause 10) of Section 1, Act XIV. of 1859.

Jackson, J.—The Courts below have held that the suit was barred by limitation. It was a suit for a sum of money to be recovered by the sale of the property pledged. The date of the bond was the 11th June 1854, and the money was payable, principal and interest, within two years from that date. In this suit, which was commenced in December 1866, the plaintiff asked both for a decree to be enforced against the person of the borrower, and also for a decision that the property pledged should be sold under the terms of the bond. The Lower Court was of opinion that a suit ought to have been brought under Clause 10, Section 1 of Act XIV. of 1859. It has been held in a similar case by a Full Bench of this Court (the decision will be found in IX. Weekly Reporter, page 171) that a suit, in so far as it relates to the sale of the mortgaged property, is really a suit to enforce an interest in immoveable property, being a charge created on that property by the bond in suit, and that it comes within the provisions of Clause 12, Section 1, Act XIV. of 1859, and not within those of Clause 10.

The decision of the Lower Appellate Court is set aside, and this case will be remanded, in order that a decision may be

come to on the remaining issues; but, of course, the plaintiff's suit, in so far as he sought for a decree against the borrower personally, was properly dismissed.

The 19th November 1868.

Present:

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice*, and the Hon'ble Dwarkanath Mitter, *Judge*.

Assignment of a debt—Right of suit—Set-off.

Case No. 61 of 1868.

Regular Appeal from a decision passed by the Principal Sudder Ameen of Patna, dated the 29th August 1867.

Bhagmonee Kowar (one of the Defendants), *Appellant*,

versus

Lalla Byjnath Pershad and others (Plaintiffs), *Respondents*.

Mr. R. E. Twidale and *Moulvie Mahomed Eusuf* for Appellant.

Baboos Unnoda Pershad Banerjee and *Hem Chunder Banerjee* for Respondents.

Plaintiff purchased a debt due from defendant to a third party (*R*) against whom defendant had recovered a decree for an amount arising out of the same transaction.

HELD that the same equity and good conscience which allows plaintiff to sue defendant for the debt due to *R* entitles defendant to set off as against the plaintiff the debt which was due from *R* to her at the time of plaintiff's purchase, and of which the plaintiff had notice.

Peacock, C. J.—THE plaintiff purchased a debt due from the defendant to Ramnath, but the defendant had recovered a decree against Ramnath for a certain amount arising out of the same transaction. According to the English law, the plaintiff, as the assignee of Ramnath's interest in the debt, would have had to sue the defendant in the name of Ramnath as plaintiff. If that had been done in the present case, it is clear that the defendant might have set off the debt due from Ramnath to her. According to the equity and good conscience administered in the mofussil, the plaintiff was entitled to sue the defendant in his own name for the debt due from the defendant to Ramnath which he purchased; but the same equity and good conscience which allows the plaintiff to sue for the debt due to Ramnath entitles the defendant to set off as against the plaintiff the debt which was due from Ramnath to her at the time of the plaintiff's purchase, and of which the plaintiff had notice. Under these circumstances the defendant is entitled to set off the amount of the decree recovered by the defendant against Ramnath with interest from the date of the decree to the date of the judgment in the Lower Court in this case, that is to say, the 29th August 1867. The amount of the interest will be calculated by the officer of the Court at 12 per cent., the rate given by the decree; the principal and interest due on the decree will be deducted from the amount awarded to the plaintiff; and the decree of the Lower Court amended by giving a decree to the plaintiff for the balance.

The costs of this appeal and the costs in the Lower Court will be borne by the parties in proportion to the amounts decreed and disallowed.

The 19th November 1868.

Present:

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice*, and the Hon'ble Dwarkanath Mitter, *Judge*.

Purchase of attached property—Compulsory payment—Execution.

Case No. 67 of 1868.

Regular Appeal from a decision passed by the Principal Sudder Ameen of Patna, dated the 31st of January 1868.

Mussamut Zahoorun (Plaintiff), *Appellant*.

versus

Mr. W. Tayler, and his agent, Mr. H. Kelly, (Defendants), *Respondents*.

Messrs. R. E. Twidale and *C. Gregory* for Appellant.

Mr. G. C. Paul and *Baboo Hem Chunder Banerjee* for Respondents.

Plaintiff purchased from defendant an estate which had, before the sale, been attached under a decree held by another party against defendant, and to prevent the property which she had purchased from being sold in execution, she paid the amount of the decree and interest.

HELD that the legal maxim of *caveat emptor* was wholly inapplicable to the case; that, even if plaintiff knew of the attachment on account of defendant's debt, that fact would make no difference; and that plaintiff was entitled to recover from the defendant the amount which she had paid.

If a Judge finds he has struck off an execution-case improperly, he is at liberty to restore it to the file, and need not proceed *de novo*.

Peacock, C. J.—IT appears to me that this is a very clear case. The plaintiff seeks to recover the sum of Rs. 12,406 and 7 annas, which she paid on account of Mr. William Tayler in discharge of a decree, which Ranee Asmedh Kooer had recovered

against him. It is almost unnecessary to consider whether the plaintiff was a volunteer in paying this money, or whether she paid it under a compulsion, because it has been admitted by Mr. Paul, the learned Counsel for Mr. Tayler, that the payment was not a voluntary one.

It appears that the plaintiff purchased an estate from Mr. William Tayler for the sum of 55,000 rupees; that before the sale to the plaintiff, that estate had been attached in execution of the decree; and that the plaintiff paid the amount of the decree and interest in order to prevent the property which she had purchased from being sold in execution. It is said by Mr. Tayler that, although the property was sold for 55,000 rupees, it was worth a great deal more, and in proof of that assertion he has called a witness, who, if he is to be believed, has shown that Mr. Tayler's estimate of the value was very much under the mark, inasmuch as the estate was worth 2 lakhs. I do not believe the evidence of that witness. It is improbable that he, acting as the agent of Mr. Tayler, would have sold for 55,000 rupees a property which was worth 2 lakhs; but whether it was worth 55,000 rupees, 88,000 rupees, or 2,00,000, is wholly immaterial for the decision of this case.

By Section 235 of the Code of Civil Procedure, when property is to be attached in execution of a decree, the attachment is to be made by a written order prohibiting the defendant from alienating the property by sale, gift, or in any other way, and all persons from receiving the same by purchase, gift, or otherwise; and by Section 240 of the same Act, it is enacted that, "when any attachment shall have been made by actual seizure . . . . . , any private alienation of the property attached, whether by sale, gift, or otherwise . . . . . shall be null and void."

Mr. Tayler, therefore, must, before he sold the property, have been served with an order from the Court prohibiting him from alienating it. He must have been fully aware at the time of the sale that any sale by him would be liable to be defeated by the decree-holder.

Several witnesses have been called on the part of the defendant, and have proved that the plaintiff, at the time that she purchased the estate, was aware of the attachment. Enayut Hossein swore that he informed the husband of the plaintiff of the attachment at the time of the execution of the deed of sale. Sheikh Eusoof Hossein swore that Enayut Hossein told the husband of the plaintiff in his presence in the house of Velayut Ali Khan, where the consideration-money was paid; and yet Enayut Hossein, who was acting for Mr. Tayler in selling the property, upon cross-examination stated that he did not remember at what place he told Ahmedoollah about the lien. Ahmedoollah, on the other hand, swears that he never knew of the attachment, and if it were necessary to decide upon the conflicting testimony of the witnesses in the cause, I should have little hesitation in deciding that the plaintiff, at the time of the payment of the purchase-money, was not aware of the attachment. It is hardly likely that, if she had been aware of the attachment, something would not have been said upon the subject. Enayut Hossein, who, according to his own evidence, took the precaution of telling Ahmedoollah about the attachment. swears that he was acting for both parties; and yet, according to his evidence, nothing appears to have been said at the time of the sale as to whether the plaintiff, in consequence of her being allowed to purchase the estate for what Mr. Tayler calls the trifling sum of 55,000 rupees, was to take upon herself to discharge the debt which Mr. Tayler owed the Ranee. Even supposing the plaintiff made a good bargain in buying this estate for 55,000 rupees, there was no obligation on her part, because she got the estate cheap, to pay Mr. Tayler's debt.

If it had been intended that she was not only to pay the 55,000 rupees to Mr. Tayler, but was also to pay off the debt which Mr. Tayler owed to the Ranee, the purchase-money would have been stated, as suggested by Mr. Twidale, to be the 55,000 rupees and the amount of the debt added, and part of the purchase-money would have been paid to the decree-holder in satisfaction of her decree. It is clear beyond all doubt that the plaintiff has paid Mr. Tayler's debt; that she was under no legal obligation to pay that debt as between her and Mr. Tayler; that she did not pay the debt voluntarily but under compulsion to save the estate which she had purchased, and for which she had paid, from sale in execution of the decree; and under the ordinary rules of law, of justice, and of equity, Mr. Tayler, who has had the benefit of having his debt discharged by the plaintiff, would be bound to re-pay the amount. Even if the plaintiff knew that Mr. Tayler owed the money, and that the estate had been attached, that fact

would make no difference unless she came under an obligation to Mr. Tayler to pay off that debt in consideration of his allowing her to have the estate for 55,000 rupees; yet Mr. Tayler contends that, because she got the estate cheap, she was bound to satisfy the decree against him. I see no reason to believe that Mr. Tayler would have sold the estate to the plaintiff or to any one else for 55,000 rupees, if he could have got 2,00,000 or even 88,000 rupees from any other person. This lady was no more bound without a contract to pay Mr. Tayler's debt, because she got the estate for 55,000 rupees, than she was to pay Mr. Tayler the difference between 55,000 rupees and 88,000 rupees, the amount at which he now values it, or the 2,00,000 rupees at which it was valued by his agent.

In the case of Exall and Partridge, reported in the 8th volume of Durnford and East's Reports, p. 308, which was decided on the principles of justice applicable as much in the mofussil as they are in England, it was held that, where the goods of a stranger were on the premises of another person, and were distrained by the landlord for rent in arrear, and the stranger was obliged to pay the rent in order to redeem his goods, he might recover the money paid from those who owed the rent.

It was said by one of the Judges that "the plaintiff could not relieve himself from the distress without paying the rent. It was not, therefore, a voluntary but a compulsory payment. Under these circumstances, the law implies a promise by the three defendants to re-pay the plaintiff." Another of the Judges said: "One of the propositions stated by the plaintiff's Counsel certainly cannot be supported, that whoever is benefited by a payment made by another is liable to an action of *assumpsit* by that other, for one person cannot, by a voluntary payment, cause an *assumpsit* against another; but here was a distress for rent due from the three defendants; the notice of distress expressed the rent to be due from them all; the money was paid by the plaintiff in satisfaction of a demand on all, and it was paid by compulsion. Therefore, I am of opinion that this action may be maintained against all the three defendants."

Here, then, was a debt of Mr. Tayler's paid under compulsion by a person who was under no obligation to pay it, and the plaintiff is entitled to recover the amount. It is unnecessary, therefore, to consider or to decide whether there was any fraudulent concealment on the part of Mr. Tayler of the fact that the estate had been attached, or to enter into the question whether the recital in the deed amounted to a covenant that Mr. Tayler had power to sell.

The legal maxim, *caveat emptor*, has been misapplied. It is wholly inapplicable, and has no bearing whatever upon the present case.

The Principal Sudder Ameen says that "the concealment, if it was one, was by no means fraudulent;" but I feel at a loss to understand what notions the Principal Sudder Ameen entertains of fraud when he holds that, if a gentleman sells an estate which he knows has been attached under a decree against him, and conceals the fact from the purchaser, and receives the purchase-money, the concealment is one which does not fall within the class of fraudulent.

Cases have been cited to show that, if an execution-case is struck off the file, the attachment which has been made under that execution necessarily falls to the ground.

Section 245 of the Code of Civil Procedure enacts that, "if the amount decreed with costs, and all charges and expenses which may be incurred by the attachment, be paid into Court, or if satisfaction of the decree be otherwise made, an order shall be issued for the withdrawal of the attachment, and if the defendant shall desire it, and shall deposit in Court a sum sufficient to cover the expense, the order shall be proclaimed or intimated in the same manner as hereinbefore prescribed for the proclamation or intimation of the attachment, and such steps shall be taken as may be necessary for staying further proceedings in execution of the decree."

I find no authority in Act VIII. of 1859 for saying that an attachment is at an end if the execution-case is struck off the file; and therefore, if it became necessary to decide upon that point. I should refer the case to a Full Bench. No one, I presume, will contend that if a Judge finds that he has struck off an execution-case improperly, he cannot restore it to the file, but that the case must proceed *de novo*. In this case, according to the statement which must be taken all together, "the execution-decree case had been for a time struck off the register when the sale took place, and subsequently the case was revived, when a sale-proclamation issued, on which the plaintiff pre-

ferred a claim, and on the claim being rejected, she paid the amount for which the property had been attached." There has been no case cited which goes to the extent of holding that, if an execution-case is struck off the file, and a proclamation issued upon the attachment which had issued before the case was struck off, the sale would be subject to all encumbrances created by the debtor between the time the attachment was made and the time the property was sold, on the ground that the effect of the attachment was destroyed for ever by the striking the case off the file. Though not expressly in point, the case of Mohesh Narain Sing *vs.* Kishramund Misser and another, Sutherland's Privy Council cases, p. 488, has a strong bearing upon the point.

For the above reasons, it appears to me that Mr. Tayler is bound to refund the money which the plaintiff was compelled to pay, and did pay, in order to save the estate which she purchased and paid for from being sold under the execution. Plaintiff is also entitled to interest at 12 per cent. upon that amount from the date of payment, *viz.*, the 25th February 1867, to this date. She will also recover from the defendant the costs incurred by her in the Lower Court and in this appeal. This decree to carry interest at the rate of 12 per cent. from the time of realization.

The decree is given against Mr. Tayler alone, and the suit is dismissed against Mr. Kelly without costs.

Miller, J.—I entirely concur. I feel no hesitation in holding that the plaintiff is entitled to recover, both upon the ground that she has paid a debt due from Mr. Tayler to Ranee Asmedh Kooer when she was under no obligation to pay it, as also upon the ground that a fraud has been perpetrated against her by Mr. Tayler in concealing from her the fact that the estate sold by him to her was under attachment in execution of a decree of Court. I would have been extremely sorry if the state of the law were otherwise.

The 19th November 1868.

Present:

The Hon'ble F. B. Kemp and E. Jackson, *Judges.*

Enhancement of rent—Jurisdiction.

Case No. 801 of 1868.

Special Appeal from a decision passed by the Judicial Commissioner of Chota Nagpore, dated the 14th January 1868, affirming a decision of the Deputy Commissioner of that District, dated the 24th September 1867.

Jugg Jeebun Lall (Plaintiff), *Appellant,*

versus

Rughoonath Kopath and another (Defendants), *Respondents.*

Baboos Romesh Chunder Mitter and *Bungshee Dhur Sein* for Appellant.

Baboo Gopeenath Mookerjee for Respondents.

In a suit for enhancement of rent, where plaintiff's right to assess certain lands alleged to be in excess of ghatwallee lands held by defendants was disputed by the latter: HELD that, as the right which plaintiff claimed had never been exercised up to the time of the suit, it should first be determined in a civil suit.

Jackson, J.—WE think we ought not to interfere any further in this suit. The right of the plaintiff to assess rent upon this land, which the defendants state belongs to their ghatwallee-tenure, is a matter of very great doubt. The plaintiff admits that he has not been in the receipt of rent from these defendants. The statement is, that the defendants are in possession of certain ghatwallee-lands, and that they pay a quit-rent for those ghatwallee-lands, but it is said that these are in excess of the ghatwallee-lands. It follows that, for all these lands, according to the plaintiff's statement, he has not been in the habit of receiving rent. The suit is, in reality, not to enhance the rent, but to assess a new rent upon these lands. The plaintiff has already attempted to establish his rights over these lands in a civil suit, and he has failed in that suit. It is the case that his suit then was upon the ground that these lands belonged to another village. His allegation now is, that the lands belong to the same village to which the defendants say they belong. We think that the right of the plaintiff to assess these excess lands, admitting them to be in excess disputed as it is by the defendants, and being a right which has not, up to this time, been exercised by the plaintiff, should be first

determined in a Civil Court. The plaint does not clearly state the rights of the plaintiff as he now puts them forward, and it does appear, from what the Judge says, that the defendants have not understood the case to be as the plaintiff now puts it. Under these circumstances, we consider that the plaintiff should first sue in a Civil Court for a declaration of his right to assess these excess lands, when all parties interested in the matter can be made defendants, and the plaintiff's rights be finally tried and determined.

We dismiss the appeal with costs.

The 19th November 1868.

Present:

The Hon'ble J. B. Phear and C. Hobhouse, *Judges.*

Sale of rights and interests in execution—Liability of purchaser.

Case No. 525 of 1868.

Special Appeal from a decision passed by the Principal Sudder Ameen of Sarun, dated the 24th December 1867, modifying a decision of the Additional Moonsiff of Chuprah, dated the 12th July 1866.

Oojagur Roy and another (two of the Defendants), *Appellants.*

versus

Ram Khelawan Singh (Plaintiff), *Respondent.*

Baboo Doorga Doss Dutt for Appellants.

Baboo Unnoda Pershad Banerjee for Respondent.

Where the rights and interests of a judgment-debtor are sold in execution, the purchaser takes the land to which they relate subject to such mortgages and leases as may be existing.

Phear, J.—It has been made to appear to us that the sale which was effected by the Court in the execution of a decree under Act X. of 1859 only extended to the rights and interests of the judgment-debtor. The Lower Appellate Court says that, "without "looking into the merits of the deeds of "mortgage, the plaintiff has every right to en-"ter into possession of the lands in dispute." This is clearly an error. As the plaintiff has only bought the rights and interests of the judgment-debtor, he must take the lands subject to the deeds of mortgage and the zur-i-peshgee leases, if any such exist. We, therefore, reverse the decision of the Lower Appellate Court, and remand the case for re-trial, directing the Court to enquire whether the deeds under which the defendants, now special appellants, claim are valid against the judgment-debtor or not. If they or any of them are valid, then the plaintiff can only obtain possession of the lands subject to those deeds, or to such of them as are valid. Costs must abide the event.

The 20th November 1868.

Present:

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice,* and the Hon'ble Dwarkanath Mitter, *Judge.*

Land—Tenants and under-tenants.

Case No. 1251 of 1868.

Special Appeal from a decision passed by the Principal Sudder Ameen of Beerbhoom, dated the 15th of February 1868, modifying a decision of the Moonsiff of that District, dated 9th April 1867.

Heeramonee and others (Defendants), *Appellants,*

versus

Gunganarain Roy and others (Plaintiffs), *Respondents.*

Baboo Nullit Chunder Sein for Appellants.

No one for Respondents.

When a tenant who holds land for a term under-lets that land, he parts with his own interest therein to the extent of the interest created by the under-lease, and cannot, therefore, determine the interest of his under-tenant by surrendering his own term to the landlord.

Peacock, C. J.—The Judge has found that the disputed land belonged to the plaintiffs, and that the plaintiffs have all along been in possession thereof by receiving rents from their tenants. He also found that the Bukshees were the tenants of the plaintiffs, and that they had under-let to the defendants' ancestors, and received rent from them. The Judge considers that, as the Bukshees relinquished their holding, the plaintiffs were entitled to recover possession from the defendants; but that is not so in point of law. If a tenant holds land for a term, and under-lets that land, he cannot determine the interest of his under-tenant

by surrendering his term to the landlord, because from the date of his under-lease he has parted with his own interests in the land to the extent of the interest created by the under-lease. Under these circumstances, the plaintiffs are not entitled to treat the under-tenants as trespassers and to turn them out of possession until either the lease of the Bukshees or the under-lease to the defendants has been determined in due course of time.

The decision of the Judge is reversed with the costs of this appeal, and the plaintiffs' suit is dismissed with the costs in both the Lower Courts.

The 21st November 1868.

Present:

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble Dwarkanath Mitter, *Judge*.

Kingdom of Ava—Commission to take evidence —Sections 177 to 179, Act VIII., 1859.

Reference from the Recorder of Rangoon.

Aga Mahomed Jaffer Tehranee, *Plaintiff*,

versus

Mirza Nuzeeroollah Shirazee, *Defendant*.

The kingdom of Ava is not the territory of a Native Prince or State in alliance with the British Government within the meaning of Section 177, Act VIII. of 1859.

If the evidence taken by a commission issued under Section 178 is given on oath or affirmation, it will be admissible, without consent of parties, upon proof of the facts necessary for that purpose under Section 179, Act VIII., 1859.

Reference.—In this case I request the opinion of their Lordships the Judges of the High Court upon two points which I am desired by the Advocate for the defendant to refer to their Lordships under Act XXI. of 1863, Section 22.

The first question is whether a commission for the examination of a witness at Mandalay in the territories of the King of Ava ought to be sent by this Court under the 177th Section of Act VIII. of 1859, or whether this Court ought to apply to the High Court to send such a commission under Section 168.

It is contended by the Advocate for the defendant that Mandalay is not within the territories of a Native Prince or State in alliance with the British Government within the meaning of the 177th Section.

It appears to me that this contention is wrong. There is no treaty of alliance, offensive and defensive, between the Queen of England and the King of Ava, so that the two States cannot be said to be in alliance according to the definitions of Wheaton. But at the same time there is a commercial treaty between the two Governments, and we have a Political Agent at the Court of Mandalay (see Political Notification No. 572, dated Simla, June 3rd, 1858). It has been held that Cabul is in alliance with the British Government within the meaning of Section 177 (see Metir Banoo *versus* Mahomed Moom Khan, 2 Wyman's Reports, p. 354). I am not aware whether there is or not a treaty of alliance between the British Government and that of Cabul; and it seems to me that Section 177 would practically be of little use if the power of the Court to send a commission depended on the existence of such a treaty.

If, however, their Lordships should consider that the commission should be sent by the High Court, which, I take for granted, corresponds with the Sudder Court alluded to in Section 178, then I would request them to direct a commission in this case to Captain E. B. Sladen, Political Agent at Mandalay, to take the evidence of the following witnesses on behalf of the plaintiffs:—

Mr. Manook, Kalawoon to the King of Burmah; Mr. Calogreedy, Merchant; Kyewoondauk Mhin; Ko Shway Thee, Broker; and Aga Abdul Rohim.

It is desired by both parties to the suit that the witnesses may be examined upon interrogatories to be settled in this Court.

The second question which I am desired to refer to their Lordships is whether the depositions of witnesses taken under a commission sent to Mandalay under either of the two Sections 177 or 178 can be read in evidence except by consent?

Section 179 says that "no depositions "taken under a commission shall be read "in evidence without the consent of the "party against whom the same may be "offered, unless it be proved that the depo- "nent is beyond the jurisdiction of the Court, "or dead, or unable from sickness or in- "firmity to attend to be personally examin- "ed, or distant without collusion more than "a hundred miles from the place where the "Court is held, or exempted by reason of "rank or sex from personal appearance in "Court, or unless the Court shall at its dis- "cretion dispense with the proof of any of "the above circumstances, or shall authorize "the deposition of any witness being read "in evidence, notwithstanding proof that "the causes for taking such deposition have "ceased at the time of reading the same."

This Section does not, it seems to me, make the deposition evidence, even supposing the witness be dead, or sick, or absent, &c. It only provides that it shall not be evidence unless he be dead, sick, or absent, &c. Section 175 gives the Court power to give directions for taking the examination of witnesses under the commission; but it would be impossible, as I am informed, in the present case, to obtain the deposition of some of the witnesses whose evidence is required upon oath, as they are officials of the Burmese Court and would refuse to be sworn. Even if an oath could be imposed, it appears to me that the deposition of a witness taken on oath in a semi-barbarous country, where the penalties attaching to perjury are merely nominal, could hardly be read in evidence in a Court of justice in the British territories, unless by consent of parties.

As, however, I am requested to do so, I will ask their Lordships' opinion upon this point.

Judgment of the High Court.

We are of opinion that the kingdom of Ava is not the territory of a Native Prince or State in alliance with the British Government within the meaning of Section 177 of Act VIII. of 1859, for we are not aware of any treaty of alliance between the two Governments. The case, therefore, appears to fall within Section 178, and we have directed a commission to issue under that Section. If the witnesses be examined upon oath or affirmation, the evidence will be admissible without consent of parties, upon proof being given in the Recorder's Court of such facts as are required by Section 179 of Act VIII. of 1859 to be proved in order to render the depositions capable of being read in evidence.

We have no power to compel the witnesses to attend before the Commissioner for examination, or to take any oath or affirmation, or to give evidence. If the evidence be given on oath or affirmation, as required by the commission, the evidence will be admissible. The weight to be attached to it will be matter for the Recorder to decide.

The 21st November 1868.

Present:

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble Dwarkanath Mitter, *Judge*.

Jurisdiction — Native camp-followers — Mutiny Act.

Reference from the Judge of the Small Cause Court at Darjeeling.

Musserooddeen, *Plaintiff*,

versus

Khoda Bux and another, *Defendants*.

A native camp-follower attached to a European regiment is amenable to the Mutiny Act.

Reference.—ARE the defendants in the case (the parties to which are named above) amenable to this Court?

The defendants, one of whom, at the time the cause of action arose, was attached to the Mess of Her Majesty's 58th Foot at Sinchal, were held by the High Court in their proceedings, dated the 11th January 1868, not amenable to this Court. This ruling, however, was made by the High Court on the understanding conveyed by this Court's letter No. 168, dated the 29th July 1867, that the defendants were amenable to the Mutiny Act. The plaintiff accordingly

brought his action before the Officer Commanding at Darjeeling, with a view to its being tried by a Military Court of Requests. The Officer in command refused to entertain the case, and referred the plaintiff back to this Court.

From the correspondence that has passed, it appears that the Officer in command holds that the defendants, whom he admits to have been attached to the Mess of Her Majesty's 58th Foot, being natives of India, are not followers within the meaning of Section 2 of the Mutiny Act, and that they are, therefore, not amenable to the Mutiny Act. He accordingly holds that the Civil Court, and not a Military Court of Requests, has jurisdiction in the case which is the subject of this reference.

I am of opinion that the case is not cognizable by any Civil Court.

My opinion is based on Sections 2 and 99 of the Mutiny Act. The wording of Section 2 is as follows: "All the provisions of this Act shall apply to all persons who are . . . . followers in or of any of the said forces." There is nothing in the Section to show that followers of any nationality are excluded.

In Section 99 of the Mutiny Act it is stated:—

"In all places in India where any body of Her Majesty's Forces may be serving beyond the jurisdiction of any Courts of Requests, or other Courts of enforcing small demands, established at the cities of Calcutta, Madras, and Bombay, respectively, actions for debt and all personal actions, against . . . . persons amenable to the provisions of this Act not being soldiers, shall be cognizable before a Court of Requests . . . . provided . . . . . the defendant was a person of the above description when the cause of action arose."

The defendants being followers of H. M.'s 58th Foot are, I consider, amenable to the Mutiny Act under Section 2 of that Act; and having been persons of that description when the cause of action arose, I further consider that under Section 99 of the said Act they are not amenable to any Civil Court.

Judgment of the High Court.

We are of opinion that the action is not cognizable by the Small Cause Court. We assume that both of the defendants are correctly stated to be camp-followers, although at the commencement of the statement it is said "one of whom, &c., was attached to the Mess of H. M.'s 58th Foot."

The reasoning of the ex-officio Judge appears to us to be correct.

The Mutiny Act extends to H. M.'s Indian Forces, and it would be a great anomaly to suppose that a native camp-follower attached to a native regiment would be exempt under the Mutiny Act, and that a native camp-follower attached to a European regiment would not.

The 21st November 1868.

Present:

The Hon'ble F. B. Kemp and E. Jackson, *Judges.*

Review—Fresh evidence—Appeal.

Case No. 321 of 1868.

Miscellaneous Appeal from an order passed by the Judge of Hooghly, dated the 17th April 1868, affirming an order of the Moonsiff of that District, dated the 17th December 1867.

Rughoonath Roy (Decree-holder), *Appellant,*

versus

Anundo Pauray (Judgment-debtor), *Respondent.*

Baboo Luckhee Churn Bose for Appellant.

No one for Respondent.

Where a Lower Court granting a review re-opened the original case, took fresh evidence, and upheld its former decision, it was held that an appeal did lie to the Judge.

Jackson, J.—The Judge has refused to allow the present appellant to appeal to his Court, on the ground that the decision from which he was appealing was one passed upon an application for review. It appears, however, that the Lower Court had granted the review and re-opened the original case, and had gone on even to take fresh evidence in that case. It is true that after taking that evidence, the Lower Court upheld its former decision; but that was a decision passed on

the original case and not on the application for review: and under such circumstances, the appeal did lie to the Judge, and it was incumbent on the Judge to hear the appeal. We reverse the Judge's decision and remand the case for him to hear the appeal.

The 21st November 1868.

Present:

The Hon'ble J. B. Phear and C. Hobhouse, *Judges.*

Remand—Section 352, Code of Civil Procedure.

Case No. 2088 of 1868.

Special Appeal from a decision passed by the Judge of the 24-Pergunnahs, dated the 14th May 1868, reversing a decision of the Deputy Collector of that District, dated the 29th of November 1867.

Moheshchunder Doss (Plaintiff), *Appellant.*

versus

Madhub Chunder Sirdar (Defendant), *Respondent.*

Baboo Hem Chunder Banerjee for Appellant.

Baboo Nobokishen Mookerjee for Respondent.

Where a suit which had been tried by the Lower Court on its merits, without the omission of any issue or question of fact essential to those merits, was remanded by the Lower Appellate Court with a view to additional evidence being taken, the order of remand was held to be not in accordance with any of the provisions of the Civil Procedure, and in opposition to the terms of Section 352 of the Code.

Phear, J.—In this case the Lower Appellate Court remanded the suit to the Court of first instance with a direction that it should take fresh evidence, and upon the evidence so taken, together with that already on the record, should try the matter in question between the parties over again. It is clear to us that this remand order is contrary to the enactment contained in Section 352 of the Civil Procedure Code, for the first Court had not disposed of the case upon the preliminary point. It had determined it upon its merits. Had the Court of first instance omitted to try an issue or to determine a question of fact which the Appellate Court thought essential to the right determination of the suit upon the merits, and the evidence upon the record were not sufficient to enable the Appellate Court to determine such issue or question of fact, then no doubt, under the provisions of Section 354, the Appellate Court might have framed the required issue or issues, and referred the same to the Lower Court for trial, and the Lower Court would have been bound to return to the Lower Appellate Court its finding thereon, together with the evidence. But that did not occur in this case. Indeed, there does not seem to be the slightest ground for suggesting that the Lower Court omitted to try any issue or to determine any question of fact which was essential to the merits of the suit.

Again, had the Lower Court for good reason thought it necessary to have before it additional evidence, it might have taken the necessary steps under Section 355 of the Civil Procedure Code for the purpose of procuring that evidence, provided that it at the same time recorded its reasons for requiring it. This again did not occur. And under no other circumstances than those to which I have referred, as we understand the Civil Procedure Code, could the Lower Appellate Court rightly direct that the parties to the suit should furnish evidence in addition to that which was already on the record. It seems to us, therefore, perfectly clear that the remand-order of the Lower Appellate Court was not made in accordance with any of the provisions of the Civil Procedure Code, and indeed that it is one directly in opposition to the express terms of Section 352. It was therefore illegal, and we are bound to direct that it be set aside. It follows that inasmuch as the decision of the Lower Appellate Court which has come up to us on special appeal, was mainly founded upon the evidence which was procured under the remand-order, the judgment of the Lower Appellate Court is bad and must be reversed.

Accordingly we decree the appeal, and reverse the decision of the Lower Appellate Court, and also the order of remand; and we further remand the case to the Lower Appellate Court for re-trial on its merits upon the evidence which is on the record, excepting so much of it as was returned from the Lower Court upon the order of remand. The special appellant must have his costs incurred in the Lower Court upon the trial on remand. Costs of the Lower Appellate Court and the costs of this Court will abide the event of the new trial.

d

The 21st November 1868.

Present:

The Hon'ble J. B. Phear and C. Hobhouse, *Judges.*

Issues—Limitation.

Case No. 1701 of 1868.

Special Appeal from a decision passed by the Principal Sudder Ameen of Backergunge, dated the 26th March 1868, affirming a decision of the Moonsiff of Madareepore, dated the 11th February 1867.

Kisto Mohun Kurmokar (Defendant), *Appellant,*

versus

Noyan Tara Dossea and others (Plaintiffs), *Respondents.*

Baboo Oomesh Chunder Banerjee for Appellant.

Baboo Bama Churn Banerjee for Respondents.

Where a defendant in the Lower Court pleaded limitation, but placed that issue upon the simple fact that he himself had possession for 12 years and upwards, which issue was found against him, HELD that it was too late for the defendant in special appeal to object that that finding did not dispose of the issue of limitation.

Phear, J.—IT is true that in this case the appellant objected to the plaintiffs' suit on the ground that it was barred by the lapse of time: but he rested the issue of limitation, which he thus raised, upon the fact that he himself had had possession for 12 years and upwards. The issue has, in both Courts, been found against him on the ground that he has not proved his possession for 12 years and upwards. It is now objected before us that this finding does not dispose of the issue of limitation, because the affirmative of that issue would be equally well supported if it turned out that the plaintiff had not been in possession for 12 years and upwards, whatever might be the case with regard to the defendant. We think it is now too late in special appeal to object to the judgment of the Lower Appellate Court upon this ground, for it is quite clear that the appellant never put it forward in either of the Lower Courts. His own written statement distinctly placed the issue upon the single fact of himself having had possession for 12 years and upwards. We think, therefore, that there is not sufficient reason made out on special appeal for sending back the case for further enquiry upon the issue of limitation. Accordingly, we dismiss the appeal with costs.

The 21st November 1868.

Present:

The Hon'ble J. B. Phear and C. Hobhouse, *Judges.*

Co-sharers—Legal inference.

Case No. 1954 of 1868 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of Nuddea, dated the 8th April 1868, affirming a decision of the Deputy Collector of Chooadangah, dated the 31st August 1867.

Mr. A. Hills (Plaintiff), *Appellant,*

versus

Aradhun Mundul (Defendant), *Respondent.*

Mr. J. S. Rochfort and *Baboo Bhowanee Churn Dutt* for Appellant.

Baboo Anund Gopal Paleet for Respondent.

Long possession under an authentic pottah from one sharer, without interference or disturbance from the others, legally warrants the inference that the grantor had authority to bind his co-sharers.

Phear, J.—WE think that there is legal evidence upon which the Lower Appellate Court could in its discretion come to the conclusion that the pottah put forward by the defendant is an authentic document. We also think that the Lower Appellate Court was legally justified in inferring, from long possession under an authentic pottah from Kasheeshur without any evidence of interference or disturbance from the other co-sharers, that Kasheeshur had authority to bind his co-sharers. This disposes of the two first grounds of special appeal, and the third ground has not been pressed before us. We, therefore, dismiss the appeal with costs.

The 21st November 1868.

Present:

The Hon'ble G. Loch and F. A. Glover, *Judges.*

Zur-i-peshgee lease—Wassilat—Possession.

Case No. 259 of 1868.

Miscellaneous Appeal from an order passed by the Judge of Bhaugulpore, dated the 24th February 1868, affirming an order of the Sudder Ameen of that District, dated the 28th September 1866.

Mussamut Sham Soondur Kooer (Judgment-debtor), *Appellant,*

versus

Rajendur Misser (Decree-holder), *Respondent.*

Baboo Boodh Sein Singh for Appellant.

No one for Respondent.

Where a decree-holder, finding a zur-i-peshgeedar in possession, paid the debt due by his judgment-debtor to the zur-i-peshgeedar, and entering on possession himself realized the rents, it was held that he could not demand wassilat from the judgment-debtor for the same period.

Loch, J.—The only point in which we think the appellant has at all made out a case regards the zur-i-peshgee given in 1256 by the judgment-debtor to Budun Dai. It is stated before us that the decree-holder, after obtaining his decree for possession, found the zur-i-peshgeedar in possession; that in order to obtain possession himself, he paid off the balance of the debt due by the judgment-debtor to the zur-i-peshgeedar and took possession and realized rents from the ticcadars; and that the judgment-debtor has been called upon to pay the wassilat of that year. We think that this point should be enquired into, for if, as stated to us, the decree-holder was in possession and realized the rents from the tenantry, he cannot, as far as we now see, demand wassilat for the same period from the judgment-debtor. In making up the account, the amount paid by the decree-holder on account of the judgment-debtor must also be taken into consideration. The case should be remanded for the consideration of the above point.

The 21st November 1868.

Present:

The Hon'ble J. B. Phear and C. Hobhouse, *Judges.*

Jurisdiction—Appeal from Deputy Collector's decision—Section 153, Act X., 1859.

Case No. 1665 of 1868 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of Sarun, dated the 14th March 1868, reversing a decision of the Deputy Collector of that District, dated the 30th November 1867.

Rucha Muhtoon (Plaintiff), *Appellant,*

versus

Mohun Lall and others (Defendants), *Respondents.*

Baboo Boodh Sein Singh for Appellant.

Baboos Abinash Chunder Banerjee and *Kalee Kishen Sein* for Respondents.

Where a Deputy Collector's judgment does not turn on any title to or interest in land, but merely determines a question of fact, the appeal lies to the Collector and not to the Judge.

Phear, J.—It appears to us that the judgment of the Deputy Collector against which the intervenor appealed to the Judge did not turn on any question relating to the title to land or to any interest in land as between parties having conflicting claims thereto; but merely determined a simple question of fact, namely, whether or not up to the date of the institution of the suit, the intervenor had been *de facto* and *bonâ fide* in receipt of the rents of the land. Therefore, we think that, under the terms of Section 153, the intervenor's appeal should have been made to the Collector's Court, and not to the Court of the Judge. Therefore, the decision of the Judge was passed without jurisdiction, and we reverse it with costs of the special appellant in that Court and in this Court. The effect will be that the decision of the Deputy Collector stands.

The 21st November 1868.

Present:

The Hon'ble F. B. Kemp and E. Jackson, *Judges.*

Interest—Date of ascertainment.

Case No. 332 of 1868.

Miscellaneous Appeal from an order passed by the Officiating Principal Sudder Ameen of Rungpore, dated the 9th May 1868.

Doorga Soonduree Debia (Decree-holder), *Appellant,*

versus

Shibessuree Debia and others (Judgment-debtor), *Respondents.*

Baboo Issur Chunder Chuckerbutty for Appellant.

Baboo Bhyrub Chunder Banerjee for Respondents.

A decree for interest upon mesne-profits from the date on which they are ascertained was held to mean from the date on which they are ascertained by the Court, and not by an Ameen.

Jackson, J.—We see no grounds for interference with the decision of the Lower Court. The plaintiff has obtained interest upon the mesne-profits from the date on which the amount had been ascertained by the High Court in 1856. The decree-holder asks for interest from the date on which the first Court passed a decree for a very small amount of mesne-profits, against which decree an appeal was preferred to the High Court where much larger mesne-profits were decreed to the decree-holder. He also asks for interest from the date on which the Ameen ascertained the amount of mesne-profits so decreed.

We think that the words of the decree, that the plaintiff is to obtain interest from the date on which the amount is ascertained, must be taken to mean from the date on which it is ascertained by the Court and not by an Ameen, and it is quite clear that the amount which was finally ascertained and declared to be due was not so ascertained till the decree of the High Court in 1856.

The 23rd November 1868.

Present:

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice,* and the Hon'ble Dwarkanath Mitter, *Judge.*

Compensation for land taken for public purposes — How regulated when there are several putnees or intermediate tenures.

Case No. 1330 of 1868.

Special Appeal from a decision passed by the Judge of Beerbhoom, dated the 10th February 1868, affirming a decision of the Principal Sudder Ameen of that District, dated the 18th June 1867.

Maharajah Mahatap Chand Bahadoor (one of the Defendants), *Appellant,*

versus

The Bengal Coal Company (Plaintiff) and others (Defendants), *Respondents.*

Baboos Juggadanund Mookerjee and *Chunder Madhub Ghose* for Appellant.

Mr. G. C. Paul and *Baboo Rash Beharee Ghose* for (Plaintiff) Respondent.

Held, that the principle laid down in the case published at page 328 of the Sudder Decisions for 1860 (*vide* foot-note) to regulate compensation for land taken for public purposes, is not applicable to the division of compensation in every case. It would not provide for the case of several putnees where the land is taken from the holder of the last tenure, and where the grantors of the several intermediate tenures have received a sum of money as a bonus for the grant.

Peacock, C. J.—We cannot say that the principle* which has been laid down in the case cited from the Sudder Decisions for 1860, page 328, is applicable to the division of compensation in every case. It certainly would not provide for the case of several

* The principle considered by the late Sudder Court in this case (No. 1576 of 1857, Maharajah Mahatap Chand Bahadoor, defendant, appellant *versus* The

putnees, where the land is taken from the holder of the last tenure, and where the grantors of the several intermediate tenures have received a sum of money as a bonus for the grant.

In this particular case, the zemindar did not appear to protect his interests or to show what was the amount of compensation coming to him. A statement was made out upon the basis of which the compensation appears to have been awarded, and in dividing the compensation the Judge does not appear to have awarded to the person from whom the lands were taken a larger share of the amount awarded than was in justice coming to him according to the statement upon which the compensation was based.

Under these circumstances, it would be unjust to give to the zemindar who granted the original putnee any portion of the sum awarded, which, according to the statement upon which the compensation was assessed, would be fairly payable to the person from whom the land was taken.

If we were to send the case back in order to have a local investigation, and to have all the facts ascertained which would be necessary for us to know before we could apply the principle laid down in the case cited from the Sudder Decisions and to apply it not only to the grantor of the putnee, but to the grantors of all the intermediate tenures, a much larger sum than the whole amount of the compensation which has been awarded would be necessarily expended in making the local investigation. In addition to which, great vexation and trouble would be caused to all the parties without any probability of having the necessary facts ascertained.

It appears to us that the Judge was right in taking the statement upon the basis of which the compensation was awarded, as he has done, and dividing the compensation according to the principle upon which it was assessed. The decision of the Judge, therefore, will be affirmed with costs.

Government, defendant, and Ishur Chunder Kur and others, plaintiffs, respondents) to be the proper principle, is stated as follows: "In respect to remission as the gross rental of the whole putnee is to the gross rent of the land proposed to be taken, so will the entire putnee rent be to the particular portion of the rent to be remitted; and with regard to compensation the principle may most conveniently be stated as follows: As the gross profits of the putnee is to the profits of the putneedar so will the gross compensation be to the portion of the compensation the putneedar is entitled to recover."

The 23rd November 1868.

Present:

The Hon'ble J. B. Phear and C. Hobhouse, *Judges.*

Rent—Partition among tenants.

Case No. 1913 of 1868 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of the 24-Pergunnahs, dated the 13th May 1868, affirming a decision of the Deputy Collector of Buseerhaut, dated the 20th December 1867.

Bholanath Sircar (Plaintiff), *Appellant,*

versus

Baharam Khan and another (Defendants) *Respondents.*

Baboo Oopender Chunder Bose for Appellant.

No one for Respondents.

In a suit for rent in which defendants, admitting their joint tenancy, set up that they had as among themselves made an allotment of the land in certain shares—HELD, that as such partition was not shown to have been recognized by the plaintiff, the plea could not avail.

Phear, J.—WE think that the Lower Appellate Court has erred in this case. The plaintiff sued the two defendants, as being jointly tenants of certain lands of his, for arrears of rent. The defendants do not appear to have disputed the amount of rent which the plaintiff alleged to be due, nor did they dispute their tenancy. On the contrary, they distinctly admitted that they were joint tenants of the plaintiff, but set up that they had as amongst themselves made an allotment of the land in certain shares. Had they shown that this sub-division or allotment was recognized by the plaintiff, then the view taken by the Lower Appellate Court would have been correct; but so far does the case seem to deviate from this that the evidence of one at least of the defendants distinctly shows that the partition amongst themselves was without the knowledge of the plaintiff. We think, therefore, that on the record as it stands, the plaintiff's case is made out, and that he is entitled to a decree. Accordingly, we reverse the decision of both the Lower Courts and decree the plaintiff's suit. The appellant must have his costs in both the Courts below as well as in this Court.

The 23rd November 1868.

Present:

The Hon'ble H. V. Bayley and W. Markby,

Judges.

Ancestral property—Self-acquisition—Onus probandi—Registration in Collectorate.

Cases Nos. 401, 403, and 418 of 1868.

Special Appeals from a decision passed by the Judge of Rajshahye, dated the 2nd December 1867, reversing a decision of the Moonsiff of Serajgunge, dated the 24th March 1867.

Gobindnath Sein and others (Defendants),

Appellants,

versus

Gobind Chunder Sein (Plaintiff),

Respondent.

Baboos Onookool Chunder Mookerjee and *Mohinee Mohun Roy* for Appellants.

Baboos Sreenath Banerjee and *Romesh Chunder Mitter* for Respondent.

In a suit for confirmation of possession of a share of ancestral property as the self-acquisition of two grandsons of the common ancestor:

HELD that plaintiff was bound in the first place to prove his allegation of self-acquisition, and also fully to show his possession.

Registration in the Collector's books is not of itself a proof of title.

Bayley, J.—THE grounds taken by the defendants in special appeal in these three cases apply to all of them alike, and it is admitted by the pleaders of both parties that one decision will govern all.

The grounds taken and pressed before us in special appeal are the following:—

1st.—That the burthen of proof has been wrongly put by the Lower Appellate Court upon the defendants, inasmuch as the plaintiff's allegation was that the property in dispute was part of the self-acquisition of the two brothers Shib Chunder and Ram Doss, sons of Kasheenath, one of the four sons of the common ancestor Dyaram.

2nd.—That even if the *onus* was on the defendants, it is clear from the Judge's own judgment that the defendants have made out a good *primâ-facie* case, especially with reference to the petition of Shib Chunder, dated the 22nd August 1816, in which the shares of the four brothers, sons of Dyaram, in the six annas, have been distinctly set forth as one anna and a half each.

3rdly.—That the Judge has failed to investigate and decide whether Kistonath was the son of Kisto Pran, as alleged by the plaintiff, or of Rughoonath, as the defendants allege, and as the first Court finds.

4thly and *lastly.*—That, this being a suit for confirmation of possession, the plaintiff is bound to prove his previous possession, and that the Judge has come to no distinct finding upon this point.

There is no doubt that the plaintiff comes to Court, on the allegation that, although there were four brothers, sons of Dyaram, who would, under the ordinary rules of Hindoo law, be the inheritors of this property in equal shares jointly, still, in this case, the property was not Dyaram's, but the self-acquisition of Shib Chunder and Ram Doss.

Defendants' case was that their vendor was the nephew—the sister's son—of Ramnath, son of Rughoonath, one of the four brothers; and that the four inherited equal shares of Dyaram's property, and there was no such self-acquisition by Shib Chunder and Ram Doss as alleged by plaintiff.

To my mind, under the ordinary rules of pleading, the first thing was certainly for the plaintiff to prove his allegation of self-acquisition. Moreover, in connection with this point, I think the plea taken by the special appellant, that in this suit, for confirmation of possession, the plaintiff is bound fully to show his possession, is a very good plea, and one in no way answered in the judgment of the Lower Appellate Court;

so that, with reference to the burden of proof which plaintiff has to discharge, I think the judgment of the Lower Appellate Court is defective in law on both the above points.

Moreover, I think the objection which is taken in regard to the petition of Shib Chunder, dated the 22nd August 1816, is a good objection. (I may here remark that there is also a similar petition by Ram Doss.) Both state that the share of each of the four brothers in the six annas was one anna and a half. The Judge observes on this point: "Although it cannot be reconciled "with the plaintiff's present claim, I think "it does not obviate the necessity of the "defendant, who claims as a stranger, from "proving the title of the person from whom "he professes to have acquired possession." In my opinion, the petition itself furnishes the *primâ-facie* proof which the Judge thinks it would be for the defendants to adduce, for it is actually the plaintiff's own evidence so far proving the defendants' case.

It is pressed upon us by the pleader for the plaintiff that, in fact, the Lower Appellate Court has found the plaintiff's case proved, especially from the following passage: "There "is no denying that Ram Doss was the son "of Kisto Pran, and the record of his name "in the Collector's book, if he was not the "original purchaser, but only the inheritor "of a share from his grandfather Dyaram, "is very inexplicable." Now, in the first place, it is urged in special appeal that, as a fact, the name of *Ram Doss* was *not* recorded with Kishennath, but those of Huree Doss and Kishennath. There is also the finding of the first Court supporting this plea of the special appellant. That the first Court and the special appellant are not right is not shown to us in any way. But, be that as it may, it has been repeatedly ruled by this Court and the late Sudder Court that registration in the Collector's books may be evidence, if unopposed, of possession at the time of issue of notice for the purpose of the registration law. And where revenue-payments are made according to the registration without any opposition, the fact of such payment may be so shown. But it has been always held that registration by itself is not a proof of title. Here the Judge speaks of no other proof, but on this alone requires the defendant to prove *his* case. I think, when registration in the Collector's book is the main evidence upon which the Lower Appellate Court relies as proving the plaintiff's allegation, he has, for the reasons given, erred in law, and until the plaintiff does prove the allegation of self-acquisition in a legal way, he is not entitled to any decree, and that these cases ought to be remanded to be re-tried with reference to the above remarks.

I may add that it is very much pressed upon us by the appellant's pleader, that, as there is an utter failure on the part of the plaintiff to prove his case, and the Judge also speaks of its being impossible for the plaintiff, considering the length of time that has elapsed, to adduce more satisfactory evidence, it would be idle to expect any more evidence on remand. In my opinion, it is not right for this Court to pre-judge what may be the result of further investigation and adjudication. I still, therefore, am of opinion that these cases ought to be remanded to be tried upon the evidence on the record and with reference to the above remarks.

Markby, J.—I also am of opinion that these cases ought to be remanded. There is a good deal in the judgment of the Lower Court which I am not able fully to understand. It seems to me, however, quite clear, on the Judge's own statement, that there was some evidence both in support of the case of the plaintiff and of the defendant. Now, the only interpretation I can put on the Judge's words is that, having some doubt as to which of these cases set up by the parties was the true one, he gives his ultimate decision in favor of the plaintiff, because, as he says, "it is incumbent on a "stranger, who comes forward to claim "ancestral property, to prove in the clearest "manner the title of the person from whom "he professes to derive his own." This seems to me to be contrary to all principles of law. The person here called a "stranger" is the defendant in possession, who purchased from a person having a *primâ-facie* title at least as good, if not better, than that of the plaintiff who now seeks to turn him out. The plaintiff is, therefore, bound to prove his title, and with whatever nicety the evidence is balanced, the Judge must decide which way the balance turns. If he is compelled to resort to any presumption at all, it must be in favor of the defendant in possession, and not of the plaintiff who seeks to eject him.

I also thinke that the judgment of the Lower Appellate Court is defective in not coming to a finding on the points referred to by Mr. Justice Bayley, and I, therefore, agree in the order of remand proposed.

The 23rd November 1868.

Present:

The Hon'ble J. B. Phear and C. Hobhouse, *Judges.*

Enhancement of rent—Inundation.

Case No. 1979 of 1868 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of the 24-Pergunnahs, dated the 24th April 1868, reversing a decision of the Deputy Collector of Baripore, dated the 30th September 1867.

Bamasoonduree Dossee (Plaintiff), *Appellant,*

versus

Kaloo Peadah (Defendant), *Respondent.*

Baboo Rash Beharee Ghose for Appellant.

Baboo Tara Prosunno Mookerjee for Respondent.

The occurrence of a catastrophe, such as an inundation, during the year succeeding a notice of enhancement was held to be sufficient to render the demand of a higher rent unfair and inequitable.

Phear, J.—We are of opinion that we ought not to interfere with the judgment of the Court below. The plaintiff sued for enhanced rent in respect of the year 1272, on the basis of a notice which he had served upon the tenant in 1271. The effect of such notice, we understand, to be that the landlord intimates to the tenant that, if he continues during the ensuing year to hold the lands which are the subject of the notice, he must pay the enhanced rates of rent mentioned in the notice. But by the express provisions of Act X. of 1859, it is competent for the tenant, at the expiration of the year, to dispute the fairness and equity of the rates of rent mentioned in the notice; and if the landlord then sues him for arrears of rent, the Court which tries the case must decree such amount of rent in respect of the year which he sued for as, on all the facts of the case, is fair and equitable. The Lower Appellate Court has in this case held that, although one or more of the alternatives of Section 17 has been made out, yet there has, during the year, occurred such a catastrophe in the shape of an inundation as rendered it unfair and inequitable that a higher amount of rent should be paid by the tenant than he had paid in the previous year. We cannot say from anything which has been put before us, or which we understand to be upon the record, that the learned Judge has in any way erred in coming to this conclusion. We, therefore, dismiss this appeal with costs.

The 23rd November 1868.

Present:

The Hon'ble J. B. Phear and C. Hobhouse, *Judges.*

Settlements (temporary and permanent)—Rights of proprietor.

Case No. 2332 of 1867.

Special Appeal from a decision passed by the Judge of Nuddea, dated the 12th June 1867, affirming a decision of the Principal Sudder Ameen of that District, dated the 20th January 1866.

Messrs. Watson and Co. (Defendants), *Appellants,*

versus

Brojo Soonduree Dabee (Plaintiff), *Respondent.*

Messrs. R. T. Allan and *J. S. Rochfort* for Appellants.

Baboos Unnoda Pershad Banerjee and *Mohinee Mohun Roy* for Respondent.

When a temporary settlement expires, whether the holder thereof had been the proprietor of the land within the meaning of the old Regulations, or a stranger, the proprietor is entitled to come forward and to claim as of right from the Government a permanent settlement of the land, unless he has, by his own conduct, forfeited that right.

Phear, J.—We think that this case has been decided upon an issue which is not strictly relevant to the merits. Upon reference to the plaint, we find that the plaintiff says that the land in suit is an accretion to the zemindary of his ancestral deity Muddun Mohun Thakoor; that he, the plaintiff, is the *sebait;* that, while he was a minor in 1849, the land in question was settled for ten years with his grandmother, who was his guardian; that this lady defaulted in the payment of revenue, and the tenure was consequently sold in 1850 to the defendants; that, after the expiration of the tenure's term, it was permanently settled with the defendants in 1862; and that he did not become a major till 1864. He urges that, by reason of his minority, and on other grounds, the sale of the tenure in 1850 was illegal and inoperative as against him. He, therefore, claims that it may be set aside, and prays that he may be declared entitled to the permanent settlement of the land in suit.

The defendants in their written statement say that it is now too late to set aside the sale of 1850; that the plaintiff's suit for this purpose is barred by lapse of time. They say further that his present reasons for setting aside the sale are opposed to those

which he put forward on a previous occasion before the Commissioner, also that the temporary tenure, having been created during the minority of the plaintiff, could, therefore, be validly sold during his minority; that the sale was, in fact, perfectly valid, and plaintiff not entitled to impeach it; also that, as the tenure was sold for Government revenue, the former proprietor had lost his rights which have devolved on the purchasers, the defendants, and they are consequently entitled to the settlement which they have obtained. Finally, the defendants say that they are the putneedars of the whole lands of the zemindary, and as such entitled to the settlement.

From this abstract of the plaint and the written statement of the defendants, it is apparent that all the material facts of the plaint are admitted. They are nowhere traversed or put in issue. Both the Lower Courts have determined the case upon the issue raised, no doubt, by the plaintiff and by the defendants, namely, the issue whether or not the sale of the temporary tenure was a valid sale. It seems to us that that issue really had no bearing upon the question whether or not the plaintiff was entitled to the permanent settlement. Nothing can, we think, be clearer than that, on the expiration of a temporary settlement, whether the holder of that temporary settlement had been the proprietor of the land within the meaning of the words of the old Regulations, or a stranger, the proprietor is entitled to come forward and to claim as of right from the Government a permanent settlement of the land, unless he has, by his own conduct, in some way or other, forfeited that right. The permanent settlement which the defendants have obtained was effected on the expiration of the temporary tenure, and the simple question in this case seems to be whether or not the plaintiff at that time had such a proprietory right within the meaning of the Regulations as entitled him to claim the settlement in preference to the defendants. Now, in truth, that question never has been tried in either of the Courts below. We think that, inasmuch as the statements of the plaint are not put in issue by the defendants, the proper issues upon which this case should be tried are two: *first*, is the title which the plaintiff sets up in the plaint sufficient to confer upon him a right to claim a permanent settlement of the land from Government; and, *secondly*, had he, in 1862, by his conduct, in any way forfeited that right?

The decree of the Lower Appellate Court must be reversed, and the case remanded for re-trial upon the issues which we have laid down. In the trial of the first issue, the Lower Appellate Court will not forget that it may be a material point to enquire whether the defendants, as putneedars, are entitled to claim a permanent settlement in preference to their zemindar. We will also add that we think the Collector ought to be made a party in this suit, though we do not say that the suit ought to abate in consequence of his not being a party. Costs will abide the event.

The 23rd November 1868.

Present:

The Hon'ble J. B. Phear and C. Hobhouse, *Judges.*

Possessory suit—Res adjudicata—Sections 223 and 224, Act VIII., 1859.

Case No. 1717 of 1868.

Special Appeal from a decision passed by the Principal Sudder Ameen of Sarun, dated the 28th March 1868, affirming the decision of the Moonsiff of that District, dated the 26th of March 1867.

Ramsurn Muhton and others (Defendants), *Appellants,*

versus

Jinonauth Bhuggut and others (Plaintiffs), *Respondents.*

Baboo Romesh Chunder Mitter for Appellants.

Baboo Debendur Narain Bose for Respondents.

Where a suit was preferred for the purpose of recovering possession from defendants of lands for possession of which plaintiff had already obtained a decree against the same defendants and others, the suit was held to be barred, as the cause of action was not different from that which had been previously determined. Instead of asking for delivery of possession under Section 224, plaintiff's proper course would have been a resort to the provisions of Section 223 of the Procedure Code.

Phear, J.—It appears that, before instituting the present suit, the plaintiff had already obtained a decree for possession of the land

d

in question against the present defendants and others. The present suit is preferred for the purpose of recovering possession from the defendants of the same lands, and the Lower Appellate Court has given a decree in favor of the plaintiff. It is now objected before us that no cause of action different from the cause of action which was heard and determined in the first suit has been shown by the plaintiff to exist in the present suit, and that therefore he is barred by the previous decree from instituting this suit.

We think that this objection must prevail. The plaintiff is unable to show us that any cause of suit such as he now sets out against the defendants has accrued to him since the first decree was given in his favor. In truth the matter of his complaint in this suit is that he has not been able hitherto to obtain execution of his first decree as against these defendants. It is possible under the circumstances of the case that he has caused the Court to take a wrong course for the purpose of executing that decree. He has asked for delivery of possession according to the provisions of Section 224, whereas it would appear that if the facts upon which he relies in the present suit are well established, his proper mode of obtaining possession would have been by putting in force the provisions of Section 223. In other words, it seems that the defendant, instead of being a person entitled by right to occupy the land under him, the plaintiff, as proprietor, is altogether a wrong-doer either of his own accord, or as claiming under other defendants in the first suit. It is not for us now to decide whether these alleged facts are really well founded or not. We only say that it appears to us the objection made in special appeal by the present defendants must prevail, because the plaintiff is unable to show any other cause of action to justify his proceeding in this suit than the cause of action upon which he sued and obtained a decree against the same defendants before. We, therefore, decree the appeal.

We reverse the decision of both the Lower Courts, but we think that the appellant ought not to have his costs in the Lower Courts inasmuch as he never set up this ground of objection until he came to this Court. As he has succeeded here upon this ground, we think he must have the costs of this Court.

The 23rd November 1868.

Present:

The Hon'ble G. Loch and F. A. Glover, *Judges.*

Representatives of a judgment-creditor—Right of suit—Cause of action—Parties to a suit.

Case No. 142 of 1868.

Regular Appeal from a decision passed by the Principal Sudder Ameen of Purneah, dated the 13th May 1868.

Mussamut Buzmoonissa (one of the Defendants), *Appellant,*

versus

Bibee Rowshun Jahan (Plaintiff), *Respondent.*

Mr. C. Gregory for Appellant.

Mr. R. T. Allan and *Moonshee Mahomed Yusooff* for Respondent.

In a suit by the widow of one of three judgment-creditors to recover the third part of a bond-debt which had been decreed in their favor, and of which execution had been taken out:

HELD that as plaintiff had failed in her endeavour to be made a party to the original suit under Section 73, Act VIII., 1859, her only course was to sue for her share of the money received under the decree. Though she might have sued to have herself declared a sharer in the decree, her not adopting that form of action was held not to bar her suit.

HELD that as the entire sum due on the bond with penal interest to date of decree had been recovered, plaintiff's cause of action had fully accrued, though a balance of interest was still due.

HELD that as she refused to make her daughters co-plaintiffs she could not recover their share.

Glover, J.—THIS was a suit to recover Rupees 6,927-13-7, the third part of a bond-debt alleged to be due by one Korban Ali to three uterine brothers, Ala Buksh, Kadir, and Elahee, and on which a decree had been obtained and execution afterwards taken out by Ala Buksh as the managing member of the family.

The plaintiff is the widow of the second brother Kadir, and she, on her own behalf, and on behalf of two minor sons of Kadir, sues for the share of the decretal moneys which belonged to her husband's estate.

The sum decreed to Ala Buksh and obtained by him in execution was Rupees 12,919. This was exclusive of costs, the amount of which does not appear to have been realized from the estate of the judgment-debtor.

There was practically no defence on the merits in the Court below, and the Principal Sudder Ameen gave the plaintiff a decree for the whole amount claimed.

Two objections are now taken in appeal:—

First.—That the plaintiff cannot maintain this action in its present shape; and

Second.—That in any case, she is only entitled to a share of the decretal-money actually recovered, and that only in proportion to her own and her minor sons' shares.

The first objection appears to us untenable. It is clear from the record that the plaintiff did endeavour to be made a party to the original suit against Korban Ali under Section 73 of Act VIII. of 1859, and failing in that, her only course was to do as she now has done, and to sue for her share of the money received under the decree. She might, no doubt, as insisted upon by the appellant, have brought the suit to have herself declared a sharer in the decree; but as the principal of the debt under the decree has been realized by the sale of the debtor's property, her present form of action raises all the necessary issues between the parties, and gives the defendants every opportunity of refuting her claim to partnership, and we think the objection raised to the form of action is merely technical. As to the cause of action not having accrued because the decretal-money had not been all paid, it appears that the entire sum due on Korban Ali's bond, together with the penal interest of Rupees 24 per cent. per mensem up to date of decree, has been recovered, and that the only balance is for interest subsequent to decree and costs, so that the plaintiff's cause of action *quoad* the bond had fully and completely accrued; but even were it otherwise, we think that, under the circumstances of the case, the plaintiff would be entitled to maintain an action for a share of such sums as had been recovered under the decree, inasmuch as she had been prevented by the defendants from being included amongst the original parties to the suit.

With regard to the second objection, we think that the plaintiff can only recover her share of the moneys actually recovered, and cannot insist on the defendants paying her what they never got from the judgment-debtor's estate. Should any thing be hereafter realized in the shape of costs, the plaintiff will be entitled to share therein, but not until then.

We have, moreover, no doubt that in this case she can only recover to the extent she has declared herself interested, and that the share of her two daughters who have not been made parties to the suit cannot be added to her own and that of the two sons who have been made parties. The plaintiff, we observe, had every opportunity given her of making her daughters co-plaintiffs, but deliberately refused to do so on account of a possibility of having to pay their costs, and she must take the consequences of her own laches. Moreover, the Court has no knowledge as to the status of these ladies, whether or not they are minors, married, or unmarried.

The Subordinate Judge's decree will, therefore, be amended. The plaintiff will recover a third share of the amount collected under Ala Buksh's decree minus the share of her two daughters, which amount will be ascertained and determined in execution of this decree. The amount so recovered from the plaintiff will be returned to the Collector, and added to the sum already in deposit on account of Ala Buksh's decree. The costs of this appeal will be assessed proportionately.

The 23rd November 1868.

Present:

The Hon'ble H. V. Bayley and W. Markby, *Judges.*

Arbitration—Order of reference—Section 316, Act VIII., 1859—Jurisdiction.

Case No. 116 of 1868.

Special Appeal from a decision passed by the Judge of Rajshahye, dated the 11th November 1867, reversing a decision of the Principal Sudder Ameen of Pubna, dated the 27th March 1867.

Haradhun Dutt (Plaintiff), *Appellant,*

versus

Radhanath Shaha and others (some of the Defendants), *Respondents.*

Baboo Sreenath Doss for Appellant.

Baboo Issur Chunder Chuckerbutty for Respondents.

When a suit is referred to arbitration the order of reference should provide for the appointment of an umpire in case of any difference of opinion among the arbitrators, and should declare that the decision shall be with the majority.

When once a matter is referred to arbitration it can never again be dealt with by the Court unless the reference be fruitless, in which case the suit may be brought back on the file of the Court without any reference to the arbitration-proceedings.

The Court which refers a matter to arbitration cannot sit in appeal from the decision of the arbitrators, nor has a Lower Appellate Court jurisdiction to go into the merits of the case.

Bayley, J.—I AM of opinion that this case ought to be remitted to the first Court, in order that the provisions of Section 316, Act VIII. of 1859, may be duly carried out.

This was a suit for an account. It was referred by the first Court to the arbitration of three arbitrators. They made in the first instance a unanimous award. That award, however, did not carry the account up to the latest date, the 23rd Bhadur 1273, but stopped with the year 1269. On the arbitrators being directed to complete their award by carrying on the adjustment to the later date, two out of the three arbitrators agreed in their award, and signed and submitted it to the Court. The third dissented, and did not sign the award of the majority, but submitted a separate memorandum signed by himself for a smaller amount. This was on the 13th March 1867. On the 26th March 1867, a paper of objection was filed by the special respondent, urging that there had been only an award of a majority of two, and that, in the form in which the award was submitted, it was illegal.

The first Court, taking the same issues on which the order of reference was made to the arbitrators, went fully into the case, and gave independent reasons for coming to the same conclusion as the arbitrators on the very evidence upon which they had already proceeded The first Court, so adjudicating the case, decreed against the special respondent.

On this, the defendant appealed to the Judge, urging, amongst other pleas, that the order of reference did not, as it ought to have done, contain any allusion to the course specified in Section 316 of Act VIII. of 1859, as necessary to be followed in case of there being a difference of opinion among the arbitrators.

The Judge held that an appeal would lie, inasmuch as the first Court had given its own reasons for its judgment, and because such a judgment was, in ordinary course, open to appeal to him. The Judge, on the merits, decided in favor of the defendant-appellant.

The plaintiff now appeals specially, and urges that the award of arbitration was, in fact, adopted by the first Court according to the substantial meaning of the law, and, that being so, the Lower Appellate Court had no jurisdiction to interfere and alter that award; and that, although the first Court gave separate reasons in its judgment for the conclusion it came to, it adopted, in fact, the award of the majority as a conclusive award.

I am of opinion that the first Court did not, in the sense that the law requires, adopt the award of the majority as an arbitration-award. It gave its own independent reasons for coming to its own judgment. Had, however, the award been rendered legally complete,as it ought to have been, by an amendment of the order of reference, the illegality existing in the proceedings of the first Court would not have occurred. The Lower Appellate Court, too, would not have erred as it has now done, in taking up the case as an ordinary appeal from the judgment of the first Court.

The first Court, on the 27th March 1867, should have ordered that the arbitrators, in case of any difference of opinion among themselves, should have the power to appoint an umpire, *or* the first Court should have declared that the decision should be with the majority, *or* appointed an umpire, or made such other arrangement as might have been agreed upon by the parties, or, if they could not agree, such as the Court might think proper.

I, therefore, am of opinion that our order should be that the record should be remitted through the Lower Appellate Court to the first Court, and the case again submitted by it to the arbitrators for decision by them with distinct orders in the terms of Section 316, Act VIII. of 1859. In this case, the course that this Court desires to be adopted with reference to the provisions of Section 316, Act VIII. of 1859, is that the decision shall be with the majority of arbitrators. The costs of this appeal will be on the special respondents.

Markby, J.—I am of the same opinion. The course taken by both the Lower Courts in this case appears to me to be erroneous and a complete departure from the procedure laid down by the Code. It is not easy for this Court now to rectify the error, and put the matter again in its proper train. The only way, as it appears to me, that this can be done is in the manner pointed out by Mr. Justice Bayley in his judgment, *viz.*, by directing the first Court to do that now which it ought to have done in the first instance, that is to say, to amend the order of reference, and

send the matter back to the arbitrators for their decision. The result of this will probably be that the arbitrators will, under the fresh order of reference, make a new award in the same terms as the first, and it is very probable that, in their discretion, they will throw the whole costs of that which is only done to meet a formal objection, upon the party who has made it.

The course taken by both the Lower Courts appears to me to be wholly illegal. When once a matter is referred to arbitration, it can never again be dealt with by the Court until it has become apparent that the reference must be fruitless, and no award can be made, in which case only the suit may be brought back on the file of the Court, and will then be treated as a new suit without any reference to the proceedings of arbitration.

The Lower Court in this case, without putting an end to the arbitration, and without any independent inquiry or evidence, constituted itself a Court of Appeal upon the merits from the decision of the arbitrators, but the provisions of the Act clearly show that such power was never intended to be given to the Court. It seems to me also that the reasoning by which the Lower Appellate Court has sought to establish that it had jurisdiction to go into the merits of this case is equally fallacious. I entirely agree with Mr. Justice Bayley that what the first Court did was not to confirm the award, but to hear the case on the merits, but the illegal proceeding on the part of the first Court can have no effect whatever in authorizing the Court of Appeal to make a similar illegality.

The 24th November 1868.

Present:

The Hon'ble L. S. Jackson and Dwarkanath Mitter, *Judges.*

Attachment—Execution—Sale—Voluntary payment to prevent sale.

Case No. 120 of 1868.

Regular Appeal from a decision passed by the Judge of Shahabad, dated the 26th March 1868.

The Collector of Shahabad (Plaintiff), *Appellant,*

versus

Ram Buddun Singh and others (Defendants), *Respondents.*

Baboo Kishen Kishore Ghose for Appellant.

Baboos Unnoda Pershad Banerjee, Romesh Chunder Mitter, Poornoo Chunder Shome, and *Mohesh Chunder Chowdhry* for Respondents.

Plaintiff's ancestor had purchased in execution the right, title, and interest of *R*, one of the defendants. Antecedently to that sale, the right, title, and interest of *R* and those of two others had been attached in execution of a decree against *D* (the uncle of *R* and father of the two others), and a sale having been ordered after purchase by plaintiff's ancestor, the latter, whose objections did not avail, finally prevented the sale by paying in the amount due.

HELD that, as *R* was not legally bound to pay the amount due under the decree against *D*, and the payment was in every sense voluntary, plaintiff could not recover from *R* and the sons of *D*.

Jackson, J.—WE think that the decision of the Court below is correct.

It appears that the father of the minor plaintiff had purchased in December 1864 the right, title, and interest of Ram Buddun Singh, one of the defendants, in execution of a decree against that defendant. It also appeared that, antecedently to that sale, in execution of decree obtained against one Dabee Pershad Singh, the uncle of Ram Buddun, the Court had attached the right, title, and interest of Ram Buddun, and of two persons who are defendants in this suit, who are Dabee Pershad Singh's sons. In pursuance of that attachment, a sale of the interests of these parties was ordered in February 1865, and the plaintiff's father, having in vain objected to these proceedings and sale, finally prevented it by paying in the amount due, and thus satisfying the decree. He now sues Ram Buddun Singh and also the two sons of Dabee Pershad, and another party implicated, to recover the money so paid.

Plaintiff's ancestor, having acquired the right, title, and interest of Ram Buddun, might, if he had shown that Ram Buddun was liable to pay the amount due under the decree against Dabee Pershad, have been entitled to recover the money due from him, on the ground that, in order to protect his own interest, he had been compelled to pay a sum of money which Ram Buddun was legally bound to pay; but the plaintiff had shown nothing of the sort. Dabee Pershad left two sons, who must have been his representatives, and there is nothing to show why Ram Buddun should have been in any way liable to satisfy his uncle's debts. As to the other defendants, the suit against them is even weaker, for the plaintiff had not purchased their rights, was a stranger to them, and was in no way connected with the payment of any sum which they might have been compelled

to pay. I think, therefore, that the payment was in every sense voluntary, and that the plaintiff is not entitled to recover.

This case does not at all resemble the case of Fatima Khattoon and another against Mahomed Jhan Chowdhry and another, decided by the Judicial Committee of the Privy Council in June last.* In that case, the plaintiff sued, and was held to be entitled to recover from certain decree-holders, who had improperly attached on account of the liability of a third party an estate to which the plaintiff was entitled, and, under that pressure, had obliged her to pay a large sum of money.

The appeal is dismissed with costs.

Mitter, J.—I concur. It is perfectly clear that the plaintiff has no right of action against the defendants in this suit. It is also perfectly clear that the plaintiff was not liable under the decree obtained against the defendant Dabee Pershad Singh; and it was for the plaintiff to show, if he wanted to make the defendants liable, that there was some legal obligation on his part to pay the money which he seeks to recover. Whether the plaintiff could have recovered against the decree-holder is a question upon which it is not necessary to pass any opinion. The action, as framed, must fail.

The 24th November 1868.

Present:

The Hon'ble L. S. Jackson and Dwarkanath Mitter, *Judges.*

Ghatwallee tenures—Commissioner's power.

Case No. 1228 of 1868.

Special Appeal from a decision passed by the Principal Sudder Ameen of Patna, dated the 11th February 1868, reversing a decision of the Moonsiff of that District, dated the 27th May 1867.

Lall Dharee Roy (Defendant), *Appellant,*

versus

Brojo Lall Singh and others (Plaintiffs), *Respondents.*

Baboo Onookool Chunder Mookerjee for Appellant.

Baboo Unnoda Pershad Banerjea for Respondents.

A Commissioner of Revenue is not warranted by law, on the demise of a ghatwal, to consider the eligibility of rival claimants to the tenure (a perpetual and descendible one), and to reject the claims of the natural heir on considerations purely moral, *e.g.*, having evinced a want of filial respect and dutiful feeling to his father.

Jackson, J.—After hearing the arguments of the special appellant in this case, we took time to consider our judgment.

It appears to me that the decision of the Lower Appellate Court was perfectly correct, and that the ground taken in special appeal is wholly untenable.

The 2nd Section of Regulation XXIX. of 1814 declares that the "ghatwals and their "descendants in perpetuity shall be main-"tained in possession of the lands so long as "they respectively pay the revenue at present "assessed upon them, and they shall "not be liable to any enhancement of rent, "so long as they shall punctually discharge "the same, and fulfil the other obligations "of their tenure." By this enactment, a hereditary tenure was secured to the ghatwals and their descendants, subject only to the condition of punctual payment of the rent assessed upon them and fulfilment of their other obligations.

It has been doubtless the practice for the Commissioner, or other authority acting on the part of Government, to enquire into cases of alleged failure to perform the duty of ghatwal, or of incapacity to perform such duty; and although I do not wish to express any decided opinion on the question, it is conceivable that a person who has held the office of ghatwal might be removed for good cause, and that, on removal from office, he would be incapable of holding the land. But, in the case before us, the Commissioner appears to have exercised a power far beyond what I have just suggested, and for which I find no warrant of law whatever, that is to say, on the demise of the ghatwal the Commissioner has thought himself at liberty to consider the eligibility of rival claimants, and to dispose at his pleasure of a perpetual and descendible tenure, and to have actually rejected the claims of the natural heir upon consideration, not of his physical incapacity to perform the duty of ghatwal, but on purely moral considerations, the ground alleged being that the heir had, on a former occasion, evinced such a want of filial respect and dutiful feeling towards his father that the Commissioner could have no confidence in his performing the duty of his station.

I think that, in coming to this decision, and so withholding from the plaintiff the inheritance to which he was entitled, the

* See *infra*, Privy Council, page 29.

Commissioner did an act beyond the scope of his authority, and which the plaintiff was quite competent to question by a suit in the Civil Court. It is clear that the plaintiff was actually entitled to succeed, and consequently the suit was properly entertained and correctly decided.

The special appeal, therefore, I think, must be dismissed with costs.

Mitter, J.—I concur. A ghatwallee tenure in Beerbhoom is not resumable at the mere good-will and pleasure of the executive authorities.

The 24th November 1868.

Present:

The Hon'ble L. S. Jackson and Dwarkanath Mitter, *Judges.*

Evidence—Supplementing a case in appeal.

Case No. 85 of 1868.

Regular Appeal from a decision passed by the Principal Sudder Ameen of Patna, dated the 11th February 1868.

Velaet Ali Khan and others (Plaintiffs), *Appellants,*

versus

Matadeen and others (Defendants), *Respondents.*

Messrs. G. C. Paul and *R. E. Twidale* and *Moonshee Mahomed Yusuf* for Appellants.

Mr. C. Gregory and *Baboos Unnoda Pershad Banerjee* and *Onookool Chunder Mookerjee* for Respondents.

A suit to recover money having been commenced against P and others, an attachment was applied for, and certain goods, supposed to be the defendant's, attached by order of the Court. Two other persons coming forward and claiming the attached goods as their property, plaintiffs concluded them to be partners with the original defendants, and made them also defendants. The Lower Court at the trial held that the proof of their partnership on the part of the plaintiffs failed.

HELD in appeal that the plaintiffs' case could not at this stage be supplemented by examining parties whom the plaintiffs did not think fit to call, or by books which they did not produce, in the Court below.

Jackson, J.—WE do not in this case propose to call upon the Counsel for the respondents. The circumstances of the case are somewhat peculiar. The suit was commenced by the plaintiffs against Pallat Ram and others, to recover Rs. 1,53,000 due on certain hoondees. After the suit had been commenced, an attachment was applied for, and on that application certain goods of the defendant, as it was supposed, were attached by order of the Court. On the attachment being made, two other persons named Jacker Ram and Matadeen came forward, and alleged that the property attached belonged to them. The ordinary mode of investigating such claims is stated in Section 86 of the Code of Civil Procedure, and the claim in question ought to have been disposed of as there directed; but, under circumstances which have not been fully stated to us, the plaintiffs, concluding that those claimants were partners with the original defendants in the suit, and as such were liable to them for the money which is the subject of the suit, amended the plaint so as to make those claimants defendants, and by permission of the Court they were made defendants and put in a written statement.

At the trial, the right of the plaintiff to recover the money in suit was clearly made out, and the question most contested was to determine whether or not the parties thus made defendants were liable or not. The Principal Sudder Ameen held them not to be liable, the proof of their partnership on the plaintiffs' part failing, and the question now raised in appeal before us relates to the liability of those same parties.

Mr. Paul, who appears for the appellant, has urged, in the first place, that the Principal Sudder Ameen should have given judgment against those parties on the record as it stands, because he says that, although the plaintiffs may not have given the strongest proof of their allegation as to the defendants' partnership, yet, in the nature of things, it was hardly possible that it could be otherwise; and, further, the defendants' allegations and the evidence which they offered in support of those allegations, ought to have been taken into consideration, and the clear failure of the defendants to prove what they alleged ought to have been received as supporting the case of the plaintiff. Mr. Paul's further contention was that, if the Court was not with him in respect of the view which ought to have been taken of the evidence as it stands, yet that materials for coming to a right decision existed, of which, in the interests of justice, further use ought to have been made, namely, that the parties ought to have been called by order of the Court, and the khata-books brought into Court and examined.

I think that it is quite clear that the plaintiffs did fail in giving the required proof of the defendants' liability, and I also think that, although the statement of the defendants Jacker Ram and Matadeen may justify a certain amount of suspicion, yet that the partial failure of their case is not sufficient to establish that of the plaintiff. It seems to me that the issue of the defendants' liability is one which the plaintiffs were called upon to prove affirmatively; and as to the contention that we ought, in this stage of the proceedings, to supplement the plaintiffs' case by examining the parties whom they did not think fit to call in the Court below, and by calling for the books, that seems to me a course we are not called to take, and under the circumstance ought not to take. We are not dealing with parties who are likely to have been ill-advised, or who, at any rate, had not access, if they had chosen, to the best possible advice. We are dealing with persons who are both wealthy and well versed in litigation, and I think that we may fairly infer that the parties, where they have abstained from calling any witness or requiring the production of any document which had any real bearing on the case, did so for excellent reasons.

The Court which tries the suit is not competent to call any witness at its pleasure, but it may examine on its own motion the parties to the suit, and it may also examine persons who are present in the Court. Perhaps, under the provisions contained in Section 166 of the Code, the Court might have called Rampersad who gave a written statement in this case, and also Pallat Ram who was a nominal defendant; but considering that these persons were merely formal parties to the suit, and that at present the real question at issue is between the plaintiffs and the defendants Jacker Ram and Matadeen, we cannot say it would have been the exercise of a wise discretion in the Court below to call and examine either the respondent Rampersad, who, it appears to have thought, was in collusion with the plaintiff, or Pallat Ram, who appears to have given in no written statement. Certainly, no application of this sort was made by the plaintiff; and although the suggestion is now made by the learned Counsel who appears for the plaintiff-appellant, I do not consider that the plaintiff can be allowed to make a fresh or a further case in the Appellate Court. And my reluctance to allow such action in this case is increased by the circumstances under which the two respondents Jacker Ram and Matadeen came into the suit. They were not originally defendants, and the plaintiffs appear to have been wholly unaware that they were dealing with them, and although the circumstance would not operate against their liability, if the suit had been originally framed against them as defendants, it does, I think, make considerable difference in the course which the Court is called upon to take, or to permit to be taken, against them, when we find that they were brought in as if to relieve the plaintiffs from the embarrassment in which they found themselves involved as the consequence of attaching property belonging to persons other than the defendants.

For these reasons, we think that we ought not to disturb the decision of the Court below, but that this appeal should be dismissed with costs.

The 25th November 1868.

Present:

The Hon'ble F. B. Kemp and E. Jackson, *Judges.*

Jurisdiction—Horticultural cultivation—Res adjudicata—Admission.

Special Appeals from a decision passed by the Judge of Hooghly, dated the 31st December 1867, affirming a decision of the Deputy Collector of that District, dated the 13th June 1867.

Case No. 789 of 1868 under Act X. of 1859.

Koylash Chunder Roy and others (Plaintiffs), *Appellants,*

versus

Heera Lall Seal and others (Defendants), *Respondents.*

Baboos Hem Chunder Banerjee and *Umbica Churn Bose* for Appellants.

Messrs. Mackenzie and *R. T. Allan* and *Baboo Ashootosh Dhur* for Respondents.

Case No. 902 of 1868 under Act X. of 1859.

Fukeer Chand Ghose (Plaintiff), *Appellant,*

versus

Heera Lall Seal and others (Defendants), *Respondents.*

Baboos Hem Chunder Banerjee, Umbica Churn Bose, and *Bhyrub Churn Banerjee* for Appellant.

Messrs. Mackenzie and *R. T. Allan* and *Baboo Ashootosh Dhur* for Respondents.

In a special appeal from the decision of a Zillah Judge, confirming the decision of a Deputy Collector, in a suit for a kubooleut at an enhanced rate of rent, wherein the High Court found that the land was originally taken for horticultural cultivation, it refused to open the question of jurisdiction which had not been raised below.

Where no issue was raised in former suits as regards certain pottahs filed in those suits, the *bona fides* of such pottahs cannot be regarded as a *res adjudicata*.

Yet where the pottahs (about half a century old) were put forward in suits (quarter of a century ago) to which the representatives of the present litigants were parties, and no objection was raised by the representatives of the present plaintiffs then, or has been raised since, their conduct was held to amount to an admission of, or acquiescence in, the *bona fides* of the pottahs.

Kemp, J.—THESE two cases were taken up together, and were very fully and ably argued on both sides. As very important points arise in the case, we took time to consider the judgment which we now proceed to deliver.

The plaintiffs sue to obtain from the defendants a kubooleut at an enhanced rate. The defendants pleaded that the lands were protected from enhancement by their pottahs. Both Courts have dismissed the plaintiffs' suits. The Judge's decision is entirely based upon two decisions passed in the years 1842 and 1844, which the Judge holds to have decided finally that these pottahs protected the tenure of the defendants from further enhancement. The Judge, therefore, treating the question as *res adjudicata*, has confirmed the decision of the first Court dismissing the plaintiffs' suit.

Mr. Allan for the respondents took up a preliminary objection that the present suit was not cognizable in a Revenue Court, and, in support of his argument, he referred us to two decisions, one published in Volume IX., Weekly Reporter, dated the 11th May 1868, Ranee Shurno Moyee *versus* the Reverend C. Blumhardt, decided by Justices Phear and Hobhouse, and another published in Volume VIII., Weekly Reporter, Kalee Kishen Biswas *versus* Sreemutty Jankee, dated the 24th July 1867, Justices Bayley and Phear. This plea was not taken below; and as it is one that will lead, if allowed, to further litigation between the parties, and put them to further expense, it behoves the Court to consider very carefully whether the cognizance of the Revenue Courts is really barred or not.

In the case published in Volume IX., the land was taken for the specific purpose of building a church. In the case published in Volume VIII. the land was taken for the specific purpose of constructing a "basha-baree" or lodging-house. The quantity of land granted in the latter case was very small, and the Judges in that case decided that the main object of taking the lease was to construct a dwelling-house on the land; and that the cultivation of the soil (if any) was entirely subordinate to that purpose. In the first decision quoted, the Judges laid great stress upon the acknowledged purpose for which the land was leased, namely, the building of a church and a school in the church-compound. In the present case, the original purposes for which the lands were taken differ materially from the purposes for which the lands were taken in the cases just referred to. It appears that these lands were originally taken by Mr. Brightman under four pottahs, dated respectively the 6th of Srabun 1221, the 22nd of Bhadro 1222, the 2nd of Pous 1226, and 9th of Aughran 1223. The first pottah was for a small piece of land, and was taken for the purpose of making a garden. In the next year, or in Bhadro, a further piece of land was taken for the purpose of building a house and for a garden also; and the two latter pottahs of 1223 and 1226 were taken, we infer for the same purpose, that is, for a garden, although the pottahs themselves do not specifically state for what purpose the land was taken. We say we infer that these two latter pottahs were taken for a garden, because there is a stipulation in the pottahs that the lessee, and not the lessor, was to pay the Chowkeedar's wages to watch the garden. The total area covered by these pottahs is 60 beegahs 15 cottahs. Now, it can hardly be said that this land, which was originally taken for horticultural cultivation, is entirely subordinate to the house which was erected on it. We therefore think that on the question of jurisdiction, taking into consideration that this point was not raised below, and that to open it now would be to bring upon the parties further litigation and expense, and, lastly, taking into consideration that the facts disclosed in these decisions do not in all respects tally with the facts disclosed in the present case, and that these decisions have not hitherto been followed by other Benches, we overrule the preliminary objection, and proceed to try the appeal on the other points raised.

The first point raised by Baboo Hem Chunder Banerjee for the appellants was that the Judge has based his decision entire-

ly upon the two decisions of 1842 and 1844, taking these decisions as *res adjudicata;* and as the Judge has, as alleged by the Baboo, not taken any evidence as to the *bona fides* of these four pottahs, the pleader has pressed us to remand the case in order that the appellant may have an opportunity of adducing evidence to show that these pottahs are not genuine.

We are of opinion that the Judge was wrong in treating these decisions as *res adjudicata.* In one case, Modhoo Soodun was the plaintiff, and Livingstone, the original lessee under the pottahs, was the defendant. In the other suit, Livingstone was the plaintiff and a ryot subordinate to him was the defendant.

In the first suit, in which Modhoo Soodun was plaintiff, he alleged that he held 8 beeghas under a pottah from the predecessors of the plaintiffs in this case, and that Livingstone in collusion with the zemindar had dispossessed him, Modhoo Soodun, of 4 beeghas out of those 8 beegahs. The defence of Livingstone was that the lands claimed formed part of the land leased to him under the four pottahs which are now under consideration. The predecessors of the present plaintiffs supported the claim of Modhoo Soodun. Livingstone, in support of his defence, filed these very four pottahs, and the suit of Modhoo Soodun was dismissed on the ground that he has failed to prove that Livingstone had dispossessed him of the 4 beegahs and that the land formed part of the holding of Livingstone. In that case, no issue was raised as to the *bona fides* of the four pottahs, the subject of the present suit, and there was no decision as between Livingstone and the present plaintiffs on the question of the the *bona fides* of these pottahs.

In the other suit, in which Livingstone was plaintiff, the suit was to eject a ryot on the ground that, on the terms of that ryot's kubooleut, he was liable to ejectment. The decision in that suit turned entirely upon the question whether, under the terms of the kubooleut, the ryot was liable to ejectment or not. In that suit, Mr. Livingstone obtained a decree, but no issue was raised nor was any decision come to with reference to the *bona fides* of these four pottahs.

We, therefore, think that the Judge was wrong in law in holding that the question of the *bona fides* of these pottahs was finally determined by these decisions.

We now come to the question whether we ought to remand this case to enable the appellants to adduce evidence to show that these pottahs are not *bonâ fide.* On this point, after due consideration, we think we should be wrong in remanding this suit, for although the two decisions of 1842 and 1844 are not *res adjudicata,* we think that the conduct of the predecessors of the plaintiffs in those suits was such as to amount to an admission or acquiescence on their part in the *bona fides* of these pottahs.

One of the plaintiffs in this suit, or the Banerjee plaintiff, was represented in the suit of Modhoo Soodun, and the father of the present Banerjee plaintiff, or Wooma Churn Banerjee, who was then a servant of Mr. Livingstone, took back these very pottahs from the file of the Civil Court and gave a receipt for the same. This fact is clear on the endorsement on the back of the pottahs. Further, in the suit of Modhoo Soodun, the answer of the Banerjee defendant was to the effect, not that Mr. Livingstone was not holding under these pottahs, but, on the admission that though he did hold under these pottahs, the lands claimed by Modhoo Soodun did not form a portion of the lands covered by the pottahs of Mr. Livingstone. Two of these pottahs are more than half a century old, and the remaining two very nearly half a century, and in two suits of a quarter of a century ago these pottahs were filed, and the answer of the Banerjee defendant in the suit of Modhoo Soodun was filed subsequent to the date upon which these pottahs were filed. It cannot, therefore, be said that he had not an opportunity of questioning then and there the *bona fides* of these pottahs. These pottahs have passed, first from Mr. Brightman to Dinonath Mullick by a formal deed of sale drawn up in the English form; secondly, from Dinonath Mullick to Livingstone and Co.; and lastly, from Livingstone and Co. to the present defendants. The plaintiffs or their predecessors have stood by and allowed valuable buildings and dockyards to be constructed on these lands, and now after the lapse of half a century when it is impossible to expect that the defendants can be able to bring witnesses to attest these pottahs, the plaintiffs question the *bona fides* of these pottahs.

In special appeal it is not very distinctly stated that the Judge refused to take evidence, nor do we think that if such evidence had been pressed upon the Judge, he would

have refused to receive it. At all events, there is nothing on the record which has been shown to us to prove that the Judge did refuse to receive this evidence. We, therefore, do not think it necessary to remand this case for further evidence.

We now come to the last point taken in appeal, namely, the terms of the pottah; whether under the terms of the pottah, the lands covered by them are liable to enhancement or not. It is contended for the special appellants that these pottahs are not mokurruree pottahs, and that there is nothing in the terms of the pottahs which fixes the rate of rent to be paid. On the other hand, it has been urged for the defendants, special respondents, that although the word mokurruree does not occur in the pottahs, it was not absolutely necessary that any formal words should be used in conveying a right to hold at a fixed rate, and in support of this contention, a decision of this Court published in Volume VII. Weekly Reporter, page 394, dated 15th April 1867, Unnoda Pershad Banerjee, plaintiff, *versus* Chunder Sekhur Deb, defendant, decided by Justices Seton-Karr and Glover, has been quoted. Now it is clear from the terms of these pottahs, that they were not ordinary pottahs, such as are taken by ryots for cultivating purposes; they were taken for building and horticultural purposes, and the lands were to be enjoyed by the lessee and his sons and their sons' sons for ever. Under these pottahs, the original lessee and the various parties who have derived title from him have held for half a century, paying the rent stated in the pottahs. They have been allowed, on the faith of these pottahs, to expend large sums of money in constructing buildings and dockyards, and therefore taking into consideration the nature of the leases, the position of the parties, and the circumstances under which the contract was originally made, we cannot, sitting in special appeal, say that the Judge has placed on the pottahs a construction which they cannot legally bear. For the above reasons, we confirm the decision of the Judge and dismiss these special appeals with costs and interest.

Jackson, J.—I quite concur in the orders which my learned colleague would pass in these appeals, and also in the grounds upon which he would pass those orders. There is one point, however, upon which I would go somewhat further than he does; that is, on the question as to whether the Judge decided these points solely as *res adjudicata* or whether he did not also look to the conduct of the parties. My impression is that he wrongly used the words *res adjudicata*. There can be no doubt that no issue was raised as regards these pottahs in former litigations and no adjudication was made regarding them, and therefore the question of their genuineness was not a *res adjudicata*. The Judge, however, seems to consider them *res adjudicata*, because they were put forward in suits to which both the representatives of the present parties were parties, and because no objection was then raised by the representatives of the present plaintiffs, and because from that time to this no objection has ever been raised by them. This, of course, is not *res adjudicata*, but it is in my opinion final and conclusive evidence of the genuineness of these pottahs. The plaintiffs' ancestors at that time knew of these pottahs, saw these pottahs, and made no objections to these pottahs. They had a far better opportunity of knowing whether these pottahs were genuine than their descendants a quarter of a century afterwards.

Under these circumstances, I think that it was quite right of the Judge to decide that these acts, and the silence and acquiescence of the plaintiffs and their representatives for half a century in the possession of the defendants under these pottahs, was conduct of that description which precludes them from now making and raising any objections to the pottahs. They have stood by and have allowed the defendants to purchase the grounds and to erect valuable buildings on these grounds on the faith of the pottahs, and it appears to me that it would be allowing the plaintiffs to act fraudulently to permit them now to come forward and impugn their genuineness.

The 26th November 1868.

Present:

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble Dwarkanath Mitter, *Judge*.

Kubooleut—Landlord and tenant—Trespasser.

Case No. 1337 of 1868.

Special Appeal from a decision passed by the Judge of Chittagong, dated the 3rd March 1868, reversing a decision of the Deputy Collector of that District, dated the 9th August 1867.

Mohunt Jalha (Defendant), *Appellant*,

versus

Koylash Chunder Dey (Plaintiff), *Respondent*.

Baboo Gopeenath Mookerjee for Appellant.
Mr. R. T. Allan for Respondent.

A landlord cannot compel every trespasser upon his land to execute a kubooleut; he is entitled to a kubooleut only from his tenants.

Peacock, C. J.—The plaintiff is not entitled to compel the defendant to execute a kubooleut unless he shows that the relationship of landlord and tenant existed between them. A person cannot compel every trespasser upon his land to execute a kubooleut and to become his tenant. The defendant denied that such relationship existed, and it was no part of the plaintiff's case that it did. It would be useless for us to remand the case unless there is some evidence to warrant the Judge in finding that that relationship did exist. There is no such evidence on the record, and the decision of the Judge is, therefore, reversed with costs in the Lower Appellate Court and in this appeal, and the decision of the first Court dismissing the plaintiff's suit is affirmed.

The 26th November 1868.

Present:

The Hon'ble L. S. Jackson and F. A. Glover, *Judges*.

Bond—Consideration-money—Onus probandi.

Case No. 78 of 1868.

Regular Appeal from a decision passed by the Judge of Shahabad, dated the 8th February 1868.

Rughoonath Doss (Plaintiff), *Appellant*,

versus

Luchmee Narain Singh (Defendant), *Respondent*.

Mr. G. C. Paul and *Baboo Rajendronath Bose* for Appellant.

No one for Respondent.

In a suit on a bond which recites receipt of money and which defendant admits having executed, a *primâ-facie* case arises which defendant must rebut by giving evidence that the money is not due.

Jackson, J.—It appears to us that the judgment originally given by the Judge in this case was right, and that his decision subsequently come to on review was erroneous.

The execution of the bond in this case was admitted, but the defence set up was that, notwithstanding such execution, in fact, no consideration had passed, and that no money was due to the plaintiff, that the recitals in the bond were untrue, and that the plaintiff's claim was untenable.

The Judge in his decision made on review observes that "there is no proof whatever before the Court that any consideration passed between the plaintiff and defendant;" and again—"The defendant

"having acknowledged the execution, his "allegation of finding out afterwards that "the money is money due to him or to his "mother, is a distinct averment, which "must be proved by him, and not by plaint-"iff."

The decisions upon the question which arises in this case are somewhat conflicting, and if the facts were otherwise than they actually are, it would have been necessary for us to submit the case to a Full Bench, for while there are decisions (one of which is to be found in Marshall's Reports, p. 27) showing that in circumstances like those of the present case the *onus* of proof lies on the defendant, there are also other cases (such as in V. Weekly Reporter, page 203, and Sutherland's Reports, 1864, page 197) which appear to throw on the plaintiff the burden of proving that consideration passed, notwithstanding the defendant admits the bond.

If we admit that, on the circumstances of the case, it was for the plaintiff to prove the consideration, it appears to me that the plaintiff has discharged himself of that burden. The admission of the defendant with regard to the bond is unquestionably evidence against him; but, in addition to that, witnesses have been called, who depose generally, not only to the execution of the bond, but also to the fact of an outstanding account between plaintiff and defendant on which money was due to the plaintiff.

It is not quite clear what the Judge meant by saying "there is no proof before the Court that any consideration passed between the plaintiff and the defendant."

It is not alleged in the plaint that money was paid to the defendant at the time of the execution of the bond, and consequently there could not be proof of any consideration passing at that time. I myself should be inclined to hold that, when the defendant admits the execution of the bond, and the bond expressly recites that he had received the money which he therein promised to pay, a *primâ-facie* case arises which the defendant must rebut by giving some evidence, that, in fact, the money was not due. The present case appears to be one in which that obligation especially lay on the defendant. His statement is that, before executing the bond, he was convinced that nothing was due to the plaintiff, and yet with his eyes open he executed the bond admitting his own indebtedness.

It is difficult to see how the Court could willingly entertain such a defence at all: but at least it is a defence so peculiar in its nature as to demand very special proof from the defendant.

The decision appealed from must be reversed, and the original judgment must be restored with costs.

Glover, J.—I concur.

The 26th November 1868.

Present:

The Hon'ble F. B. Kemp and E. Jackson, *Judges.*

Mokurrureedar—Sub-tenures—Rights of occupancy.

Cases Nos. 1355 and 1356 of 1868.

Special Appeals from a decision passed by the Second Principal Sudder Ameen of Hooghly, dated the 14th February 1868, affirming a decision of the Moonsiff of Sulkea, dated the 21st September 1867.

Koylash Chunder Biswas and another (Defendants), *Appellants,*

versus

Biressuree Dossee (Plaintiff), *Respondent.*

Baboos Ashootosh Dhur and *Oopendur Chunder Bose* for Appellants.

Baboos Hem Chunder Banerjee and *Bhyrub Chunder Banerjee* for Respondent.

When a mokurrureedar resigns his tenure, the durmokurrurees created by him come to an end; but the position of ryots holding rights of occupancy is not affected by the extinction of either the tenure or the under-tenures.

Kemp, J.—THESE two appeals are from the same decision, one being preferred by the ryot Permanund Bagdee, and the other by the intervenor Koylash Chunder Biswas.

The plaintiff's allegation is that her husband, in a suit for enhancement against Anund Chunder Ghose, obtained a decree on the 17th of May 1861. This decree was confirmed by this Court in special appeal, the Court observing that, as the suit for enhancement had been brought before Act X. came into operation, the plea of the ryot (defendant) Anund Chunder Ghose that he had laid out money in improving the land could not be attended to. Subsequently, the plaintiff's husband sued Anund Chunder Ghose for arrears of rent at an enhanced rate, when, on the 18th of Assar 1270, Anund Chunder Ghose resigned his tenure, not being able to pay the enhanced jumma with reference

to the jumma receivable by him from the dur-mokurrureedars. We may here state that the jumma payable by Anund Chunder Ghose to the plaintiff's husband was 7 rupees, and that receivable by Anund Chunder Ghose from Koylash Chunder Mitter, the dur-mokurrureedar, 39 rupees. When the jumma of Anund Chunder Ghose was raised to 72 rupees, and he only received 39 rupees from his lessee, he threw up his holding. The plaintiff now sues Permanund Bagdee for khas possession of 3½ cottahs of land.

Permanund answers to this effect, that he is not a ryot of the plaintiff, or of the plaintiff's husband; that he is a ryot of Koylash Chunder Biswas; and that Koylash Chunder ought to have been made a party to the suit. Koylash Chunder then intervened, and was made a party to the suit. Permanund Bagdee filed his pottah, which was dated in the year 1252, and dakhilahs which showed payments of rent at the jumma fixed in that pottah to his lessor Koylash Chunder Biswas, from 1252, or upwards of 20 years prior to suit. Koylash Chunder filed his pottah, dated the 29th of Cheyt 1251, which he obtained from the descendant of Anund Chunder Ghose; he also filed dakhilahs from 1251. Both the Lower Courts have decreed the plaintiff's suit, and given her khas possession ejecting Permanund Bagdee, holding that, on the resignation by Anund Chunder Ghose of the mokurruree, all the subordinate tenures, as a matter of course, fell with the mokurruree, and that the plaintiff, the zemindar, was entitled to direct possession. The Courts below observed that, if this were not the law, the mokurrureedar, whose mokurruree might subsequently be set aside on the suit of a zemindar, could create under-tenures to the ruin of the zemindar.

In this case, the zemindar, even supposing the sub-tenures were allowed to continue, would not be a loser; on the contrary, instead of receiving 7 rupees from Anund Chunder Ghose, he would receive 39 rupees from Koylash Chunder. It is very clear, in this case, that the alleged mokurruree pottah of Anund Chunder Ghose was set aside by the decision which was confirmed in special appeal, and that the tenure held by him was enhanced, and that he threw it up.

When Anund Chunder Ghose's mokurruree was declared to be invalid, and he resigned any rights that he had in the tenure, the dur-mokurruree of Koylash Chunder Mitter came to an end; but the position of Permanund Bagdee is a very different one. His position as a ryot with right of occupancy is, in our opinion, not affected by the resignation of Anund Chunder, nor by the extinction of the dur-mokurruree of Koylash Chunder. Looking to the dates of the pottahs of Anund Chunder, Koylash Chunder, and Permanund, it is very clear that these lands were not really occupied by either Anund Chunder or Koylash Chunder, but that they were leased out to ryots, amongst whom is Permanund Bagdee, for building purposes. Permanund Bagdee has been in occupation of these lands since 1252. Whether his tenure is liable to enhancement or not is a question which we have not to decide in this case; but that he is entitled to hold possession, and that he cannot be ejected at the suit of the plaintiff is clear. We therefore reverse the decision of the Principal Sudder Ameen in as far as Permanund Bagdee is concerned. The special appeal of Permanund Bagdee is decreed with costs, and the special appeal of Koylash Chunder, the intervenor, is dismissed with costs.

The 26th November 1868.

Present:

The Hon'ble J. B. Phear and C. Hobhouse, *Judges.*

Criminal prosecution—Civil liability.

Case No. 1973 of 1868.

Special Appeal from a decision passed by the Principal Sudder Ameen of the 24-Pergunnahs, dated the 22nd April 1868, reversing a decision of the Moonsiff of Diamond Harbour, dated the 9th August 1867.

Chinta Monee Bapoolee and another (two of the Defendants), *Appellants,*

versus

Digambur Mitter and others (Plaintiffs), *Respondents.*

Baboo Annund Chunder Ghossal for Appellants.

Baboo Mohendro Lall Shome for Respondents.

Parties who act honestly in initiating proceedings in a Magistrate's Court cannot be held civilly responsible

for any order which the Magistrate may pass in the case, whether it lies within his jurisdiction to make such order or not.

Phear, J.—We are of opinion (and indeed this hardly seems to be contested by the respondent) that the plaint does not disclose any cause of action against the defendants. It in no way charges them with any act or conduct for which they can be made responsible in any civil suit. We have further heard the pleader for the respondent at some length, and we think that the case which he desires to set up on behalf of his client, and which he urges that they are entitled to have tried even on the imperfect plaint filed in the record, does not make out any cause of action against the defendant. Substantially, no doubt, he wants the Civil Court to set aside an order injunctional made by the Magistrate under the provisions of the Criminal Procedure Code. There is some little vagueness resulting from the position which he takes up as to the particular order which he wants to get so set aside, but whichever be the order, whether it be the order of 1862 or that of 1865, he does not, as we think, connect the defendants with the making of that order in such a way as to render them responsible in a civil suit. For all that we have heard, if they were the persons who initiated the proceedings before the Magistrate (and of that we may say there seems to be no certainty whatever), the action so taken by them, for all that appears on the record, was perfectly honest, and without any malicious intention towards the plaintiff. They had a right to have recourse to the Magistrate's Court; and if the plaintiff is aggrieved by the order which the Magistrate made in consequence, the defendants, for anything that we can see, are not liable in a civil suit. It would have been otherwise if there had been anything in the facts of the case, as alleged by the plaintiff, to show that the defendants had, in the proceedings which they took, been actuated by malicious motives or with the intention of wrongfully injuring the plaintiff. If the order of the Magistrate was an order which it lay within his jurisdiction to make, they, acting honestly, cannot be made responsible for its consequence. Again, if the order was one which the Magistrate had no power to make, the proper course for the plaintiff to take is to disobey it. Unless he can show fraud or wrongful conduct on the part of the defendants in bringing about the passing of the Magistrate's order, we think that he cannot make them civilly responsible for the consequences of that order. We have said this much on the hypothesis that the parties did really intend to contest the case upon the footing which the pleader for the special respondent wishes us to accept as the basis of his case; but we have already said that there is no trace of that being so in the plaint, nor do we think, from anything else, that we have had read to us from the papers, that it was the course which was taken by the parties in the actual progress of the suit. The appeal is decreed, and the plaintiff's suit dismissed. The special appellant must have his costs in all the Courts.

The 26th November 1868.

Present:

The Hon'ble J. B. Phear and C. Hobhouse,

Judges.

Construction of the words সন বসন in a pottah —Registration—Clause 4, Section 17, Act XX. of 1866.

Case No. 1951 of 1868.

Special Appeal from a decision passed by the Principal Sudder Ameen of the 24-Pergunnahs, dated the 23rd April 1868, affirming a decision of the Moonsiff of Manicktollah, dated the 29th August 1867.

Ram Coomar Mundul (one of the Defendants), *Appellant,*

versus

Brojohuree Mirdha (Plaintiff), *Respondent.*

Baboos Mohesh Chunder Bose and *Nil Madhub Sein* for Appellant.

Mr. Mendes for Respondent.

Where the form of a pottah is expressed by the words সন বসন, a year by year tenancy is meant, and such a pottah falls within the 4th Clause of Section 17, Act XX. of 1866, and is a lease for a term exceeding one year, and unless registered it cannot be received as evidence.

Phear, J.—The defendant's case in this suit rested upon a title which he set up under a certain pottah which the Lower Court refused to receive as evidence on the ground that it was not registered. The term of this pottah is expressed by the common form with which we are so familiar, সন বসন *shone bu shone.* This has been invariably interpreted by this Court to mean a year by year tenancy, that is, a tenancy which is certain for the period of one year, and will continue beyond that period until it is properly put an end to by either party. We think that a pottah, the term of which

is defined by these words falls within the 4th Clause of Section 17, Act XX. of 1866, and that it is lease for a term exceeding one year. Therefore, by the provisions of that Section, the document must be registered; otherwise, by Section 49 of the same Act, it cannot be received as evidence in any Court whatever. It follows that the first objection made on special appeal to the judgment of the Court below falls to the ground.

The remaining objection is one which is based upon the nature of the title of the defendant; but inasmuch as the title-deed, which is the primary evidence of that title, cannot be received, the Court would have been wrong if it had looked at secondary evidence of the same. This objection therefore also fails, and the special appeal must be dismissed with costs.

The 28th November 1868.

Present:

The Hon'ble J. B. Phear and C. Hobhouse, *Judges.*

Remand—Preliminary issue—Right of suit—Joint obligation.

Case No. 1861 of 1868 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of the 24-Pergunnahs, dated the 29th May 1868, reversing a decision of the Deputy Collector of that District, dated the 25th January 1868.

Gopal Chunder Gooho (Defendant), *Appellant,*

versus

Juggodumba Dossia (Plaintiff), *Respondent.*

Baboos Kalee Prosunno Dutt, Ramanath Bose, and *Nurrendurnath Chatterjee* for Appellant.

Baboos Kalee Kishen Sein and *Oopender Chunder Bose* for Respondent.

Where a suit for rent was decided and dismissed by the Lower Court on the issue whether or not the plaintiff's title to sue could be made out: HELD that it was not competent to the Lower Appellate Court to remand the case in order that it might be tried on its merits.

Where a kubooleut creates an obligation from a tenant to two parties jointly, the obligation can only be properly enforced by a suit brought by those parties jointly.

Phear, J.—WE think that this case has been unfortunately dealt with in the Lower Appellate Court. The order of the Judge is that it be remanded in order that it may be tried on its merits. It appears clear to us that the Judge had no power under the provisions of Act VIII. of 1859 to make such a remand under the facts of the case.

The parties went to trial upon two issues. The first of these was whether or not the plaintiff's title to sue could be made out; and the second was, whether or not the payment pleaded by the defendant was established. The first Court decided the first issue in the defendant's favor, and accordingly dismissed the suit. In other words, the first Court determined the suit upon a substantial issue going to the whole merits of the case. It was, therefore, not competent to the Judge to remand the case in order that it might be tried upon its merits. Moreover, the Court could only have remanded the case for trial on the merits, in the event of the first Court having decided the case in such a way upon a preliminary issue as to have prevented the parties from adducing evidence on the merits. This clearly was not the case here, and the only thing open for the Court to do, if it found itself unable upon the evidence upon the record to finally determine the second issue which had been left untouched by the first Court, was to send back the case with an order that the first Court should take the evidence of the parties upon that issue, and return the record with such additional evidence, and its own report thereon, to the Appellate Court. We do not gather from the judgment of the Lower Appellate Court that there was any occasion for a remand of this partial character even. It, therefore, seems to us that the Judge ought to have entertained and determined the suit himself upon the merits; and had he taken this course, he would have been clearly bound to consider the validity of the plea set up by the defendant to the effect that the tenancy exhibited by the kubooleut upon which the plaintiff sued had, in fact, terminated.

We do not, however, having regard to the terms of the kubooleut itself, think it necessary to send back the case to the Lower Appellate Court for decision upon the merits. We are of opinion that by the terms of that kubooleut, the defendant contracted to pay rent to the present plaintiff and Kumooddeen jointly. Now, in this suit, the plaintiff making this kubooleut the basis of her claim, seeks to recover the whole of the rent which is due thereunder, and not merely the moiety of it. She does not show that there has been any difficulty on her part in getting Kumooddeen to join her in the suit. Even had there been such difficulty, she might have made

Kumooddeen a defendant, so that the Court having all the persons interested in the matter before it as parties, might have done justice between them. In short, there is nothing to show why the present plaintiff should be excused from the necessity of suing according to the terms of the kubooleut upon which she relies; and that kubooleut, according to the interpretation which we put upon it, created an obligation from the defendant to the plaintiff and Kumooddeen jointly. This obligation, therefore, could only be properly enforced by a suit brought by the plaintiff and Kumooddeen jointly. It appears to us on this state of facts that the plaintiff's suit ought to be dismissed.

We, therefore, reverse the decision of the Lower Appellate Court, and confirm that of the first Court. The appellant must have his costs in this Court and in the Lower Appellate Court.

The 27th November 1868.

Present:

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble Dwarkanath Mitter, *Judge*.

Deed held to be mala fide—Onus probandi.

Case No. 1362 of 1868.

Special Appeal from a decision passed by the Judge of Chittagong, dated the 28th February 1868, reversing a decision of the Sudder Ameen of that District, dated the 14th March 1867.

Eshan Chunder Doss and others (Defendants), *Appellants*,

versus

Rokeemooddeen Sowdagur (Plaintiff), *Respondent*.

Mr. G. A. Twidale for Appellants.

Baboos Bama Churn Banerjee and *Ukhil Chunder Sein* for Respondent.

Where a plaintiff in a civil suit relies upon a *kobalah*, which has been held by a Court of Small Causes to be *mala fide* the *onus* lies upon him to prove that the deed was executed, and that it represented a real and honest transaction between the parties.

Peacock, C. J.—We think it clear that the Judge in his judgment has laid down several erroneous principles of law. In the first place, he says that the *onus* was on the defendant to prove the alleged *mala fides* of the transaction in question, and he has failed to prove it.

The suit was brought to set aside an order of the Small Cause Court in which that Court had held that the deed was *mala fide*. The *onus* therefore lay on the plaintiff to prove, not only that the deed was executed, but that it represented a real and honest transaction between the parties. The Judge says that the kobalah has been attested and proved by the attesting witnesses. We do not think that the Lower Court disputed that fact, but what the Lower Court did dispute was that, although the deed was executed, there was no consideration for it so as to make it binding on a creditor.

Then, again, the Judge says that in a talookee pottah granted to the plaintiff by the zemindar, mention is made of the above kobalah, thereby treating the fact that the zemindar believed the pottah to be genuine, without having any evidence before him as a guide to himself, the Judge, as to the mode in which he should determine the case upon the evidence adduced. We cannot say that the Judge would have upheld this kobalah, but for the erroneous opinion which he appears to have entertained as to the law.

It may be as well to remark that with respect to the *bynamah*, *viz*, the purchase under the execution, the Judge says in effect that such a sale could have taken place without any fraud having been committed or intended, and then he adds: "The *onus* "was upon the defendant to prove the alleg-"ed fraud, and that he has utterly failed to "do." We have already pointed out that that *onus* is on the defendant. The decision of the Judge must be reversed, and the case remanded to be re-tried *de novo* upon regular appeal; the costs to abide the event. Having remanded the case, we think it right to call it up and hear it ourselves upon regular appeal, as we have done in other similar cases.

[The Court then heard and considered the evidence in the case, and upheld the decision of the Sudder Ameen, and proceeded to say]---

If in cases in which there is an apparent attempt to defeat a decree by a bill of sale of the debtor's property, Judges would examine minutely as to the mode in which the purchase-money for the bill of sale was paid, and how it was dealt with, they would be more likely to detect the frauds which in cases of this sort are frequently attempted to be palmed upon them.

d

The 27th November 1868.

Present:

The Hon'ble H. V. Bayley and F. B. Kemp, *Judges.*

Suit for confirmation of right and possession—Onus probandi.

Case No. 586 of 1868.

Special Appeal from a decision passed by the Principal Sudder Ameen of Tipperah, dated the 24th December 1867, reversing a decision of the Moonsiff of that District, dated the 21st August 1867.

Gungamala Chowdhrain (Defendant), *Appellant,*

versus

Madhub Chunder Nag (Plaintiff), *Respondent.*

Baboo Poorno Chunder Mookerjee for Appellant.

Baboos Romesh Chunder Mitter and *Kalee Mohun Doss* for Respondent.

In a suit for confirmation of right and possession in respect of lands alleged to be within plaintiff's permanently-settled talook, where plaintiff incidentally remarked that defendant (as intervenor in a previous rent-suit) had claimed the lands as appertaining to another talook which plaintiff alleged had no existence:

HELD that it was an error of law in the Lower Appellate Court to place on the defendant the *onus* of proving the existence of that other talook, instead of following the usual and recognized course of requiring the plaintiff to prove that the lands in suit belonged to his talook.

Bayley, J.—THIS is a suit for confirmation of right to and possession of certain lands which the plaintiff alleges are within his permanently-settled resumed lakheraj talook Kismut Amkee, No. 190 on the Bhullooah Collectorate rent-roll.

The real point at issue in this appeal is whether or not there has been an error in law in the Lower Appellate Court having put the whole *onus* of proof on the defendant (special appellant) without requiring from the plaintiff a sufficient *primâ-facie* case before the Court went into the defendant's case.

I think this contention good, because, after a careful consideration of the original terms of the plaint, and taking the plaint as a whole in its true and substantial meaning, it amounts to this, *viz.*, that the plaintiff claims the lands in suit on the declaration that they belong to his resumed lakheraj talook No. 190 aforesaid. It is true that the plaintiff goes on to say that, when he brought a suit against certain tenants for a kubooleut before the Deputy Collector, the defendant intervened in the suit, claiming the lands as of his talook Raj Kishore Narain Chowdhry in Tuppeh Joynuggur, to which (said the plaintiff) the lands did not appertain, and which talook, in fact, was no real talook at all; but that the Deputy Collector in that rent-case held that the lands in suit were part and parcel of the defendant's existing talook Raj Kishore Narain Chowdhry in Joynuggur, and thus the plaintiff, fearing that his rights might be prejudiced, brought this civil action.

The first Court dismissed the plaintiff's suit with costs.

On appeal, the Lower Appellate Court reversed that decision, and decreed the plaintiff's suit. The Lower Appellate Court remarks: "If it be found as a fact that "the talook in question was in existence "from before, the present suit must be "viewed in the light of other suits involv-"ing questions of boundary, and the plaintiff "would be charged with the *onus* of prov-"ing his allegations. The Moonsiff has "committed some error by entirely throw-"ing the *onus* of proof upon the plaintiff. "In my opinion, it is necessary to take at "first the condition of the talook set up by "the respondent into consideration; and it "is, therefore, for her, in the first place, to "show by what document and evidence she "has proved that the talook set up by her "was in existence from before."

It is contended by the pleader for the special respondent that, in fact, the defendant had to meet the statement of the plaintiff that the defendant's talook Raj Kishore Narain Chowdhry had no real existence at all; that that was a matter which had to be tried and disposed of preliminarily before any further investigation would be necessary, because, if the talook had really no existence, there would be an end of the whole question, and that thus the Lower Appellate Court was right to make the defendant prove that this talook existed. But really plaintiff's main allegation was that the lands in suit belonged to his lakheraj mehal No. 190 on the Towjee,

and it was only subsidiarily and in connection with the intervention of the defendant in the rent-suit that a remark was incidentally added by plaintiff, to the effect that, not only was that intervention improper because the lands appertained to the plaintiff's talook, and not to the defendant's, but also that the defendant had no such talook at all.

Under these circumstances, and upon this state of the pleadings, I think the main question which plaintiff had to prove before the defendant's case had to be gone into was that the lands in suit belonged to his resumed lakheraj talook No. 190. Supposing the plaintiff had ended his statement without making the subsidiary remark about the non-existence of the defendant's talook, the allegation of the plaintiff that the lands were in his talook would have to be proved by the plaintiff himself. Such being the nature of the plaint, I cannot consider the remark of the Principal Sudder Ameen (given above in full) to be a correct one, because I do not think that, only on account of an incidental and subsidiary remark by the plaintiff in his plaint, the whole burthen of proof and the rules of pleading should be changed. The judgment below also shows that simply on this incident the whole of the defendant's case has been gone into, as if she had to prove that the lands in suit belonged to her talook, instead of the usual and recognized course being followed, which would require the plaintiff to prove that the lands belonged to his talook before the defendant's case would be gone into. I would, therefore, remand the case to the Lower Appellate Court with instructions that, as above stated, the Court has erred in law in going contrary to the recognized rules of pleading, and placing the *onus* of proof on the defendant in this case. The Lower Appellate Court should, therefore, be now directed to put the *onus* on the plaintiff, as indicated above, and should re-try the case with reference to the above remarks.

Costs of this appeal will abide the ultimate result.

Kemp, J.—I concur in the order of remand. I wish to add that, referring to the plaint, I find that the plaintiff has valued his suit, not with reference to the whole of the defendant's talook and putting in issue the existence or non-existence of that talook, but simply with reference to a small portion of the whole lands contained in that talook. I quite concur in the order of remand.

The 27th November 1868.

Present:

The Hon'ble L. S. Jackson and F. A. Glover, *Judges.*

Taking a putnee—Notice of adverse agreement.

Case No. 365 of 1868.

*Application for review of judgment passed by the Hon'ble Justices L. S. Jackson and F. A. Glover, on the 14th August 1868, in Special Appeal No. 756 of 1868.**

Dwarkanath Chowdhry (Respondent), *Petitioner,*

versus

Komul Lochun Doss Mundul and others (Appellants), *Opposite Party.*

Mr. G. C. Paul and *Baboo Motee Lall Mookerjee* for Petitioner.

Baboos Onookool Chunder Mookerjee and *Gopeenath Mookerjee* for Opposite Party.

Where A, taking a putnee to the prejudice of B, has notice of an agreement existing between B and the zemindar, he cannot in equity maintain the lease which he has obtained, but B will be entitled to relief against him.

Jackson, J.—We think there is much force in the argument of Mr. Paul which appears to be, that we overlooked in deciding the case the important bearing of a fact which is certainly suggested by the proceedings, *viz.*, that the defendant, at the time of taking a putnee, had notice of the agreement existing between the plaintiff and the zemindar, and if he had such notice, he could not in equity maintain the lease which he obtained to the prejudice of the plaintiff, but the latter will be entitled to relief against him (*vide* Le Neve *versus* Le Neve, II. White and Tudor's Leading Cases in Equity, page 34).

On looking through the Judge's decision, however, there is no distinct finding discoverable on this point, and we, therefore, now set aside our first judgment, and remand the case to the Lower Appellate Court, in order that the Judge may clearly find whether or not the defendant had notice of the agreement under which the zemindar was a party. If so, a decision will be come to for the plaintiff, and not otherwise.

* See *supra*, page 254.

The 27th November 1868.

Present:

The Hon'ble H. V. Bayley and F. B. Kemp, *Judges.*

Reviews.

Case No. 274 of 1868.

Application for review of judgment passed by the Hon'ble Justices H. V. Bayley and F. B. Kemp, on the 28th May 1866, in Special Appeal No. 3384 of 1865.

Mr. A. J. Forbes (Plaintiff, Appellant), *Petitioner,*

versus

Shaikh Dyanutoollah and others (Defendants, Respondents), *Opposite Party.*

Baboos Hem Chunder Banerjee and *Umurnath Bose* for Petitioner.

Mr. C. Gregory for Opposite Party.

After rejection of an application made within 90 days for review of the judgment of a Division Court, which turned upon the construction of a "*teep*" or indigo contract, a Full Court, sitting in appeal under Section 15 of the Charter, put a construction upon a similar "*teep*," upon which a second application was filed for review of the original decision.

HELD that such second application should have been made within 90 days from the date of the decision of the Full Court, that having been the judgment which gave cause to the review.

Kemp, J.—THIS is an application for review of our judgment, dated the 28th May 1866. It appears that an application for review, made within 90 days, was rejected on the 3rd September 1866. The present application was filed on the 30th May 1868, on the ground that, according to the terms of the "*teep*" or indigo-contract, dated the 22nd October 1859, and according to the construction put by the Full Court sitting on appeal under Section 15 of the Charter upon the terms of a similar "*teep*," the appellant ought to have been daclared entitled to damages for each of the two years claimed. On the 20th June last, this Court directed the original "*teep*" to be sent for, and the opposite party was called upon to show cause why the application should not be granted. Mr. Gregory for the opposite party contends that this application ought not to be admitted, *1st*, because it was not presented within 90 days from the decision of the Full Court sitting on appeal under Section 15 of the Charter, dated the 24th February 1868; and, *2ndly*, even if the appellant be able to show sufficient cause to the satisfaction of the Court why this application should be admitted, the decision of the Full Court, not upon a question of law, but upon the construction of a document the terms of which are not free from ambiguity, and upon which different Benches of this Court might arrive and have arrived at different opinions, is not a ground for admitting the review.

Baboo Hem Chunder Banerjee for the applicant contends that, inasmuch as an application was made within 90 days from the date of our original decree, he is not bound to show just and reasonable cause to the satisfaction of the Court for not having preferred his *second* application within 90 days from the date of the judgment of the Full Court sitting on appeal under Section 15 of the Charter. The Baboo, indeed, went to the extent of contending that his client had 12 years from the date of the decision, within which he could make an application for review.

We are of opinion that the applicant was bound to make this application within 90 days from the date of the decision of the Full Court sitting on appeal under Section 15 of the Charter. There is no just and reasonable cause shown why such application was not made within the above period, and we, therefore, reject this application with costs.

Bayley, J.—I only wish to add that, had not the decision of the Appeal Court under Section 15, dated the 24th February 1868, been given, it is quite clear that the present application, in the terms in which it is presented, would never have been made. The application is one for a review of judgment. An application for review of judgment must be presented within the term prescribed for reviews, that is to say, within 90 days of the judgment which gives cause to that review, which in this is the Appeal Court's judgment above referred to.

Again, it is urged by Baboo Hem Chunder Banerjee for the applicant that, although the decision of the Full Court is dated the 24th February 1868, it did not come to his possession until several days after that date; but it is stated by Mr. Gregory that the actual sum and substance of the judgment and order was given, as usual, orally by the Chief Justice in the presence of both parties in as definite terms as were subsequently used in the signed judgment after the hearing, *viz.*, on the 28th February 1868.

Looking, therefore, to all these facts, and to what has been stated by Mr. Justice Kemp, I fully concur with him in thinking that the present application ought not to be admitted.

Rejected with costs.

The 28th November 1868.

Present:

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble Dwarkanath Mitter, *Judge*.

Huts—Moveable or personal property—Sections 6 and 19, Act XI., 1865.

Reference to the High Court by the Judge of the Small Cause Court at Jessore.

Raj Chunder Bose

versus

Dhurmo Chunder Bose.

Huts are not moveable property within the meaning of Section 19 of the Small Cause Court Act, and cannot be seized in execution. The word "moveable" does not comprehend everything which a judgment-debtor has a right to remove, but means property which is capable of being moved in its existent state.

The words "personal property" in Section 6, Act XI. of 1865, are used in the sense of moveable property; for, as regards Hindoos and Mahomedans, there is no distinction between real and personal property, but between moveable and immoveable.

Case.—THIS is a suit brought under Section 246 of Act VIII. of 1859 by the plaintiff to establish his right to the huts mentioned in the plaint, and to recover possession of the same; but there is no prayer in the alternative for the value of the same.

Two questions therefore arise: *firstly*, whether huts in this country are to be considered personal property; and, *secondly*, whether the suit, as laid in the plaint, is cognizable by a Small Cause Court.

I have already expressed my opinion in the case noted in the margin that it does not appear to me that huts in this country fall within the definition of personal property, and the High Court held with me that the suit, as laid in the plaint, did not appear to fall within the cognizance of the Small Cause Court; but I find that, in the case noted in margin, which was on all fours with the one in which I made the reference, Bayley and Macpherson, JJ., held that a suit for the materials, bamboos, post, verandah, &c., appertaining to four thatched huts, wherein plaintiff sought a decree to break up and remove them, or to obtain their value to the extent of Rupees 29 and 4 annas, was held to come under Section 6, Act XI. of 1865, and to be a case in which, by Section 27, Act XXIII. of 1861, no special appeal would lie.

Rohiny Canth Ghose *versus* Moha Bharuth Nag and others.

Kashee Chunder Dutt *versus* Judoonath Chuckerbutty. (W.R., Vol. X., p. 29, C. R.)

It is said that every man's house is his castle (*domus sua unicuique est tuutissimum refugium*). It, therefore, becomes necessary to consider whether a man's hut in this country is to be considered his castle. I think it must be so considered, as there are few *pucca* houses to be found in the mofussil, and those are inhabited by the rich. People in middling circumstances, and the very poor, all live in thatched huts, and whole villages are to be seen studded with them. Apart from this argument, huts do not fall within the definition of "personal property," as laid down in the English law-books; and as it was held in the case noted in the margin that the "option of taking to the building, or allowing the removal of the material, remaining with the owner of the land in those cases in which the building is not taken down by the builder during the continuance of any estate he may possess," it would appear that huts cannot be considered personal property in this country; for, if they were, the option spoken of could not be exercised by the owner of the land in the event therein contemplated, as personal property can always accompany the person of the owner.

Thakoor Chunder Poramanick *versus* Ramdhone Bhuttacharjee. (W. R., Vol. VI., p. 229, C. R.)

It would also be an anomaly to hold that Small Cause Courts in the mofussil can attach thatched huts in execution of their decrees, if an action for recovery of possession of the same, or their value, be held not to be cognizable by the same Court.

For the above reasons, I think that huts should not be considered personal or moveable property in this country, and that no action for the recovery of the same or their value can lie in a Small Cause Court, and that huts ought not to be attached in execution of a decree of such a Court. The plaintiff's suit has accordingly been dismissed with costs, contingent on the opinion of the Hon'ble the Judges of the High Court.

Judgment of the High Court.

Peacock, C. J.—We think that the opinion expressed by the Small Cause Court Judge is correct.

We think that huts are not moveable property within the meaning of Section 19 of the Small Cause Court Act, and consequently that they cannot be seized in execution. The word "moveable" in that Section is used in contradistinction to the word "im-

moveable" in Section 20. The word used is "moveable," not "removeable," and that word does not, in our opinion, comprehend everything which the judgment-debtor has a right to remove. It means property which is capable of being moved in its existing state. A man has a right to remove a house which is built upon his own land, but it could not be contended that a *pucca* house built by a man upon his own land is moveable property, because he has a right to remove it, and that the land itself is immoveable. If a house built upon a man's own land is not moveable property, a house built upon land which is rented from another does not seem to fall within the word "moveable." If such a house is not moveable property, there seems to be no reason why a mud house should be held to be moveable property; and the same reasoning appears to be applicable to a hut. In any one of these cases, a right to remove may exist, and the materials of which the erection is composed are capable of being removed, although the removal in one case would be attended with a greater degree of labor than in the other. But the question as to whether the property is moveable or not, cannot depend upon the amount of labor which is required to remove it.

The words "personal property" in Section 6 seem to be used in the sense of moveable property, for, as regards Hindoos and Mahomedans, there is no distinction between real and personal property, the distinction being between moveable and immoveable. That the word "personal" is used in Section 6 as referring to moveable property is borne out to some extent by Section 19, which gives power to issue execution against the moveable property of the debtor, and in the subsequent part of it uses the word "personal" apparently in the sense of moveable. The words are: "If the warrant be directed "against the moveable property of the judg-"ment-debtor, it may be general against any "personal property of the judgment-debtor "wherever it may be found within the local "limits of the jurisdiction of the Court, or "special against any personal property belong-"ing to the judgment-debtor within the same "limits, and which shall be indicated by the "judgment-creditor."

There is no more reason why the Small Cause Court should have power to seize in execution a hut erected upon a small piece of land than it should have to seize the land itself.

The 28th November 1868.

Present:

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice*, and the Hon'ble Dwarkanath Mitter, *Judge*.

Probate—Will of a Buddhist—Indian Succession Act.

Reference to the High Court by the Recorder of Rangoon.

In the matter of Ko Kya Daine, late of Rangoon.

Probate may be granted of the will of a Buddhist made after the 1st of January 1865; but it is not necessary that the will of a Buddhist should be executed according to the formalities required by the Indian Succession Act.

Case.—MAH MEE, Mah Lay, and Moung Yoon, the children of Ko Kya Daine, deceased, ask for probate of the will of Ko Kya Daine.

The deceased was a Buddhist, and the petitioners are Buddhists.

The deceased died upon the 3rd of September 1868, leaving property, both real and personal, within the jurisdiction of this Court, and leaving a will dated the first day of the waning moon of Jandelin 1230 Burmese, corresponding with the 1st of September 1868.

The applicants contend that they are the executors appointed by this will by implication.

The application was made on the 14th of September 1868. The usual citations were issued, and the case came on for hearing on the 14th of October 1868, when Mr. Nicolson, Advocate, appeared for Moung Lay, the widower of the eldest daughter of the deceased, and objected among other things that this Court has no jurisdiction, because the deceased was a Buddhist, and that his will could not be admitted to probate by reason of the 331st Section of the Indian Succession Act, 1865. He took a further objection—

that the will was not signed as required by that Act. These two objections cannot, it seems to me, both be good. If the Indian Succession Act does not permit of the grant of probate to the will of a Buddhist on the ground that he belonged to a class excepted by the 331st Section, it cannot apply to his will so as to invalidate it for non-compliance with the forms prescribed by the Act itself: and if the will of a Buddhist, made after the 1st of January 1866, needs to be executed according to the forms prescribed by Part 5 of the Indian Succession Act, it cannot be objected that the District Court has no jurisdiction to grant probate under Part 31.

The questions I wish to submit to their Lordships are—(1) Can the District Judge grant probate under the Indian Succession Act, 1865, to the will of a Buddhist, the will being made after the 1st of January 1866? (2) Is it necessary that the will of a Buddhist should be executed according to the formalities required by the Indian Succession Act, in order to support an application for a grant of probate under that Act?

With regard to the first question, it seems to me that there is nothing in the wording of Section 331 of the Indian Succession Act, 1865, expressly taking away, in the case of the will of a Buddhist, the general jurisdiction given to the District Judge by Section 235 in granting probates in all cases within his jurisdiction. Section 331 refers in its first part to intestate and testamentary successions, and exempts Buddhists, amongst others, from the operation of the Act so far as those subjects are concerned. By that I understand that, in the case of the will of a Buddhist, it shall not be governed by the rules of law laid down in the Act, that is to say, it shall not require to be executed as prescribed in Part 8, or attested as required in Part 10, and that it shall not be construed by the rules laid down in Part 11 and so on—not that it shall not be admitted to probate.

The Succession Act consists, it seems to me, of two distinct portions, the first portion relating to substantive law and the last to mere rules of procedure. It may very well be that the part of the Act dealing with substantive law is not to be applied in the case of a Buddhist, while the part relating to procedure is to be so applied, the object of Section 331 being to prevent interference with the rules relating to the devolution of property after death in the cases of certain excepted classes. The same objection does not apply to matters of mere procedure, and, as a matter of fact, probate was constantly granted in the late Supreme Courts and in the High Courts at the Presidency-towns before the Act of 1865 came into operation. In the case of Sreemutty Kaminee Dossee *versus* Bissonath Ghose (2 Indian Jurist, p. 6), probate was granted to the will of a Hindoo, also one of the excepted classes, after the Act came into operation; but it may be said that the will in that case was dated prior to the 1st of January 1866, and so that the case fell within the exception in the second part of Section 331. I have been unable to find any reported case of the grant of probate to the will (dated after the 1st of January 1866) of a Hindoo, Mahomedan, or Buddhist, after the Indian Succession Act came into operation; but this circumstance is no evidence that such grants are never made.

In the case of Sharo Bibee *versus* Baldeo Doss (1 Bengal Rep., p. 24, Original side) it was said that as regards the will of a Hindoo, the executor takes nothing from the grant. His title is founded solely and simply on the will of the testator considered as an instrument of gift. Except for the purposes of evidence, the will of a Hindoo does not require probate (See also Jivuvalar *versus* Kisustnappa Mudale, 3 Madras High Court Reports, p. 50). These were both cases of probate granted under the old law, but Mr. Justice Norman, in the case reported in the Bengal Reports, speaking in 1867, uses the present tense, from which it may be inferred that the will of a Hindoo does require probate for the purposes of evidence. My own opinion is (1), that the District Court has jurisdiction to grant probate to the will of a Buddhist made after the 1st of January 1866; but that (2), it is not necessary that the will should be executed according to the formalities required by the Indian Succession Act.

Judgment of the High Court.

Peacock, C. J.—We are of opinion that in this case the view taken by the learned Recorder is correct, and that probate may be granted of the will of a Buddhist made after the 1st of January 1866, but that it is not necessary that the will of a Buddhist should be executed according to the formalities required by the Indian Succession Act.

The 28th November 1868.

Present:

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble Dwarkanath Mitter, *Judge*.

Lease in perpetuity at fixed rent—Ownership of trees.

Reference to the High Court by the Judge of the Small Cause Court at Jessore.

Sharoda Soondari Debia

versus

Gonee Sheik and others.

Where a lease is granted in perpetuity at a fixed rent, and the lessor reserves no reversionary interest in the land or in the trees growing on it, the lessees are entitled to the ownership of the trees.

Case.—THIS is an action brought by the plaintiff as zemindar to recover from the defendants Rupees 10, being the value of a mango-tree unlawfully cut and carried away by them under the circumstances mentioned in the plaint, which runs as follows:—

"This is a suit to recover from the defendants Rupees 10 as the price of a mango-tree. Appertaining to Dehee Kanojepore, &c., of Pergunnah Shabanjial in the plaintiff's zemindaree, mouzah Foolleaty was recorded in the plaintiff's sheristah as a jummah on Sicca Rupees 267-6-6 in the name of Rotee Kanth Roy, deceased, the predecessor of the 2nd and 3rd defendants, and which the defendants are enjoying possession of. Within this jummah and on the land as per boundary given in the schedule the mango-tree that grew was blown down by the cyclone of the 16th Kartick 1274, which the 1st defendant, in collusion with the 2nd and 3rd, cut and carried away on the 5th Falgoon 1274 in spite of the objection raised by the plaintiff's man; whereas the 2nd and 3rd defendants, beyond the privilege of enjoying the fruits, had no right of cutting down trees or appropriating their value. Under these circumstances the plaintiff now seeks to recover the amount claimed."

It was admitted at the trial by both parties that only a few branches of the tree had been cut and converted by the defendants; and on consent of both parties I gave judgment in plaintiff's favor for Rupee 1, subject to the opinion of the High Court on the following point, *viz.*:—

Whether the 2nd and 3rd defendants as mauraseedars are, under the terms of their pottah, liable to the plaintiff for the value of the branches so cut and appropriated; or, in other words, whether they or the plaintiffs are entitled to the ownership of the tree.

Now the pottah or lease for a maurasee izarah does not specifically convey more than an hereditary right of occupancy. If it be not "istemraree," or entitling the tenant to hold at a fixed rent, the amount of the annual rent payable to the zemindar is variable, and when not settled by mutual agreement, is determinable only by the indefinite standard of the customary rate of the pergunnah, that is, the rent payable by similar tenures in the same pergunnah; and in the pottah under which the 2nd and 3rd defendants set up their right to the tree nothing is specified regarding the powers of dealing with trees, and no special or particular local custom was pleaded by the defendants, but the mauraseedar has bound himself to the zemindar not to do certain acts without his permission, *viz.*, not to excavate or build indigo factory himself, nor will he allow any body to do the same.

Now, under the common law of the country, the ownership in trees as well as timber generally is in the proprietors of the land upon which they grow; and it appears to me that under the terms of the pottah, the mauraseedar is entitled to use and enjoy the property he has farmed without injury to its substance, and that the power of dealing with trees was apparently left by the parties to be governed by such law. Hence, as the mango-tree, subject of action, was of the nature of timber, the ownership of it belonged to the plaintiff, the zemindar. Consequently the cutting of the branches of the same by the defendants, without the leave and licence of the plaintiff, the owner of them, constituted an act of voluntary waste, rendering them liable for damages, and therefore the plaintiff's suit is well maintainable.

Judgment of the High Court.

Peacock, C. J.—We are of opinion that the defendants are entitled to the ownership of the trees. The lease was a grant in perpetuity at a fixed rent, and the lessor reserved no reversionary interest in the land or in the trees which were growing on it. The stipulation that the tenant was not to

dig tanks without the consent of the landowners does not add any weight to the argument of the plaintiff's counsel. By making that stipulation, the landowner showed that he considered that in the absence of such a stipulation the tenant would be entitled to dig tanks.

The 28th November 1868.

Present:

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble Dwarkanath Mitter, *Judge*.

Suit for enhancement of rent—Agreement of compromise—Indigo contract.

Reference to the High Court by the Judge of the Small Cause Court of Chooadanga.

Messrs. Morris Fitzgerald Sandys and Faulkner Chute Sandys

versus

Setul Mundul.

Where a contract for sowing indigo was entered into and advances made in part performance of an agreement of compromise between the parties to a suit for enhancement of rent—HELD that the non-completion of the agreement of compromise did not exonerate the defendant from performing his part of the contract for sowing indigo.

Case.—SUIT laid at Rupees 19-6-9, being the amount of damages sustained in 1866 and 1867 by breach of an indigo contract, dated 20th February 1865.

The facts of the case, as stated by Mr. G. Glascott, manager of the plaintiffs, are the following: The ryots of Wootholee not being on good terms with the Loknathpore indigo concern, enhancement-cases were brought against almost all of them. The defendant being one of the refractory ryots, Mr. Glascott, as manager of the concern, sued him for enhancement of rent. The defendant came to terms, and it was agreed between him and Mr. Glascott that defendant would make contract for sowing indigo, and give kubooleut for a small increase of rent, and Mr. Glascott would withdraw the enhancement-case then pending against him (defendant). Accordingly, defendant entered into contract for sowing indigo, and received advance, but gave no kubooleut for increase of rent, and Mr. Glascott did not desist from prosecuting the enhancement-case against him. Defendant sowed no indigo as contracted, and this suit was instituted for recovery of damages for breach of the contract. Defendant pleads non-liability, denying the execution of the contract and receipt of advance, and gives his dispute with the concern as the reason for the institution of the suit against him.

The first thing to be considered in the disposal of the case is whether the contract upon which the claim is founded is a valid contract, and any action for damages for breach of it can lie against defendant.

It appeared from the averment of the plaintiffs' manager that when the plaintiffs and defendant fell out, and plaintiffs instituted the enhancement-case against him, they made a mutual agreement between themselves, the conditions of which were that defendant would enter into a contract for sowing indigo, and would give kubooleut for a little increase of rent, and that the plaintiffs would withdraw the enhancement-case which they instituted against him. Defendant on his part fulfilled one of the conditions of the mutual agreement by executing the contract, but left the other (the giving of kubooleut) unfulfilled. The plaintiffs on their part did not carry into effect, by withdrawing the enhancement-case, the only condition imposed upon them by the terms of the mutual agreement.

I am of opinion that as this contract, for breach of which this suit is brought, is not an independent contract, but only a partial fulfilment of a prior agreement on the part of the defendant, a suit for breach of contract brought on it is not tenable. A reciprocal agreement requires that the parties making it should observe the conditions they impose upon themselves respectively. The non-execution of the kubooleut by defendant and the prosecution by plaintiffs of the enhancement-case against him in opposition to the terms of the agreement are no fulfilments of the mutual contract either on the side of the defendant or on that of the plaintiffs, and consequently they make it null and void, and the contract which is vitiated in the root cannot be made a basis for an action for damages for the breach of it. I have, therefore, dismissed the case, considering the contract given by defendant for sowing indigo as not binding upon him as not being complete in itself. Now the point submitted for the Hon'ble Judges of the High Court is, whether the contract is a valid one, and whether plaintiffs are entitled

to recover damages for breach of the performance of it.

This reference is made at the request of the plaintiffs' pleader, who prays for a new trial.

Judgment of the High Court.

Peacock, C. J.—We are of opinion that the contract for sowing indigo is a valid one, and that the plaintiffs are entitled to recover damages for breach of performance. The contract for sowing indigo was entered into in part-performance of the agreement of compromise in the enhancement-suit. That agreement of compromise was not fully carried out. The defendant not having executed a kubooleut for a slight increase of rent, the plaintiffs did not withdraw the enhancement-suit. The non-completion of the agreement of compromise did not exonerate the defendant from performing his part of the contract for sowing indigo which was entered into in pursuance of the compromise. The plaintiffs performed their part of the contract for sowing indigo by making the advances to the defendant. The defendant, having entered into that contract to sow, and having received the advance for that purpose, was liable to perform his part of the contract, and to damages for non-performance.

The 28th November 1868.

Present:

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice,* and the Hon'ble Dwarkanath Mitter, *Judge.*

Suit for kubooleut at enhanced rent—Auction-purchaser—Tenant in perpetuity.

Case No. 1301 of 1868.

Special Appeal from a decision passed by the Judge of Dacca, dated the 20th February 1868, reversing a decision of the Deputy Collector of Furreedpore, dated the 31st July 1867.

Haran Chunder Ghose (one of the Defendants), *Appellant,*

versus

Gooroochurn Sircar (Plaintiff), *Respondent.*

Baboos Sreenath Doss and *Bhuggobutty Churn Ghose* for Appellant.

Baboos Kalee Mohun Doss and *Onookool Chunder Mookerjee* for Respondent.

An auction-purchaser cannot compel the holder of a tenure in perpetuity to execute a kubooleut acknowledging himself to be a tenant for one year at an enhanced rent.

Peacock, C. J.—It is quite clear that the plaintiff is not entitled to maintain this suit. It is unnecessary to determine whether he is entitled or not to enhance the rent. He has sued, not merely for an enhancement of rent, but he has sued without notice for a kubooleut at an enhanced rate. He contends that he, as an auction-purchaser, is entitled either to treat the defendant as a trespasser, or enhance the rent to a fair value at his own option. The defendant's tenure was granted in perpetuity. The plaintiff cannot enhance the rent in perpetuity. No one can say at the present time what will be the value of the land in all time to come; and if he upholds the defendant's tenure, he must uphold it for the whole term for which it was originally granted. An auction-purchaser cannot, as contended, compel the holder of a tenure in perpetuity to execute a kubooleut acknowledging himself to be a tenant for one year at the enhanced rent. The action is misconceived. It is admitted that this case does not fall within the Full Bench decision as to the substitution of a suit for a kubooleut for a notice of enhancement. The suit must be dismissed with costs of this appeal and the costs in both the Lower Courts.

The 28th November 1868.

Present:

The Hon'ble F. B. Kemp and E. Jackson, *Judges.*

Suit to recover advances—Accounts—Onus probandi.

Case No. 1565 of 1868.

Special Appeal from a decision passed by the Judge of Hooghly, dated the 18th March 1868, reversing a decision of the Principal Sudder Ameen of that District, dated the 14th June 1867.

Messrs. Robert Watson and Co. (Plaintiffs), *Appellants,*

versus

Sreedhur Mundle (Defendant), *Respondent.*

Messrs. R. T. Allan and *J. S. Rochfort* and *Baboo Umorendurnath Chatterjee* for Appellants.

Baboo Mohendro Lall Shome for Respondent.

In a suit to recover advances alleged to be due from a discharged gomashta, who pleaded acquittance at the time of his discharge—HELD that plaintiff was bound to prove the payments to, and the receipts from, the gomashta, and to put in original documents, and not mere transcripts, even if the defendant had remained silent.

Jackson, J.—IN this case Messrs. Watson and Co. have sued one of their gomashtas for a sum of Rupees 2,519-5-3, which it is alleged had been advanced through the gomashta for silk manufacturing purposes, but which he had not accounted for. The gomashta alleges that he was not at all liable to the plaintiffs for the sum demanded, and that because he had obtained an acquittance from the plaintiffs at the time of his discharge.

The first Court found that the acquittance was not proved, and therefore gave the plaintiff a decree. The gomashta (defendant) appealed to the Judge, again putting forward the plea that he had been discharged by the act of the plaintiffs, and also adding that, even if he had not been so discharged, still the plaintiffs had not proved the amount which they alleged was due. The Appellate Court agreed with the Court of first instance that the acquittance which was set up by the gomashta was not proved in any way, but the Appellate Court held that the plaintiff was, notwithstanding, bound to prove the account set up by him; and that Court found that the evidence which had been produced on behalf of the plaintiff was, for the greater part, not legal evidence, inasmuch as some original receipts obtained from the gomashta for sums given to him were not attested, and that payment of these sums was not proved; and as certain other documents which had also been filed in support of the plaint were not original documents, but were mere transcripts prepared by the mohurrir from the original documents; on these grounds the Appellate Court reversed the decision of the first Court, and dismissed the plaintiff's suit.

It is objected on special appeal that, as the defendant's gomashta took no special objection to any of the items of the accounts, either on the debit or on the credit side, but merely pleaded a general acquittance from all dues, of whatever amount they were, under these circumstances, the plaintiffs were not bound to prove all the items of the accounts. We are inclined to think that the Judge was correct in the law that he laid down that the plaintiffs were bound to give some evidence of the accounts which they put forward.

They were bound to prove the payments of the money to the gomashta and the receipts which they obtained from the gomashta; they were bound also to put in the original documents, and not the mere transcripts made by their mohurrir; and this the plaintiffs were bound to do, even if the defendant-gomashta had remained silent.

Looking to the manner in which the first Court decided this case, the first Court evidently being of opinion that it was not necessary to require such strict proof of the plaintiffs, we think that the Judge should have given the plaintiffs an opportunity of proving the unattested documents which they put in, and of producing their factory-books and other documents which were wanting. We, therefore, remand the case to the Judge, and direct that he will summon the defendant and examine him regarding the items of these accounts. Had this been done from the commencement, we have no doubt that this litigation would have ceased long before this. The Judge will also require the plaintiffs to put in the additional evidence required to prove the gomashta's receipts for the money advanced to him, and the original books and papers from his office to prove the different items of the accounts. After receiving this evidence, the Judge will proceed to pass a fresh decision in the case.

Under the circumstances, each of the parties will bear his own costs of this appeal.

The 28th November 1868.

Present:

The Hon'ble F. B. Kemp and E. Jackson, *Judges.*

Attachment in execution—Adverse possession.

Case No. 1385 of 1868.

Special Appeal from a decision passed by the Judge of Tirhoot, dated the 11th March 1868, affirming a decision of the Subordinate Judge of that District, dated the 12th July 1867.

Lyakut Ali and others (Defendants), *Appellants,*

versus

The Court of Wards on behalf of the Rajah of Durbhungah (Plaintiff), *Respondent.*

Messrs. R. E. Twidale and *C. Gregory* for Appellants.

Baboo Juggadanund Mookerjee for Respondent.

In a suit for the sale of certain property in satisfaction of a decree against a judgment-debtor (since deceased), where it was found that the judgment-debtor had made over the property to his wife in lieu of her dower, and that she had transferred it to defendant:

HELD that the *onus* was on the plaintiff.

Kemp, J.—THIS was a suit brought by the Manager under the Court of Wards on behalf of the Rajah of Durbhungah praying for the sale of a certain property in satisfaction of a decree obtained by a former Rajah on the 13th May 1837. It is very clear from the record that between 1837 and the present suit, former Rajahs had tried to execute this decree against this property, and were successfully opposed by the parties in possession. The present suit is brought under Section 246 of Act VIII. of 1859, the objections of the defendant having been allowed under that Section. The plaintiff, therefore, had to establish his right, and to prove that the judgment-debtor, Luteef Ali, who, from the record, it appears, died in 1850, was in possession of the property sought to be sold within 12 years prior to suit. The Judge has thrown the whole *onus* upon the defendant, who was admittedly successful under Section 246, having been found to be in possession. The Judge further has refused to allow the defendant, who only reached his majority while the suit was pending before the Judge, to put in any evidence with a view of discharging himself of the *onus* which has been improperly thrown upon him.

We think that the Judge, in refusing to admit that evidence, did not exercise a wise discretion; but, after hearing the arguments on both sides, we think it unnecessary to remand the case, and there can be no question in our opinion that the *onus* is on the plaintiff. The defendant does not claim as heir of the judgment-debtor: his claim is that the judgment-debtor, two years before the decree obtained by the Rajah, made over this property to his wife in lieu of her dower, and that it was by her transferred to him, and that his possession and that of his donor have been all along adverse to the judgment-debtor. It also appears that, so far back as 1847, the then Rajah of Durbhungah was well aware of the claim of Syud-un-nissar, the mother of the defendant. It is also clear that for more than 12 years after the death of the judgment-debtor, no active steps were taken to enforce the decree of 1837 against the property in question. We, therefore, reverse the decision of the Judge, and dismiss the suit of the plaintiff with costs of the Court below and of this special appeal with interest.

The 1st December 1868.

Present:

The Hon'ble L. S. Jackson and Dwarkanath Mitter, *Judges.*

Jurisdiction—Revenue Courts.

Case No. 1673 of 1868.

Special Appeal from a decision passed by the Subordinate Judge of Dacca, dated the 31st March 1868, reversing a decision of the Moonsiff of that District, dated the 31st March 1867.

Bacharam Paul (Plaintiff), *Appellant,*

versus

Asgur Fukeer and others (Defendants), *Respondents.*

Baboo Doorga Doss Dutt for Appellant.

Baboos Romesh Chunder Mitter and *Chunder Madhub Ghose* for Respondents.

A ryot having, under the provisions of Act VI. (B.C.) of 1862, deposited with the Collector a sum of money alleged to be due as rent, the zemindar refused to receive it on the ground that the rent due was *less* than the amount deposited.

HELD that it was beyond the competency of the Collector to go into an enquiry as to the quantity of land held by the ryot and the circumstances under which he had been ejected.

Jackson, J.—THIS decision, which Baboo Chunder Madhub Ghose, who appears for

the special respondent, has very wisely not attempted to support, is clearly erroneous.

The Subordinate Judge has held plaintiff to be bound by a decision arrived at by the Collector on a so-called suit under the Bengal Act VI. of 1862.

It appears that the point which the Collector affected to decide under the provisions of that Act was one which he had no jurisdiction at all to try.

A ryot deposited, under the provisions of that Act, with the Collector, a certain sum of money which he alleged to be due to the zemindar as rent. The zemindar refused to receive it on the ground that the rent due was *less* than the amount deposited by the tenant, and the Collector, therefore, went into an enquiry as to the quantity of land held by the ryot and the circumstances under which he had been ejected from it.

This was a proceeding beyond his competency, and his decision is in no way conclusive on the plaintiff.

The decision must be set aside, and the proceedings must be sent back to the Lower Appellate Court, in order that a proper decision may be come to on the evidence.

The 1st December 1868.

Present:

The Hon'ble H. V. Bayley and C. Hobhouse, *Judges.*

Enhancement of rent—Misconstruction of lease —New plea in special appeal.

Case No. 684 of 1868 under Act X. of 1859.

Special Appeal from a decision passed by the Officiating Additional Judge of Jessore, dated the 31st December 1867, reversing a decision of the Deputy Collector of Khoolnah, dated the 29th September 1866.

Satooram Mojoomdar and others (Plaintiffs), *Appellants,*

versus

Preonath Banerjee (Defendant), *Respondent.*

Baboos Bhowanee Churn Dutt and *Nil Madhub Bose* for Appellants.

Mr. J. S. Rochfort for Respondent.

In a suit for enhancement of rent which was dismissed in the Lower Court, where the sole issue raised was the genuineness of a pottah pleaded by the defendant—

HELD that an entirely new plea of misconstruction of the terms of the lease could not be admitted in special appeal, when the facts on which alone it could be supported had not been found in the Lower Court.

Bayley, J.—I AM of opinion that this special appeal ought to be dismissed with costs.

The grounds taken in the certified petition of special appeal are far from clear and distinct, although by law they ought to be so. By the argument, however, of the special appellant's pleader, it would appear that the real objection to the decision of the Lower Appellate Court is that the term "*raemee*" used in the pottah conveys no hereditary right to the present defendant, who is the son of the original lessee. The judgment of the Lower Court does not show this ground to have been in any way taken below, nor is it any sufficient answer for the appellant to say that because he was respondent in the Lower Court, he had no opportunity to raise the point; for, in the course of the argument, he certainly might have done so. In addition, however, to this defect on his part, the appellant's pleader shows us no facts indicating that he himself treated this *raemee* pottah as one limited to the lifetime of the defendant's father. He does not show for what period after the father's death he allowed the son to pay the original rent under the *raemee* pottah without question. But he asks this Court, not as a matter of right, which he cannot do, but as a matter of permission and discretion, which is all that he can do by law, to admit a new ground in special appeal not taken below, and he asks this without showing such facts as might support this new plea of misconstruction of the lease below as to its being valid beyond the father's life. Under these circumstances, I do not think we should admit this ground at the present stage.

I may here add that the case cited in Weekly Reporter, Volume IX., page 3, Privy Council Decisions, refers to *mokurrurees*, in respect to which there is no contention in the present case. The special appellant's case is entirely upon the construction of the word *raemee*, which may have a different bearing, and may, in fact, under the very ruling cited, be shown on certain evidence to involve hereditary rights. The appeal is dismissed with costs.

Hobhouse, J.—I concur in thinking that this appeal ought to be dismissed with costs.

The material facts of the litigation are shortly these. The plaintiff sued for arrears of rent at an enhanced rate after service of

notice. The defendant set up a pottah, *raemee* pottah, which he said barred the plaintiff's right to enhance the rent; and the sole question upon which the parties went to issue in both the Courts below was whether, as a matter of fact, this pottah had or had not been really granted, and it was assumed that if the pottah was genuine, the plaintiff would be barred from enhancing the defendant's rent.

The Lower Appellate Court found against the plaintiff on the pottah, and the plaintiff now comes in special appeal before us, asking us to raise an entirely different question, that is to say, admitting the pottah to be genuine, is or is not the plaintiff barred by its terms from enhancing the defendant's rent?

Without saying that this is not a question which may be taken in special appeal, although not taken in the Court below, it seems to me that it can only be taken when all the facts in the case are exactly ascertained and are before us as matters of fact. In this case, there are several material facts which have not been found, and which cannot be found unless the case be remanded to the Judge of the Lower Appellate Court who is the sole Judge of facts—facts whether the present defendant is holding under the *raemee* pottah, and, if so, how long under it, and so forth. It has been the plaintiff's own fault that these facts have not been found, and I consider he cannot now be allowed to raise a contention founded on such facts.

The appeal is dismissed with costs.

The 1st December 1868.

Present:

The Hon'ble H. V. Bayley and C. Hobhouse, *Judges.*

Limitation—Special appeal—Minor—Mother's guardianship.

Case No. 144 of 1868.

Special Appeal from a decision passed by the Judge of East Burdwan, dated the 5th December 1867, affirming a decision of the Officiating Sudder Ameen of that District, dated the 12th July 1867.

Ram Dhun Doss and others (Defendants), *Appellants,*

versus

Ram Ruttun Dutt (Plaintiff), *Respondent.*

Baboo Boykuntnath Paul for Appellants.

Baboos Kishen Succa Mookerjee and *Nil Madhub Sein* for Respondent.

Where a plea of limitation can only be properly decided with reference to facts found in connection with the question of possession and dispossession, and where appellants have omitted to press evidence on the point, though they had every opportunity before the Lower Appellate Court, it cannot be admitted to be taken in special appeal.

Under Section 3, Act XL. of 1858, and under the Hindoo Law generally, a mother may ordinarily be guardian of her minor son without either a certificate or a special order of Court.

Bayley, J.—In this case, the plaintiff sued for possession of 4-annas share of certain property with mesne-profits as inherited from his father, and also to cancel a certain ruffanamah filed by plaintiff's mother in a case No. 170, which case was originally brought for possession of the property now in suit.

The defendants' case is that the plaintiff was entitled only to 1-anna and not to 4-annas share by right of inheritance, and that the property in suit was legally transferred to them (the defendants) by a certain ruffanamah executed by the plaintiff's mother on behalf of her minor son, the plaintiff, and by consent of the other son.

The first Court decreed the plaintiff's suit for the 4-annas share claimed.

On appeal, the Lower Appellate Court affirmed that decision.

Defendant appeals specially, and urges before us—

1stly.—That the suit cannot be heard as the same subject-matter has been disposed of by the decision on the *ruffanamah* in case No. 170.

2ndly.—That limitation bars the suit as the plaintiff has been all along out of possession.

3rdly.—That the Lower Appellate Court was wrong in holding that the mother was not legally capable of making the transfer to the defendants by the *ruffanamah*, on the ground that she had no certificate under Act XL. of 1858, nor any appointment as recognized guardian in case No. 170.

* * * * * * *

* * * * * * *

The point of *res adjudicata* is not so seriously pressed on us as the point of limitation. On this plea, it is urged that, although it is not taken specifically in the Lower Appellate Court, yet it is a question which in the exercise of this Court's discretion we should now adjudicate.

I am of opinion that in the case of a special appeal like this, where the point of limitation could only be properly decided with reference to certain facts to be found in connection with the question of possession and dispossession, and where the appellants having had every opportunity to press evidence upon the point before the Lower Appellate Court, have omitted to do it, it is too late at this stage of the case to admit this entirely new plea.

In regard to the ruling of the Lower Appellate Court that, because the plaintiff's mother was not appointed guardian under a certificate under Act XL. of 1858, nor appointed by any order of Court in the litigation in Case No. 170, she had no authority to transfer the property by the *ruffanamah* on behalf of her minor son, the Lower Appellate Court has committed an error in law for under Section 3 of that Act, and under the Hindoo Law generally, a mother may ordinarily be guardian of her minor son without either a certificate, or a special order of Court.

* * * * * * *
* * * * * * *

The 2nd December 1868.

Present:

The Hon'ble J. B. Phear and C. Hobhouse, *Judges.*

Res adjudicata — Difference of title with same cause of action—Section 2, Act VIII., 1859.

Case No. 19 of 1868.

Regular Appeal from a decision passed by the Second Subordinate Judge of the 24-Pergunnahs, dated the 14th November 1867.

Wooma Tara Dabee (Plaintiff), *Appellant,*

versus

Unnopoorna Dossee and others (Defendants), *Respondents.*

Baboos Onookool Chunder Mookerjee, Sreenath Doss, and *Ashootosh Chatterjee* for Appellant.

Baboos Unnoda Pershad Banerjee and *Romesh Chunder Mitter* for Respondents.

Where a plaintiff sued to recover possession, as being part of her own talook, of land which she had in a former suit claimed as *towfeer* reclaimed and occupied, her action was held to be barred by Section 2, Act VIII. of 1859, as the difference of title did not change the cause of action within the meaning of that Section.

Phear, J.—THIS is a suit to recover possession of certain land from the defendants.

The present plaintiff also, in 1854, instituted a suit against the present defendants to recover possession of land from them.

I am distinctly of opinion from the evidence that the land which is the subject of the present suit was part of the land which the plaintiff sued for in 1854. She was defeated in the suit of 1854, and has never had possession of the land in question since that date. It follows, therefore, as it appears to me, that her cause of action was in both suits the same. In both, she sought to recover from the defendants the same land, on the ground that it was wrongfully withheld from her by them, and the wrongdoing of the defendants was the same act or series of acts in the one case as in the other. It is true that the title to possession on which the plaintiff now relies is different from that which she set up in the suit of 1854. In the present suit, she claims the land as being part of her talook Shahazadpore, while in 1854 she maintained that this land was *towfeer*, which she had reclaimed and occupied as proprietor of the talook, and on that account was entitled, as against the defendants, to have settled with her by Government But I think the difference in the title put forward does not change the cause of action within the meaning of Section 2 of Act VIII. of 1859. The plaintiff's cause of action—that which obliges her to seek the aid of a Court of justice—is simply this, namely, that she is, as she alleges, wrongfully deprived by the defendants of the enjoyment by possession of certain land which she is entitled to have. It is for her at the trial to make out such a title to possession as will prevail against the defendants. If she omits to put forward her strongest title or her real title, so much the worse for her. The adjudication in the suit determines as between her and the defendants not only the matter of the particular title which she sets up, but the actual right to possession at the date of the plaint, by whatever title it might be capable of being then supported.

It appears to me that this suit is barred by the operation of Section 2 of Act VIII. of 1859, and consequently that this appeal should be dismissed with costs.

Hobhouse, J.—I am of the same opinion.

The 2nd December 1868.

Present:

The Hon'ble F. B. Kemp and E. Jackson, *Judges.*

Enhancement of rent—Admission—Presumption of uniform payment.

Case No. 1671 of 1868 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of Hooghly, dated the 13th February 1868, affirming a decision of the Deputy Collector of that District, dated the 26th October 1867.

Pearee Mohun Dutt (Plaintiff), *Appellant.*

versus

Radha Madhub Mookerjee (Defendant), *Respondent.*

Baboos Ashootosh Chatterjee and *Ashootosh Dhur* for Appellant.

Baboos Nubo Kishen Mookerjee and *Bama Churn Banerjee* for Respondent.

In a suit for enhancement of rent, plaintiff's admission that defendant held the tenure for 30 or 32 years at the same rent, was held not to amount to an admission that the land had been held at that rate of rent from the Permanent Settlement, and that plaintiff should have an opportunity allowed him of rebutting any presumption which might arise from that admission.

Kemp, J.—This was a suit for the recovery of rent at an enhanced rate after service of notice. The ryot, the defendant, pleaded that the rent at which the land had been held by him had not been changed for a period of 20 years prior to suit. The *onus* of proving that was upon him. The Judge held that by the plaintiff's own admission "the defendant's tenure was protected from enhancement under the presumption allowed by Section 4 of Act X. of 1859." The Judge has further held that when the Lower Court found that the rent-receipts filed by the defendant did not prove the plea of uniform payment of rent, there was no necessity to look at the plaintiff's deeds which were filed for the purpose of rebutting the defendant's plea.

In special appeal, it is contended that the Lower Appellate Court is wrong in construing the statements of the plaintiff's gomashta, Bhoobun Mohun Mookerjee, as an admission by way of estoppel conclusively binding upon the plaintiff; *2ndly*, that the Lower Appellate Court has omitted to notice *jumma-wassil-bakee* papers filed by the plaintiff for a period of several years, which prove a variation of rent.

We are of opinion that on both these grounds the decision of the Judge cannot stand. The admission of the gomashta amounts to this, that the defendant had held the tenure for 30 or 32 years, paying a rent of 18 rupees 10 annas 18 gundas 3 cowries during that period. This admission raised a presumption that the lands had been held at that rate from the time of the Permanent Settlement, inasmuch as it admits that the rate had not been changed for a period of 20 years before the commencement of the suit; but it does not contain any admission to the effect that the land has been held at that rate from the time of the Permanent Settlement. On the contrary, it states that the tenure commenced at a much later period. The Judge was, therefore, clearly wrong in law in holding that this admission protected the defendant's tenure from enhancement.

On the second ground, the first Court, it appears, had considered these *jumma-wassil-bakees*, and pronounced a decision upon them. The Judge has entirely omitted to do so. The plaintiff had, therefore, no opportunity given him to rebut any presumption which may arise from the admission made by the gomashta, and to show that, although the rent at which the land is held by the defendant has not been changed for a period of more than 20 years prior to the commencement of the suit, it has been changed sometime subsequent to the Permanent Settlement, or that such rate was fixed at some later period.

The case is, therefore, remanded for retrial with reference to the above remarks. Costs to follow the result.

The 2nd December 1868.

Present:

The Hon'ble J. B. Phear and C. Hobhouse, *Judges.*

Applications (defective and partial) for execution of decree—Bona fide proceedings—Section 20, Act XIV., 1859.

Case No. 403 of 1868.

Miscellaneous Appeal from an order passed by the Judge of the 24-Pergunnahs, dated 22nd July 1868, reversing an order of the Sudder Ameen of that District, dated the 3rd March 1868.

Oodoy Chand Lushkur and another (Judgment-debtors), *Appellants,*

versus

Nobocoomar Poramanick and others (Decree-holders), *Respondents.*

Baboo Romesh Chunder Mitter for Appellants.

Baboo Anund Chunder Ghosal for Respondents.

Where an application for execution of a decree was defective in regard to many particulars required by the terms of Section 212, Act VIII. of 1859, and asked also for execution of a share only of the decree, it was held not to be a proceeding within the meaning of Section 20, Act XIV., 1859.

Where an application for execution by a party representing himself to be the purchaser of a decree, was rejected on account of the applicant's failure to produce evidence, as he was directed to do, in support of his claim, it was held not to be a proceeding properly taken to enforce a decree.

Phear, J.—We think that the view taken of this case by the Court of first instance was correct, and that taken by the Lower Appellate Court not correct. The point which we are called upon to decide is simply whether or not as a matter of law the steps taken by the present applicant for execution of a decree on the 17th of September 1867 and 11th December of the same year, were proceedings for the purpose of obtaining execution of a decree within the meaning of Section 20, Act XIV. of 1859.

Now, it appears that the application of the 17th September 1867 was defective in regard to very many of the particulars which are required on such an occasion by the terms of Section 212, Act VIII. of 1859. The appellant also, as it appears to us, at that time asked for execution of a 14-annas share only of the decree (not for execution of the whole decree), and the Court before whom the application was made, having regard to these points, rejected it as not being a proper application within the provisions of the legislature which affect applications for decree. It is true that the Court did not reject the application on the day it was made, but it did so on the 11th of December 1867, after having received a report in the matter from one of its officers, which led it to the conclusion that I have just now mentioned. We think that the decision of the Court on that occasion was, on the facts I have stated, a correct one, and that the application for decree which was so erroneously made was not properly a proceeding within Section 20, Act XIV. of 1859.

But on the day when the Court rejected this application, that is, on the 11th December 1867, the applicant made a further application to the Court, representing himself to be the purchaser of the decree, and the Court directed that he should put in evidence in support of his claim. It seems that he did not put in evidence, and that eventually the Court on account of his default rejected this application also. If this were so, we think that this application was not properly a proceeding taken to enforce a decree within the meaning of Section 20, Act XIV. of 1859. The Court of first instance has taken the same view of these two applications that we have, and has held that the present application, which was made on the 27th of February 1868, is consequently out of date and barred. We think that this conclusion is inevitable, and that the decision of the first Court is, therefore, right.

Accordingly we reverse the judgment of the Lower Appellate Court, and, affirming that of the first Court, direct that execution be stayed. The appellant must have his costs both in this Court and in the Court below.

d

The 2nd December 1868.

Present :

The Hon'ble J. B. Phear and C. Hobhouse, *Judges.*

Presumption of uniform rent—Sections 3 and 4, Act X., 1859.

Case No. 1992 of 1868 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of the 24-Pergunnahs, dated the 4th May 1868, reversing a decision of the Deputy Collector of that District, dated the 29th October 1867.

Kasheenath Lushkur (Defendant), *Appellant,*

versus

Bamasoonduree Debia (Plaintiff) and another (Objector), *Respondents.*

Baboo Kedarnath Chatterjee for Appellant.

Baboos Bhyrub Chunder Banerjee and *Hem Chunder Banerjee* for Respondents.

In order to bring himself within Sections 3 and 4, Act X. of 1859, a ryot need only show that the particular land which is the subject of suit, not the whole tenure of which it may once have formed a part, has been held at an unchanged rent since the Permanent Settlement. It is not necessary that the land should have remained a separate holding.

Phear, J.—In this case, the sole question is whether or not the defendant has made out that the land, in respect of which the plaintiff claims an enhanced rent, has been held at an unchanged rent from the time of the Permanent Settlement. The Judge, after reviewing the greater portion of the evidence, says: "If there were no other evidence before "me, I should concur with the Lower Court "in finding that the defendant is entitled to "the benefit of the presumption of Section "4. But it appears to me that the presumption is rebutted by the other evidence." And then he proceeds to say that the other evidence to which he here refers, namely, a pottah of the year 1232, taken together with certain admitted facts, go to show that the land in suit before the making of that pottah formed part of a larger quantity, the whole of which was let together as one holding. In view of this, he is of opinion that the defendant's case fails, because he thinks that, "in order "to obtain the benefit of Section 3, it "must be proved, whether by presumption "or direct evidence, that the whole tenure "has been held at an unchanged rent from "the time of the Permanent Settlement." And on the ground that the land held by the defendant was a portion only, and not the whole of that which was formerly held by one Lushkur, he came to the conclusion that the defendant was not protected from enhancement of rent.

It seems to us that this is an erroneous construction of Sections 3 and 4 of Act X. of 1859. We think that a ryot, in order to bring himself within those Sections, is only concerned to show that the particular land which is the subject of suit has been held at an unchanged rent since the time of the Permanent Settlement, and it is not, in our opinion, important that that land should, throughout that period, have remained a separate holding. The defendant in this case has clearly established that the land in respect of which the plaintiff sues has been held at an unchanged rate of rent for at least the last 40 years, and there is nothing whatever to indicate that previously thereto this land was held at any other rate of rent, except the fact that it was for some time let out with other land as one holding. The Judge remarks that, "if it was "necessary to give a fresh pottah (in "1232), it may be presumed that some "change was made in the terms of the "case." It seems to us that the Judge is not justified in raising this presumption. In truth, it is scarcely better than a mere speculation, for any number of reasons may be fairly suggested for the giving of a

pottah, without having recourse to the assumption that the terms of the lease were changed.

We think that, on the facts found by the Judge, the defendant is entitled to the benefit of Section 4, Act X. of 1859. The appeal, therefore, should be decreed, and the judgment of the Lower Appellate Court reversed with costs.

The 2nd December 1868.

Present :

The Hon'ble J. B. Phear and C. Hobhouse, *Judges.*

Receiver of High Court—Right of suit—Rule of procedure—Possession—Occupation—Rent.

Case No. 27 of 1868.

Regular Appeal from a decision passed by the Second Subordinate Judge of the 24-Pergunnahs, dated the 30th December 1867.

Ram Lochun Sircar (Defendant), *Appellant,*

versus

Mr. C. S. Hogg, Receiver of the estate of the late Ram Chunder Halder (Plaintiff), *Respondent.*

Mr. G. C. Paul and *Baboos Romesh Chunder Mitter, Unnoda Pershad Banerjee, Chunder Madhub Ghose,* and *Bhugobutty Churn Ghose* for Appellant.

Mr. R. T. Allan and *Baboo Kalee Mohun Dass* for Respondent.

In a suit by *K* against *B* and others, the Supreme Court ordered that the estate of *R* (deceased) should be applied to the payment of his debts, legacies, &c., and appointed a Receiver of the rents and profits of his real property. It also ordered the defendants and persons claiming through them to give up to the Receiver such of the real property as might be in their possession. Subsequently in the same suit, the High Court declared that *K* was entitled to a moiety of the estate of *R* after payment of costs and legacies, and directed the estate to be sold, and the proceeds brought into Court.

Afterwards the Receiver brought a suit in his own name against *R* and one *S*, alleging that, though the property had been decreed to *K* and himself jointly, yet *K* had, by collusion, obtained sole possession of it, and that, in execution of a money-decree against her, it had been sold to *S*.

HELD that, as Receiver of the High Court, plaintiff had no title as of right against *S* to the immediate possession of the property, and no right to sue in another Court in his own person to receive possession thereof.

The rule in the original side of the Court, taken from the practice of the English Court of Chancery, is not to compel a party to a suit to give up to the Receiver possession of property, unless an order of Court to that effect had previously been made upon him, the proper course being by proceedings in Court to fix an occupation-rent, and to order the party in possession to pay the same.

Phear, J.—IN a suit originally instituted in the Supreme Court which we may designate as a suit brought by Kaminee Debee against Bindoo Bashinee Debee and others, the Supreme Court, on the 20th of November 1860, ordered that the estate of Ram Chunder Halder, deceased, should be applied to the payment of his debts, funeral and testamentary expenses, legacies, &c., and Mr. Charles Swinton Hogg was appointed Receiver of the rents and profits of the real estate of the said deceased, Ram Chunder Halder. The defendants and all persons claiming through them were ordered by the Court to give up any portions of such real estate of Ram Chunder Halder as might be in their possession to Mr. Hogg; but it is observable that the order did not direct the plaintiff, Kaminee Debee, to give any such property to him. Subsequently, in the same suit, on the 28th July 1862, the High Court declared that Kaminee Debee, the plaintiff, was entitled to one moiety of the estate of Ram Chunder Halder after the payment of costs and legacies. It went on to direct that the whole of the estate should be sold by auction, and the money-proceeds of such sale brought into Court, subject to further orders; and it also directed that Mr. Hogg, the Receiver of Ram Chunder Halder's estate, should be continued.

Mr. Hogg, as Receiver of the just-mentioned estate, under the orders of the Supreme Court and the High Court respectively, now brings this suit against Ram Lochun Sircar and Kaminee Debee to recover certain property which he alleges to be part of the estate of the deceased Ram Chunder Halder. He sues in his own name, and not in the name either of Kaminee or Kaminee and the other persons in the suit. He states in his plaint that he had, in 1865, in a suit brought by him jointly with Kaminee, obtained a decree for possession of this property, and that Kaminee Debee alone by collusion, and so on, according to the usual mofussil form, obtained sole possession of it; that afterwards the principal defendant in this suit, Ram Lochun Sircar, got a decree against Kaminee Debee for a money-debt, and at the sale which took place in execution of his decree, purchased this same property, and obtained possession.

Upon this state of facts it appears to us, without going into any evidence at all, that the plaintiff's suit must fail. We have already said that he sues in his own name as Receiver of the estate. Now, as Receiver of the estate, he has no proprietary rights or interests whatever. The proprietary rights in the estate remain, notwithstanding his appointment, in the persons who are by law entitled to the estate; and the High Court, in 1862, declared that Kaminee Debee was entitled to one moiety of the estate. When, therefore, he admits in his plaint that Kaminee Debee obtained possession of the property, and that the defendant Ram Lochun Sircar bought that property at a sale in execution of a decree against her, he discloses that the rights and interests in the property to recover which he now sues had in law passed from Kaminee Debee to the defendant, Ram Lochun Sircar. Mr. Hogg, therefore, as Receiver of the High Court, has no title as of right against Ram Lochun Sircar to the immediate possession of this property. His only means of getting it into his possession, if this be needed for the purposes of the suit, is by putting in action the Court which made him Receiver. If the suit is still actually pending before the High Court, and it is necessary for the Court in order to deal with it effectively to insist upon its being got into the hands of its officers, the Court itself has a ready means of effecting this. We need not now point out the course which would be properly followed for the purpose. It is enough for us to say what we have already said, that Mr. Hogg, merely as Receiver of the Court, had not a right to sue in another Court in his own person to recover possession of property which he admits Kaminee herself had a legal title to, of which she during the pendency of the suits obtained possession, and to which Ram Lochun Sircar has acquired a title by a sale effected in due process of law. Indeed, if the Receiver had attempted in the proper way to get possession from Kaminee Debee herself while she had it, as he says she had, before Ram Lochun Sircar purchased, he could not, by the practice of the Supreme Court and the High Court on its original side, have succeeded, because Kaminee Debee was never directed by the order of the Court appointing the Receiver to hand over the property of the deceased which she might have or might get into her possession; and it is a rule in the original side of the Court, which is taken from the practice of the English Court of Chancery, not to compel a party to a suit to give up to the Receiver possession of property unless an order of Court to that effect had previously been made upon him. In such cases the course is by proper proceedings taken in Court to fix an occupation-rent, and to order the party in possession to pay the occupation-rent from the date of the order to that effect. Mr. Hogg, therefore, could not obtain possession from Kaminee Debee had she retained possession, which he admits that she once had; and we think it follows *à fortiori* that he could not get possession from the person who has succeeded her in title.

For these reasons, it seems to us that the plaintiff's suit ought to be dismissed. Therefore this appeal must be decreed, the decision of the Lower Court reversed, and the plaintiff's suit dismissed with costs in both Courts.

The 3rd December 1868.

Present:

The Hon'ble J. B. Phear and C. Hobhouse, *Judges.*

Appeal—Jurisdiction—Rent-suit.

Case No. 1995 of 1868 under Act X. of 1859.

Special Appeal from a decision passed by the Officiating Judge of Nuddea, dated the 31st March 1868, affirming a decision of the Assistant Collector of Meherpore, dated the 6th June 1867.

Gireebala Debia (Intervenor), *Appellant,*

versus

Dinonath Mookerjee (Plaintiff) and another (Defendant), *Respondents.*

Baboo Grish Chunder Mookerjee for Appellant.

Baboo Doorga Doss Dutt for Respondents.

A Zillah Judge has no jurisdiction to entertain an appeal from the judgment of a Deputy Collector in a suit to recover rent involving no question of title to, or interest in, land as between parties with conflicting claims.

Phear, J.—We confess that we have very great difficulty in understanding the judgment of the Lower Appellate Court. We do not very exactly apprehend the *ratio decidendi* which the Judge appears to have followed. But it is not necessary for us now to enter upon a consideration of the judgment of the Appellate Court, because we are of opinion that that Court had no jurisdiction to entertain the appeal which was brought before it. The suit was simply a suit to recover rent

and did not involve a question of right to enhance or otherwise vary the rent of the defendant, and it appears to us that no question relating to title to land or to interest in land as between parties having conflicting claims thereto was determined by the judgment of the Deputy Collector; and further the amount of the plaintiff's claim falls below 100 rupees. Under these circumstances, the appeal lay to the Collector, and not to the Judge. We, therefore, feel ourselves obliged to reject this appeal, for if the Lower Court had no jurisdiction to entertain the appeal, no appeal could lie from that Court to us. We reject this appeal and direct that the decree of the Lower Appellate Court be set aside as void for want of jurisdiction. We think that the appellant must pay the costs in this Court.

The 3rd December 1868.

Present:

The Hon'ble J. B. Phear and C. Hobhouse, *Judges.*

Review—Fresh evidence—Section 378, Code of Civil Procedure.

Case No. 1990 of 1868.

Special Appeal from a decision passed by the Officiating Judge of Nuddea, dated the 26th June 1868, reversing a decision of the Subordinate Judge of that District, dated the 28th April 1868.

Nuffur Chand Paul Chowdhry and another (Defendants), *Appellants,*

versus

Mr. A. D. Sandes and another (Plaintiffs), *Respondents.*

Mr. Vertannes and *Baboo Sreenath Doss* for Appellants.

Baboo Bhowanee Churn Dutt for Respondents.

A Judge ought not to admit a review for the purpose of receiving fresh evidence in the suit, except upon being satisfied by legal evidence that the fresh evidence was not known to the applicant, or could not be obtained by him, at the time of the original trial.

Phear, J.—We think that the special appellant must succeed in this case on the ground, which perhaps is somewhat narrow, that the review was granted by the Lower Court without there being any evidence before the Court to justify its coming to the conclusion that a review of its judgment was properly required within the provisions of Section 378 of the Civil Procedure Code. We think that the Judge ought not to have admitted a review for the purpose of receiving fresh evidence in the suit, except upon being satisfied by legal evidence that the fresh evidence proposed to be adduced was not known to the applicant, or could not be obtained by him, at the time of the original trial. Had there been any evidence to this effect before the Judge, we could not here, sitting in special appeal, have interfered with his discretion as regards the conclusions which he drew from it. But it appears to us that there was, in fact, no evidence before him. He directed a review simply upon the statements made to him in the petition of the plaintiff, and that petition, as we understand, was not verified; it was, therefore, really nothing more than an unsanctioned statement. We think it right to add that even had there been some evidence before the Judge upon which he could have legally come to the conclusion favorable to the petitioner in the matter of his petition for a review, still, to use the words of the Chief Justice reported in Marshall, page 554, he "ought not to have granted the application without strict proof that the new "matter was discovered since the decree "was passed." We direct that the order granting the review be set aside, and we reverse the decision which has been come to by the Lower Appellate Court upon that review. The special appellant must have his costs in this Court and in the Lower Court upon review.

The 3rd December 1868.

Present:

The Hon'ble G. Loch and F. A. Glover, *Judges.*

Appeal against part of a decree—Jurisdiction.

Cases Nos. 3204 and 3205 of 1866.

Special Appeal from a decision passed by the Subordinate Judge of Bhaugulpore, dated the 19th September 1866, modifying a decision of the Moonsiff of Tegrah, dated the 26th February 1866.

Kishore Singh (Plaintiff), *Appellant,*

versus

Pookhun Singh (one of the Defendants), *Respondent.*

Mr. R. E. Twidale and *Baboo Poorno Chunder Shome* for Appellant.

Baboos Nil Madhub Sein and *Sreenath Banerjee* for Respondent.

Where a plaintiff, dissatisfied with so much of the decision of first Court as is adverse to him, appeals, making the party in whose favor the decree is made the sole respondent, the Judge of the Appellate Court has only to determine whether, as between the appellant and respondent, the order of the first Court is correct.

Loch, J.—THE plaintiffs in these cases purchased privately the property of a certain judgment-debtor, Rughooburdyal Chowdry, and sought to set aside a miscellaneous order, directing the sale of the property in execution of a decree held by Deonarain. After the present suit was instituted, the property was sold in execution of that decree, and purchased by several parties. The auction-purchasers were then made parties to the suit, but in case No. 3204 only one of the auction-purchasers, namely, Pookhee Singh, appeared. The first Court held that the plaint is spurious, and therefore set aside the plaintiff's purchase with regard to the property held by the auction-purchaser above named; but with regard to the remaining properties comprised in the deed of sale, he gave plaintiff a decree for it, as no one disputed plaintiff's right thereto. Plaintiff, dissatisfied with the order passed, appealed to the Subordinate Judge, who, concurring with the opinion of the first Court, held the documents, namely, the deeds of sale, to be spurious, and dismissed the whole of plaintiff's suit.

A special appeal has been preferred on the ground that, as the appeal before the Subordinate Judge was only against one respondent, and related only to so much of the decree as had been unfavorable to the plaintiff, and no other parties to the suit were made respondents, the Subordinate Judge should have confined his attention to the matter of appeal as placed before him.

We think the contention is right. The plaintiff, dissatisfied with so much of the decree of the firrt Court as was adverse to him, appealed, making the party in whose favor a decree had been made the sole respondent to the appeal; and, therefore, in disposing of the case, the Judge of the Lower Appellate Court had only to determine whether, as between the appellant and respondent, the order of the first Court was correct or not; and even if he concurred with the first Court, as he has done, in holding the deeds of sale to be spurious, yet as no other parties were before the Court, he had no cause to adjudicate upon their rights. We think, therefore, that so much of the judgment of the Lower Appellate Court which goes beyond that of the Moonsiff be set aside, and the order of the Moonsiff be restored.

Appeal decreed with costs. Pookhee Singh will recover his costs from the plaintiff in the Lower Courts.

The 3rd December 1868.

Present:

The Hon'ble J. B. Phear and C. Hobhouse, *Judges.*

Intervention—Jurisdiction—Revenue Courts.

Case No. 950 of 1868 under Act X. of 1859.

Special Appeal from a decision passed by the Officiating Judge of Patna, dated the 21st January 1868, affirming a decision of the Deputy Collector of that District, dated the 11th April 1867.

Nowab Jan (Plaintiff), *Appellant,*

versus

Munnoo Lall (Defendant) and others (Intervenors), *Respondents.*

Baboo Kishen Succa Mookerjee for Appellant.

Mr. R. E. Twidale and *Baboos Chunder Madhub Ghose* and *Khettur Mohun Mookerjee* for Respondents.

In a suit for rent, the Revenue Court has no jurisdiction to enquire into the conflicting rights of plaintiff and intervenors.

Phear, J.—THE first ground of special appeal involves an objection which might have been taken before the Lower Appellate Court, and which was not taken there. We think, under the circumstances of the case, that we ought not to give the special appellant the benefit of it now.

With regard to the other objections, we think that they have been substantially made out. It appears to us that there has been a mistrial of this case in the Lower Appellate Court. That Court, as far as we can judge, has come to a decision adverse to the plaintiff's claim against the defendant-ryot, solely upon the consideration of an issue as to the conflicting rights of the plaintiff and the intervenors. Now, the Revenue Court has no jurisdiction to enquire into the relative rights of the plaintiff and the intervenors. We think, therefore, that the judgment of the Lower Appellate Court must be reversed, and the case remanded to that Court for re-trial upon two issues. The first issue will be whether the intervenors actually and

in good faith received and enjoyed the rent which the plaintiff claimed of the defendant before and up to the time of the commencement of the suit. If the Court find this issue in the affirmative, then the plaintiff's suit should be dismissed. If, however, the Court should find it in the negative, then the second issue will be whether or not the defendant, by reason of a contract of tenancy, expressed or implied, is bound to pay the plaintiff the rent which he claims, or any part of it. Costs will abide the event.

The 4th December 1868.

Present:

The Hon'ble J. B. Phear and C. Hobhouse, *Judges.*

Jurisdiction—Execution—Attachment.

Case No. 173 of 1868.

Regular Appeal from a decision passed by the Subordinate Judge of Nuddea, dated the 16th March 1868.

Pran Bundhoo Sircar (one of the Defendants), *Appellant,*

versus

Surbo Soonduree Debia, guardian of Nil Ruttun Adhikaree, minor, and others (Plaintiffs), *Respondents.*

Baboos Gopal Lall Mitter and *Onookool Chunder Mookerjee* for Appellant.

Mr. G. C. Paul and *Baboo Mohinee Mohun Roy* for Respondents.

In executing a decree for arrears of rent, a Revenue Court has no power to seize and sell any other property than that of the judgment-debtor, even though such property had previously belonged to the judgment-debtor, *e. g.*, a tenure which once had belonged to him, but was sold in execution of a Civil Court decree.

Phear, J.—It appears to us that this case lies within a very small compass. It seems that the plaintiff's ancestor, through whom she claims, purchased the tenure which is the subject of suit at a sale which took place on the 2nd of December 1865, in execution of a decree of a Civil Court passed against the then owner, Mahomed Ishak. On the 23rd of August 1866, the defendant-appellant bought the same tenure at an auction-sale which was held in execution of a decree made by the Deputy Collector against the same Mahomed Ishak. This decree had been obtained by the zemindar on account of arrears of rent due to him from Mahomed Ishak before the sale to the plaintiff's ancestor in December 1865. Now, the sale to the plaintiff's ancestor Ram Sunkur is not in any way impeached before us. The first decree against Mahomed Ishak, for all that has been made out before us, was a valid decree of the Civil Court, and that Court, therefore, had power in execution to sell Mahomed Ishak's rights and interests in this property, because, by the very case of the defendant himself, it was a transferable tenure. That being the case, the only question before us is whether the Deputy Collector had power by law, in proceeding to execute his decree against Mahomed Ishak, which was passed before this sale to Ram Sunkur, to seize the tenure which had become the property of Ram Sunkur, and to sell it.

The power which a Revenue Court has in this behalf is given to it by the provisions of Section 105, Act X. of 1859, and we think that those provisions only enable the Revenue Court to seize and sell that which at the time is the property of the judgment-debtor. There is nothing in the whole Act, as we read it, to indicate that the Legislature contemplated for a moment that the property of any other person than the judgment-debtor should be sold for the debt of the latter, even though that property had previously been the property of the judgment-debtor. And we observe that, in the latter part of Section 105 itself, there is language used which by implication satisfies us that the Legislature, in giving this power of sale to the Court, intended it to apply only to the existing property of the debtor. The words which we refer to are these: "If, after sale of an under-tenure, "any portion of the amount decreed remains "due, process may be applied for against "any other property, moveable or immove-"able, belonging to the debtor." It seems to us obvious that, in using the words "other property," the Legislature clearly showed that it regarded the tenure which it had made liable to sale being the property at the time of the judgment-debtor.

Taking it on the facts of this case as they have been read to us, that at the date of that sale by the Deputy Collector in execution of his decree against Mahomed Ishak, the tenure in question had duly passed away from Mahomed Ishak to Ram Sunkur, and become the property of Ram Sunkur—the interpretation which

we put upon Section 105 leads us to hold that the Deputy Collector had no power by law at that time to sell the tenure which is the subject of suit; and consequently, the defendant obtained no title by being a purchaser at the Deputy Collector's sale. The previous title of the plaintiff must, therefore, necessarily prevail against him.

The appeal, consequently, is dismissed with costs.

The 4th December 1868.

Present:

The Hon'ble L. S. Jackson and F. A. Glover, *Judges.*

Suit for reduction of an embankment—Infraction of right.

Case No. 1678 of 1868.

Special Appeal from a decision passed by the Judge of Beerbhoom, dated the 26th March 1868, reversing a decision of the Moonsiff of Gopalpore, dated the 30th July 1867.

Prankristo Roy (Plaintiff), *Appellant,*

versus

Huro Chunder Roy and another (Defendants), *Respondents.*

Baboo Kalee Kishen Sein for Appellant.

Baboo Bama Churn Banerjee for Respondents.

In a suit for an injunction to compel defendant to reduce to its original dimensions an embankment which he had recently raised from a certain height to a greater height, on the ground that the effect of defendant's act had been, and would be, to injure plaintiff's land by preventing the passage of water which used to overflow that land:

HELD that plaintiff was bound to establish not merely an injury, actual or prospective, caused by the act complained of, but an injury caused by infraction of some right which plaintiff possessed, or by the omission of something which defendant was legally bound to do.

Jackson, J.—THE plaintiff's suit in this case was in the nature of a suit praying for an injunction to compel the defendant to reduce to its original dimensions a certain *ail*, or embankment, which he had recently raised from the height of half a cubit or thereabouts (at which height it had stood for many years), to the height of two cubits or two and a half.

The plaintiff's case was that his land lay to the west of the defendant's land, and that to the south of the defendant's land there was a reservoir formed by a natural hollow into which the water having flowed over defendant's land, after topping the *ail* at its original height, used to be discharged; that the water so collected in this reservoir was used by the plaintiff as well as defendant and their neighbours for purposes of cultivation; and that the effect of this raising of the *ail* by defendant has been and would be to injure the plaintiff's land by the water being carried round the embankment, instead of passing over it, as heretofore. Defendant denied the fact of injury to the plaintiff's land, and alleged that he had raised the height of the embankment merely for the purpose of improving his own land.

It is not very easy to understand the merits of plaintiff's case without a map showing the position of the land and direction of the *ail*, and it is singular that the Moonsiff who tried the case should have deputed an Ameen to hold a local enquiry without directing such a map to be prepared. The Moonsiff was of opinion on the Ameen's report, that injury had been sustained by the plaintiff, and ordered the reduction of the *ail* to the height of one cubit; but the case coming before the Judge in appeal, he was of opinion on the evidence that no specific injury had been proved, and he held that the defendant was fully entitled to raise his embankment for defence of his own land. He, therefore, gave a decree for the defendant.

It is contended before us in special appeal that defendant was not legally justified in adding to the height of the embankment so as to injure plaintiff; that even if no present injury had been proved, there was a likelihood of future damage; and that consequently the decision of the Moonsiff was right.

It seems quite clear that the plaintiff in this case was bound to establish not merely an injury, actual or prospective, caused by the act of defendant, but an injury caused by infraction of some right which plaintiff possessed, or by the omission of something which the defendant was legally bound to do.

There is nothing to show that the plaintiff had any right to insist that the water on the defendant's land, when it reached the height of half a cubit or one cubit, should pass over the defendant's *ail* and so escape into a reservoir, or that defendant was bound to cause the water so to escape for the plaintiff's benefit.

I think, therefore, whether there be proved injury to the plaintiff from the defendant's act or not, plaintiff is not entitled to maintain this suit, and consequently the decision of the Judge made on appeal must be affirmed with costs.

Glover, J.—I am of the same opinion.

The 4th December 1868.

Present:

The Hon'ble L. S. Jackson and F. A. Glover, *Judges.*

Suit for possession—Sale of joint property—Onus probandi.

Case No. 1696 of 1868.

Special Appeal from a decision passed by the Judge of Shahabad, dated the 19th April 1868, reversing a decision of the Moonsiff of that District, dated the 19th August 1867.

Phookun Pandey (Defendant), *Appellant,*

versus

Mussamut Sookhia (Plaintiff), *Respondent.*

Baboos Anund Chunder Ghossal and *Gopeenath Banerjee* for Appellant.

Moonshee Mahomed Eusuff for Respondent.

Plaintiff alleged that she and her deceased husband's minor brother had, with his other three surviving brothers, held joint possession, but that these three had wrongfully sold the land to the other defendants, and she prayed for possession by reversal of the sale. The purchasers appeared and filed a written statement to the effect that the vendors had separated from their father in his lifetime, and that they (the purchasers) had been in succession to the vendors for more than 12 years in possession.

HELD that the *onus* lay on the plaintiff, who would have to show not only that she represented one of the heirs of her husband's father, but also that the land in dispute was part of the estate left by the father at his death.

Jackson, J.— THERE are two objections to the judgment of the Court below. The first is that as the plaint discloses no cause of action, the suit ought to have been dismissed, and, secondly, that the Judge has incorrectly thrown the *onus* of proof on the defendants.

The suit was of this nature: One Taz Khan dying left five sons, of whom one was a minor, and one was plaintiff's husband, since dead. Plaintiff alleged that she and the minor, who was under her tutelage, had, with the other three surviving sons, held joint possession of the land in dispute, and that these three sons had wrongfully sold the land to the other defendants (the respondents). She, therefore, prayed for possession by reversal of the deed of sale, we presume as far as it concerned any interests except those of the three vendors. The purchasers appeared and filed a written statement to the effect that the vendors had separated from their father in his lifetime, and had received the land in question as their separate property, and that they (the purchasers) had been in succession to the vendors for more than 12 years in possession, and consequently the suit was barred.

The Moonsiff took a not improbable view of the case, *viz.*, that the plaintiff was in collusion with the vendors, and had brought the suit to deprive the purchasers of possession and to recover the land, and he dismissed the case. The suit coming up before the Judge in appeal, he was of opinion that the land had been originally what he called joint hereditary property, and as defendants set up a separation in estate on the part of their vendors, he laid upon them the *onus* of proving their allegation. He found that there was no proof of such separation, and he therefore reversed the decision of the Moonsiff, and has given judgment for the plaintiff. The Judge seems in this case to have applied to these Mahomedan parties the law which governs joint Hindoo families.

As to the objection which relates to the cause of action, doubtless the plaint is defectively framed and ought, strictly speaking, to have been returned to the plaintiff for amendment, because dispossession is not expressly alleged, and the Court was left to infer that the plaintiff only complained of the execution of the bill of sale. That certainly would not be a sufficient cause of action, and it would be rather hard on parties if, in addition to paying money for a worthless title, they were subject to be sued by any party really interested for a declaration of right. But as the defendants came in and alleged that they were in possession, and thereupon the parties evidently went to trial as if the suit were one to recover possession, we think the objection must be disallowed.

But, on the other objection, the judgment of the Court below must be set aside. It was for the plaintiff, who sought to invalidate the bill of sale, and to dispossess the purchaser defendants, to prove her right, and for this purpose she would have to show, not merely that she was or represented one of the heirs of Taz Khan, but also that the land in dispute was part of the estate left by Taz Khan at his death.

The case must be remanded to the Court below that it may be decided whether the plaintiff has made out such a case, and, if so, whether the defendants have rebutted that case.

d

The 5th December 1868.

Present:

The Hon'ble J. B. Phear and C. Hobhouse, *Judges.*

Limitation—Appeal—Review—Section 347, Act VIII., 1859.

Case No. 653 of 1867.

Miscellaneous Appeal from an order passed by the Subordinate Judge of the 24-Pergunnahs, dated the 23rd June 1867.

Tarakalee Dabee, *Appellant,*

versus

Nitya Moyee Dabee, *Respondent.*

Baboo Bhowanee Churn Dutt for Appellant.

No one for Respondent.

An application to a Court, asking it to set aside a decree by which it dismissed an appeal for default of prosecution, ought to be made, by the terms of Section 347, Act VIII., 1859, within 30 days from the date of such dismissal.

Phear, J.—As far as we can understand, the petitioner's matter of complaint is two-fold. She says that a review of a judgment which she had obtained in appeal was granted by the Lower Court without previous notice to her to enable her to appear and be heard in support of her decree. And she also says that, after the review order was made, a re-hearing was had of her original appeal, and that appeal was then dismissed on the ground of her not having appeared at such re-hearing. This second matter of complaint falls under the provisions of Section 347 of the Civil Procedure Code, and, according to this Section, she had 30 days from the date of the dismissal of her appeal to apply to the Appellate Court for the re-admission. She did make an application to the Appellate Court, not for the re-admission of the appeal, but for a *review.* This application was rejected by the Lower Court on the ground that the condition precedent to obtaining an *appeal* had not been complied with, namely, that she had not filed the judgment which she was seeking to alter. After this the petitioner preferred a petition of appeal against the decree in review, and this was rejected by the Lower Court on the ground that it was not brought within 90 days of the date of that decree, and also upon the ground that the petitioner had not accounted for the delay.

This present miscellaneous appeal before us, is an appeal against this latter order of the Subordinate Judge. In face of the statements of the Subordinate Judge, we are unable to say that his decision was wrong. If this is, as it purports to be, an application to the Court asking it to set aside the decree by which it dismissed the appeal for default of prosecution, it ought to have been made, by the terms of Section 347, within 30 days from the date of such dismissal. As the Subordinate Judge says it was not made within 90 days, it follows that the petitioner did not bring herself within the provisions of the Act. It is admitted before us that the Subordinate Judge is right in his facts, and we cannot therefore do otherwise than say we think he is right in the conclusion of law to which he has come. Our conclusion must be the same. It is not necessary now for us to say whether, after the lapse of time which the petitioner has allowed to occur, she still has a remedy of another kind, supposing her to have been aggrieved in the way in which she says she has been by the admission of the review without notice to her. We dismiss this appeal.

The 5th December 1868.

Present:

The Hon'ble J. B. Phear and C. Hobhouse, *Judges.*

Right of suit—Kubooleut.

Case No. 2056 of 1868 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of the 24-Pergunnahs, dated the 8th May 1868, reversing a decision of the Deputy Collector of Busseerhaut, dated the 30th October 1867.

Chunder Nath Nag Chowdhry (Plaintiff), *Appellant,*

versus

Assanoollah Mundul (Defendant) and others (Intervenors), *Respondents.*

Mr. M. L. Sandel for Appellant.

Baboo Oopendur Chunder Bose for Respondents.

A suit for a kubooleut is a suit to enforce the performance of a contract for future occupation of the tenure, and cannot be maintained where there is no evidence of defendant having ever agreed to hold the land of the plaintiffs or ever paid them rent.

Phear, J.—In this case the plaintiffs sue one Assanoollah to obtain a kubooleut from him in respect of certain 7 beegahs 11 cottahs of land. The Lower Appellate Court states that "there is no evidence to show that "Assanoollah agreed to hold the land of the "plaintiffs, no evidence that he ever paid "rent to them for the land, no evidence "beyond the statement of the witnesses "that they understood the defendant, Assan-"oollah, held the lands from Kala Chand, "the ancestor of the plaintiffs' lessors, and "his heirs." Under these circumstances, the Appellate Court says, "the judgment "of the Lower Court cannot be upheld. I "set aside the decree, and dismiss the suit."

It is not pretended before us that the Judge is wrong in stating that there is no evidence on the points which we have just mentioned, and it seems to us inevitable that the plaintiffs' suit should be dismissed. This is not a mere suit for past arrears. If it were, it might be that mere occupation under the plaintiffs' predecessors and themselves would be sufficient evidence to entitle the plaintiffs to recover rent. But this is a suit for a kubooleut, that is to say, a suit to enforce the performance of a contract for future occupation of the tenure; and it is clear in this case, taking the statements in the judgment of the Lower Appellate Court to be correct, that there is no foundation for making the defendant liable to execute to the plaintiffs a contract for future occupation.

The appeal is therefore dismissed with costs.

The 7th December 1868.

Present:

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice,* and the Hon'ble Dwarkanath Mitter, *Judge.*

Section 230, Act VIII. of 1859—Summary dismissal—Remand.

Case No. 390 of 1868.

Miscellaneous Appeal from an order passed by the Judge of Dacca, dated the 9th June 1868, reversing an order of the Sudder Ameen of that District, dated the 23rd January 1868.

Sabir Khan (Decree-holder), *Appellant.*

versus

Ram Luckhee Chowdhrain (Judgment-debtor), *Respondent.*

Baboo Romesh Chunder Mitter for Appellant.

Baboo Khettur Mohun Mookerjee for Respondent.

Where a Lower Appellate Court found that a suit, falling substantially under Section 230, Act VIII. of 1859, which had been received and numbered as such, had been subsequently dismissed by the Court of first instance upon a point which did not properly arise under that Section: HELD, that it should have remanded the case to the first Court for trial and decision under that Section.

Peacock, C. J.—WE think that this was substantially a case under Section 230 of Act VIII. of 1859.

The application was received and numbered as a suit under that Section, and ought, therefore, to have been tried according to it. The Moonsiff, to use the words of the Judge, instead of trying the case summarily, kicked over all parties upon a point which did not properly arise in a suit under Section 230. The Judge ought, therefore, to have remanded the case to the Moonsiff for trial and decision under that Section. We accordingly remand it to the Moonsiff for that purpose. The respondent will pay the costs of this appeal and the costs in the Lower Appellate Court. The appellant will put in the proper stamp as for an appeal under Section 230.

The 7th December 1868.

Present:

The Hon'ble F. B. Kemp and E. Jackson, *Judges.*

Damages for malicious prosecution — Onus probandi.

Case No. 47 of 1868.

Regular Appeal from a decision passed by the Officiating Subordinate Judge of Rungpore, dated the 10th February 1868.

Doongrussee Byde (Defendant), *Appellant,*

versus

Gridharee Mull Doogur (Plaintiff), *Respondent.*

Baboos Onookool Chunder Mookerjee, Sreenath Doss, and *Bissessur Dyal Roy* for Appellant.

Baboos Ashootosh Chatterjee and *Anund Chunder Ghossal* for Respondent.

In a suit for damages for malicious prosecution where it was proved that plaintiff, a man of property and respectability, had been charged by defendant with theft, and that he had been convicted before the Magistrate but acquitted by the Sessions Judge: HELD, that the mere fact of acquittal did not prove that the charge was malicious; that property having been found in plaintiff's house, which defendant claimed as his stolen property, plaintiff could not recover damages unless it was certain that the property in question was not stolen but his own; and that it was for plaintiff to show that there was no ground or reasonable cause for bringing the charge.

Jackson, J.—THIS is a suit for damages for malicious prosecution. The plaintiff lays his damages at 10,000 rupees. The plaintiff states that he is a large merchant, worth about half a lakh of rupees in the Rungpore District; that he is a respectable man of good character; that a theft occurred in the house of the defendant which was situated on the other side of the road from the plaintiff's own house; that the defendant charged him with that theft in collusion with the police; that the plaintiff's house was searched, and the defendant pointed out property, which really belonged to the plaintiff, as part of the stolen property; that, in consequence of this, he was sent in to the Magistrate, and the Magistrate sentenced him to two years' imprisonment; that he remained in prison for 26 days, and, on appeal to the Sessions Judge, he was acquitted and released. The plaintiff asks for damages for the degradation, pain, and anxiety which he suffered by these proceedings, which he states to have been maliciously instituted by the defendant in con-

sequence of a dispute then existing between him and the defendant.

The defendant states that there were good grounds for the charge; that a theft took place; that information was given to him which led him to suspect the plaintiff; that the plaintiff's house was searched, and the stolen property was found there.

The Principal Sudder Ameen who tried this case in the Lower Court has found that this was a false prosecution, and that it was deliberately and maliciously brought with the intention of injuring the plaintiff and without any grounds, and he has awarded to the plaintiff 500 rupees damages. This appeal is preferred from that decision, and it is again alleged by the defendant that he, the defendant, had good grounds for bringing this charge against the plaintiff, and that the plaintiff was really guilty, and that the stolen property was found in his house.

We find that the plaintiff has, in the trial of this case, proved that he is a man of respectability, and that he possesses a certain amount of property, and that he is at enmity and quarrelling with the defendant; but beyond this, the plaintiff has attempted to prove nothing. He has put in the proceedings before the Magistrate and the Sessions Judge on the criminal trial, and for him it is pressed on the Court that the fact of his having been acquitted by the Sessions Judge is sufficient *primâ-facie* proof that the prosecution by the defendant was a malicious one. Even admitting this to be the case, that *primâ-facie* proof is rebutted by the defendant, who has produced the evidence of his cashier and of his gomashta, and not only of his own servants, but also of the police; and not only of the police, but also of the neighbours who were present at the search; and all these witnesses depose that the search was duly and regularly made, and that the property which was alleged to be stolen was found in the plaintiff's house, and that it was part of the stolen property. Whether that evidence is true or whether that evidence is false, it is quite certain that the plaintiff has not attempted to prove that this property which he stated at the time of the search belonged to himself, is his property. There were ornaments, there were corals, there was a bag of rupees The witnesses now examined depose that all this property belonged to the defendant. In the absence of any evidence on the part of the plaintiff that that property belonged to him (evidence which was so easy for him to produce, or certainly as easy as it was for the defendant) it is impossible to give any opinion as to whether the charge against the plaintiff was a totally unfounded charge or not. If there was any foundation for the charge, and if the defendant's property was found in the plaintiff's house, the plaintiff cannot recover damages, unless it is quite certain that the property found was not the stolen property and was really the plaintiff's own property.

Speaking for myself, I admit that I have very great suspicions as regards the truth of the charge of theft brought against the plaintiff; but be it true or be it false, it is impossible to decide whether it is true or whether it is false upon the evidence adduced in this case. It is quite clear that the police and the neighbours are all against the plaintiff, and give evidence against him very much to the same effect as the defendant does. The Sessions Judge decided the case in plaintiff's favor upon some enquiry which he made on the spot, the particulars of which are not recorded. The plaintiff has brought this suit, but he has not attempted to support it by any evidence whatever bearing upon the charge of theft. He seems to have been very badly advised.

Under such circumstances, the decision of the Principal Sudder Ameen should be reversed. I would decree this appeal, and dismiss the plaintiff's suit with costs.

Kemp, J.—I concur in this judgment. I wish to add that it appears to me that the Principal Sudder Ameen has proceeded entirely on the presumption that, because the plaintiff was acquitted by the Sessions Judge, it must be inferred that the defendant's charge of theft was a malicious one.

Baboo Onookool Chunder Mookerjee for the appellant has pointed out three decisions of this Court—one published at page 159, Volume III. of the Weekly Reporter, Justices Morgan and Shumbhoonath Pundit; one in Volume V., page 282, Justices Norman and Campbell; and one in Volume VI., page 245, Justices Kemp and Markby—in which the law is laid down thus: that the mere failure to obtain a conviction on a criminal charge does not entitle the party who has been acquitted to sue for damages on the ground of malicious prosecution, but that it is for that party to show that there was no ground or reasonable cause for bringing the charge. In this case, I am of opinion that there was a reasonable cause for bringing the charge. and I agree entirely in dismissing the plaintiff's suit with costs.

The 7th December 1868.

Present:

The Hon'ble H. V. Bayley and L. S. Jackson, *Judges.*

Purchase of a share—Arrangement as to collections.

Case No. 936 of 1868 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of Gya, dated the 17th January 1868, affirming a decision of the Deputy Collector of that District, dated the 28th May 1867.

Ramnath Singh (Defendant), *Appellant,*

versus

Gondee Singh (Plaintiff), *Respondent.*

Baboo Nil Madhub Sein for Appellant.

Baboo Poorno Chunder Shome for Respondent.

A party who purchases the rights of one of a number of co-sharers comes into all arrangements made in respect to the collections; any express consent by him is not necessary for the payment of his share of the rent to any one else.

Bayley, J.—I AM of opinion that this case ought to be remanded to the Lower Appellate Court for re-trial.

The plaintiff sued on the allegation of purchase of an eight-annas share, being the rights and interests of Cheeta Singh, and both the Lower Courts have found as a fact that Cheeta Singh's share was eight annas.

The case of the defendant is that the purchase made by the plaintiff is of a two annas and some gundahs share; that Gudadhur and Bhinuck Singh were two joint sharers; and that the sale-certificate shows that the plaintiff purchased with notice of the claim of the two parties last named. It is also alleged by the defendant that payment of his rent was made to Nusseeb on behalf of the other co-parceners.

The Lower Appellate Court in this case holds that the plaintiff's purchase was of eight annas share of Cheeta Singh. This it does upon a copy of a petition presented by Gudadhur and Bhinuck repudiating any right or share in Cheeta Singh's property. The Lower Appellate Court also concludes that the defendant's alleged payment to Nusseeb has not been satisfactorily made out, because Nusseeb is the brother of the defendant.

The defendant appeals specially, and urges that the finding by the Lower Appellate Court with regard to the share of Cheeta Singh is not based on legal evidence, as the copy of the petition above referred to was in no way proved, and further that there has been no proper investigation or finding as to the payment of rent by the defendant to Nusseeb on behalf of all the sharers.

I am of opinion that both these objections are valid. On the face of the judgment of the Lower Appellate Court, there seems to be no other evidence upon which it comes to the finding that the share of Cheeta Singh was eight annas than the copy of the petition mentioned above, and there is no proof of the genuineness and authenticity of that document.

As to the alleged payment by the defendant to Nusseeb on account of all the sharers, the Lower Appellate Court comes to no clear finding on any evidence that Nusseeb did not receive the rent on behalf of all the co-parceners. It merely decided this on the suspicion arising from the relationship existing between the parties.

As, then, there is thus no clear decree binding Gudadhur or Bhinuck, I think the whole case ought to be remanded to be retried with reference to the above remarks.

Jackson, J.—I agree that there must be a remand in this case. The payment of rent by the defendant to one of the co-sharers, if proved, would afford a good answer to the plaintiff's suit. The Judge, although he intimates an opinion that the proof on this point was not so good as it might have been, avoids a distinct finding upon it by observing that the plaintiff, being a purchaser of one of the shares, had not consented to the payment of his share to any one else. It seems to me that any express consent by the plaintiff was not required in this case, and that, having purchased the rights of the co-sharers, he came into all arrangements made in respect to the collections. Even if he had given notice of any intention to collect his own rents separately, it seems to me doubtful whether, under the rulings of this Court, he could be entitled to maintain the present action.

There is a further question as to the proof of the extent of the plaintiff's share. I think it quite clear that the copy of the petition presented by Gudadhur and Bhinuck would not be evidence of the repudiation of their interests, without it being proved that the original petition was presented at their direction.

I think, therefore, that the Judge must find whether the defendant has paid rent as alleged by him; and, if not, I think that a decree can only be given for the plaintiff, if the other co-sharers are made parties to this suit.

The 8th December 1868.

Present:

The Hon'ble F. B. Kemp and E. Jackson, *Judges.*

Remand—Presumption of uniform payment—Further evidence.

Case No. 1914 of 1868 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of the 24-Pergunnahs, dated 15th April 1868, affirming a decision of the Deputy Collector of that District, dated the 25th September 1867.

Rakhal Chunder Tewarec (one of the Defendants), *Appellant,*

versus

Kinooram Haldar (Plaintiff), *Respondent.*

Baboos Kalee Mohun Doss and *Nubo Kishen Mookerjee* for Appellant.

Baboo Khettur Nath Bose for Respondent.

In a suit for enhancement of rent, which had been remanded to the Lower Appellate Court with the instruction that the defendant had produced sufficient evidence to raise the presumption that he held his tenure at a fixed rate from the Permanent Settlement, and that it was for the Judge to give an opinion how far the plaintiff was able to rebut that presumption:

HELD that there was nothing objectionable in the Judge directing the first Court to hear further evidence upon the point.

Jackson, J.—THIS was a suit for enhancement of rent, and it has been twice remanded to the Judge. On the last occasion of remand, the Judge was informed that the defendant (ryot) had produced sufficient evidence to raise the presumption that he held his tenure at a fixed rate from the Permanent Settlement, and that it was for the Judge now to give an opinion upon the question how far the plaintiff was able to rebut that presumption. Thereupon the Judge ordered that the plaintiff should be allowed an opportunity of rebutting the presumption, and directed the first Court to hear further evidence upon that point. Such evidence has been heard, and the Judge has decided that the plaintiff has rebutted that evidence, and has proved that there has been a change in the rent of the defendant's tenure from 7 rupees to 8 rupees—a change which took place in the year 1234.

It is said in special appeal, *first*, that the Judge had no authority under the circumstances to allow further evidence to be given by the plaintiff, inasmuch as the order of remand of this Court did not state that he was to give the plaintiff any opportunity of giving further evidence. We think that, looking to the manner in which this case was originally tried, there was nothing objectionable in the course pursued by the Judge. The Courts had, on former trials, considered that the defendant had not made out his plea of presumption. Under such circumstances, it was not surprising that they had not gone into the evidence to rebut that presumption; indeed, it was quite possible that the Courts might have stopped the plaintiff, and prevented him from going into that evidence. Under any circumstances, we think that, in admitting further evidence to throw light upon the case, the Judge acted correctly.

* * * * * * *
* * * * * * *

The 9th December 1868.

Present:

The Hon'ble H. V. Bayley and A. G. Macpherson, *Judges.*

Section 33, Act XI., 1859.

Case No. 378 of 1867.

Regular Appeal from a decision passed by the Judge of Tipperah, dated the 11th September 1867.

Gunga Narain Bose (Plaintiff), *Appellant,*

versus

Mr. William Cornell, Collector of Bullooah (Defendant), *Respondent.*

Baboo Bungshee Dhur Sein for Appellant.

Baboos Juggadanund Mookerjee and *Romanath Bose* for Respondent.

Section 33, Act XI. of 1859, contemplates an action against the individual wrong-doer, irrespective of Government and co-parceners.

Bayley, J.—IN this case, the plaint discloses no cause of action against Mr. Cornell individually; yet, in his appeal, Mr. Cornell has been made the sole respondent. The suit was brought against him as a Government officer, against Government, and against the plaintiff's co-sharers in the property out of the sale of which this suit arises. The plaint shows that redress is sought as against *all* these defendants, and does not show that

there was any intention to have Mr. Cornell declared personally liable. But if the case was such as is presented to us in appeal, the plaint should have been against Mr. Cornell individually under Section 33, Act XI. of 1859. That Section contemplates an action against the individual wrong-doer, irrespective of Government and co-parceners.

In this view, we think no cause of action is shown in the case brought before us in this appeal, and we accordingly dismiss this appeal with costs.

The 9th December 1868.

Present:

The Hon'ble F. B. Kemp and E. Jackson, *Judges.*

Chittahs—Attestation—Parol evidence of land being mal.

Case No. 1070 of 1868 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of Hooghly, dated the 13th December 1867, reversing a decision of the Deputy Collector of that District, dated the 31st May 1867.

Debee Pershad Chatterjee (Plaintiff), *Appellant,*

versus

Ram Coomar Ghossal and others (Defendants), *Respondents.*

Baboo Hem Chunder Banerjee for Appellant.

Baboo Khettur Nath Bose for Respondents.

Where chittahs were produced by plaintiff as evidence of certain lands being *mál*, it was held that they were sufficiently attested by the deposition of the village-gomashta that they were the chittahs of the village while he was gomashta, and that he had been present when, with their assistance, a purtâl measurement had been carried out in the village.

The oral evidence of persons able from their position to testify as to certain lands being *mál* is not to be rejected as hearsay, when they depose that they have known the lands to be *mál* for many years, and that defendant has been in the habit of paying rent for them.

Jackson, J.—We think that the Judge has made some mistakes in deciding this case. He has dismissed the plaintiff's suit, because, in the first place, the plaintiff has not attested the chittahs which he has produced to support his allegation that these lands were *mál;* but we find that the gomashta of the village has deposed that these chittahs were the chittahs of the village while he was gomashta, and that he had been present when, with the assistance of these chittahs, a purtâl measurement was carried out in the village. We think this is a sufficient attestation of these chittahs, and that the Judge was bound, under these circumstances, to look into them to ascertain whether, at the time that these chittahs were drawn out, the plaintiff claimed a right of ownership over these lands. The Judge says that these chittahs are not attested by the tenants, but it is not usual for tenants to attest measurement-chittahs. It may be that the plaintiff, when he measured his village, measured the lakheraj lands as his *mál* lands. If the Judge is satisfied that he did so, he should, of course, state it, but these chittahs are some *primâ-facie* evidence that, long before this case originated, and before this suit was thought of, the plaintiff put forward his rights to these lands as *mál* lands, that is, supposing that the chittahs do contain these lands amongst the *mál* lands.

Then, as regards the oral evidence, the Judge rejects that evidence, because it is mainly hearsay evidence, but it is the evidence of persons well able from their position to speak to these lands, and they depose that these lands are *mál*, that they have known them as *mál* for a great many years, and that the defendant has been in the habit of paying rent for them. We think that, under these circumstances, the Judge should have gone on, and not rejected the plaintiff's case without making any inquiry into what evidence the defendant had to offer in support of his contention that the lands were lakheraj.

We think, therefore, that we must remand this case to the Judge in order that he may re consider his decision upon it, and after looking at the evidence on both sides, declare whether these lands are *mál* or akheraj.

The 10th December 1868.

Present:

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble Dwarkanath Mitter, *Judge*.

Devastation by husband—Suit against widow.

Case No. 125 of 1868.

Regular Appeal from a decision passed by the Subordinate Judge of Dacca, dated the 30th March 1868.

Mr. E. Staves (Plaintiff), *Appellant*,

versus

Eulalia Dias (Defendant), *Respondent*.

Messrs. G. C. Paul, C. Gregory, and *M. L. Sandel* for Appellant.

Mr. Bourke and *Baboos Romesh Chunder Mitter* and *Kalee Mohun Doss* for Respondent.

In a suit against a widow individually, and not in her representative capacity, to recover plaintiff's share of property alleged to be in her possession, the suit being one wherein defendant was charged with devastation in respect of such property only:

HELD that defendant was not liable in that suit to be made answerable out of her husband's assets for any devastation which he may have committed.

Peacock, C. J.—IT appears to us that, upon the construction of the will of the testator DeSanto, one-third of his estate vested absolutely in Mr. Manuel Dias, his nephew, who survived him, and that it was not intended that Mr. Manuel Dias was to take a mere life-estate.

* * * * * * *

* * * * * * *

It is admitted by the respondent that the sum of Rupees 2,345-8 annas and 10 gundahs, taken as the value of the carriages, tables, chairs, and articles of gold and silver, &c., was only half, and not the whole, of the value of those articles, and consequently that the plaintiff would be entitled to succeed upon the second ground of his appeal, unless the objection of the defendant is to prevail that he is not entitled in this suit to recover against the defendant out of the assets of her deceased husband, Mr. Manuel Dias, any portion of the property which was wasted or improperly applied by Mr. Dias, her husband.

This suit was commenced against the defendant individually, and not in her representative capacity, to recover the plaintiff's share of property alleged to be in her possession. No issue was raised as to whether Mr. Dias has misappropriated any of the moveable property of the deceased. Some evidence, it is true, was gone into upon the subject, but no issue was regularly raised under which the defendant could be reasonably expected to produce evidence to prove that her husband had properly administered all the moveable estate, which came into his hands, nor was the suit one in which such an issue could properly have been laid down. The defendant in her cross-objection contends that she is not liable in this suit to be made answerable out of her husband's assets for any devastation which he may have committed, the suit being one in which she was charged merely in respect of property alleged to have come into her own possession. We think that that objection must prevail, and that the decree of the Subordinate Judge must be reversed so far as it orders 2,281 rupees 13 annas and 10 gundahs, alluded to in paras. 5 and 7 of his judgment, to be paid by the defendant with interest and costs and interest thereon out of the estate of Mr. Manuel Dias. The effect of this decision is that the second ground of appeal of the plaintiff will fall to the ground—that ground only going to show that 2,281 rupees was too small a sum.

The decree of the Subordinate Judge will, therefore, be affirmed, except as to the 2,281 rupees 13 annas 10 gundahs, with costs and interest thereon, and reversed as to that. The plaintiff will pay the defendant's costs of this appeal and the stamp of the cross-objection, and the parties will recover costs in the Lower Court in proportion to the amounts decreed and disallowed.

The 10th December 1868.

Present:

The Hon'ble J. B. Phear and C. Hobhouse. *Judges.*

Execution—Khas possession—Surburakar.

Cases Nos. 345 and 379 of 1868.

Miscellaneous Appeals from an order passed by the Subordinate Judge of Backergunge, dated the 9th June 1868.

Hurrish Kishto Doss and another (Decree-holders), *Appellants*,

versus

Motee Chand (Judgment-debtor), *Respondent*.

d

Baboo Mohinee Mohun Roy for Appellants.

No one for Respondent.

Decree-holders seeking to obtain *khas* possession of property which is already in possession of a Surburakar under order of Court should apply for his removal to the Court which appointed him in the matter of the suit in which he was appointed.

Phear, J.—It is conceded by the pleader for the special appellants in these two cases that the property in question is in the possession of a *Surburakar* under order of Court, and it appears that the Subordinate Judge refuses in both these cases to execute the decrees by delivering to the special appellants *khas* possession on the ground that the decrees do not entitle them to *khas* possession as against this *Surburakar*. We think that the decision of the Subordinate Judge is right, and that there is no ground now on special appeal for interfering with it. If the special appellants have good reasons to urge why the *Surburakar* should be removed from possession, their proper course would be to apply to the Court which appointed him in the matter of the suit in which he was appointed, and to seek in that way for his removal. We dismiss both these appeals, but without costs as no one appears on the other side.

The 10th January 1868.

Present:

The Hon'ble Sir Barnes Peacock, *Kt*, *Chief Justice*, and the Hon'ble Dwarkanath Mitter, *Judge*.

Fraud—Presumption—Bona fides—Evidence.

Case No. 1774 of 1867.

Special Appeal from a decision passed by the Principal Sudder Ameen of Mymensingh, dated the 3rd May 1867, reversing a decision of the Moonsiff of that District, dated the 9th August 1866.

Pran Kishen Deb (one of the Defendants), *Appellant*,

versus

Lokenath Sing Mojoomdar (Plaintiff), *Respondent*.

Baboo Sreenath Banerjee, for Appellant.

Baboo Gopal Lall Mitter for Respondent.

The relationship between parties to a conveyance of property may be immaterial if the purchase is found true, but is not immaterial where the question to be decided is whether the purchase was true or fraudulent. The mere handing over of the purchase-money from one party to the other in the presence of strangers, and the registration of the deed, are not sufficient to prove the transaction to be *bonâ fide*.

Peacock, C. J.—The Principal Sudder Ameen, in reference to an argument which was urged in support of the position that the transaction was not a real and honest transfer by the uncle to his nephew, *viz.*, that the property was worth 500 rupees and was sold for only 200 rupees, says: "That a "presumption cannot invalidate a true pur-"chase;" and in another part of his judgment he says: "The Moonsiff finds that there "exists relationship between the parties, "but that circumstance is immaterial when "the purchase is true. It would have been "entitled to some weight had the transac-"tion been collusive."

By these expressions, the Principal Sudder Ameen shows that he did not thoroughly understand the question which he was trying, *viz.*, whether the transaction as shown on the face of the document was a real one honestly intended to take effect, or was merely colorable or collusive. It is true that the relationship of the parties was immaterial if it was found that the purchase was true; but not immaterial when the question to be decided was whether it was true or fraudulent.

In like manner, an honest transaction cannot be invalidated by presumptions against the honesty of it, and a true transaction cannot be invalidated by presumptions against the truth of it; but so long as the question is under consideration whether a transaction is real or colorable, honest or fraudulent, true or fictitious, presumptions against the reality, the honesty, or the truth of the transaction must necessarily be admissible. The Principal Sudder Ameen, when trying whether the transaction was true or not, assumes it to be true, and then refuses to admit presumptions against it.

Besides the relationship of the parties and the fact of their living together in commensality, as was found by the first Court, and the relative value of the property and the price given for it, there were many other badges of fraud in this case from which it might have been presumed that the sale was merely colorable; and, coupled with those facts, due weight and consideration ought to have been given to the fact that the deed was executed at

Nusseerabad in the presence of persons who were strangers to the parties; whereas the Principal Sudder Ameen says: "The mere "fact of the execution of the document at "Nusseerabad before strangers, instead of "at the plaintiff's own village, and its non-"registration on the date of execution can-"not render it open to suspicion."

The decision must be reversed, and the case remanded to the Principal Sudder Ameen with directions to take into consideration and to give due and proper weight to all the facts from which fraud may be presumed, as well as all the other circumstances of the case, and then to decide whether the sale was fraudulent and colorable or not, instead of assuming as he has done that the transaction was true, and then rejecting the circumstances which tended to impeach its veracity.

It is not because the conveyance was actually executed by the uncle, and the alleged purchase-money handed over by the nephew to the uncle in the presence of strangers who were not dependants of the parties, and probably knew nothing of their relationship, that the alleged sale was *bonâ fide*.

In this view of this case, it will be important in weighing the whole probabilities of the case to consider whether the money which was handed over by the nephew to the uncle was really the money of the nephew, or whether it was money which belonged to the uncle alone, or to the uncle and nephew jointly as members of a joint family.

Further it is important to consider whether the possession of the property remained with the uncle notwithstanding the sale, or was delivered to the nephew and retained by him on his own separate account, or for the use of the uncle alone, or of himself and his uncle jointly.

Registration of the deed did not materially affect the case, for even if the deed were fraudulent or colorable, it would have been the object of the parties by registration to make the world believe, as they made the strangers before whom it was executed believe, that it was a true and honest transaction.

Upon the hearing after remand, the following remark was made by the Court (present: the Chief Justice and Mitter, J.) on the 11th December 1868:—

These attempts to defraud creditors by fraudulent conveyances are so frequent that it ought to be made generally known that the offence is one punishable severely under the Penal Code.

The 11th December 1868.

Present:

The Hon'ble J. B. Phear and C. Hobhouse, *Judges.*

Attachment for arrears of rent—Payment to prevent sale.

Case No. 2192 of 1868.

Special Appeal from a decision passed by the Subordinate Judge of Nuddea, dated the 30th May 1868, reversing a decision of the Sudder Ameen of that District, dated the 7th March 1868.

Ram Buksh Chutlangea and another (Plaintiffs), *Appellants,*

versus

Hridoy Monee Debia, mother and guardian of Boidonath Mookerjee (Defendant), *Respondent.*

Baboo Bhowanee Churn Dutt for Appellants.

Baboos Sreenath Doss and *Bhuggobutty Churn Ghose* for Respondent.

Plaintiff purchased a jote jumma at a sale in execution of a decree against defendant. After it came into plaintiff's possession, the putneedar under whom the jote was held obtained a decree against the defendant for arrears of rent which had become due before the above purchase, and attached the tenure with a view to selling it under an order passed by the Collector. At this stage plaintiff, to save the tenure from sale, paid the amount of the decree against the defendant.

HELD, that the payment was a voluntary one made without legal necessity, and was not recoverable by suit against the defendant.

Phear, J.—THE plaint sets out the fact of this case very clearly and concisely. The plaintiff purchased a certain jote jumma at an auction-sale, and obtained possession of it on the 6th April 1866. This sale was held in execution of a decree against the defendant in this suit, who was at that time the possessor of the tenure. The plaintiff, as we have said, obtained possession after his purchase, and while he was so in possession, Rakhal Doss Mookerjee, the putneedar under whom this jote was held, instituted a suit in the Collector's Court against the defendant to recover arrears of rent in respect of this jote jumma which had become due during the time of the possession of the defendant and before the purchase of the plaintiff.

In execution of the decree which the putneedar obtained in the Collector's Court, this jote jumma then held by the plaintiff was attached, and an order was passed by that Court, directing that it should be sold. At that stage of the proceedings, the plaintiff, in order to protect, as he supposed, his right to the tenure, and to save it from sale, paid the amount of the decree against the defendant, and he now seeks in the present suit to recover the amount which he so paid as being money paid on behalf of the defendant.

The only question before us is whether the payment which he made under the circumstances that we have mentioned, was such as entitled him to claim to be reimbursed the money by the defendant. We think that this payment was a voluntary payment. Had the present suit been brought against the putneedar who, by the proceedings taken in the Collector's Court, did bring about the result that the plaintiff considered himself coerced into paying this money, the case might have been different. It might then have been that the putneedar could not have resisted the plaintiff's claim, merely on the allegation that the money need not have been originally paid by the plaintiff.

But in the case before us, we think that the defendant is quite entitled to rely upon the actual facts of the case; and under these circumstances, according to a judgment which has lately been delivered by this Bench, there was no legal necessity rendering it incumbent upon the plaintiff to pay the amount of the decree which the putneedar had obtained against the defendant. Had the sale been proceeded with in the Collector's Court, nothing could have passed by it. The plaintiff would have been no way damaged in his proprietary rights. It is true that he might have been inconvenienced by the occurrence of such a sale; but we think that mere inconvenience without risk of any actual damages is not enough to take away the voluntary character of the payment which he made. In this view, we think that the plaintiff's suit ought to be dismissed; and as the Lower Appellate Court has, in fact, dismissed it, although the Subordinate Judge appears to have been governed in his decision by reasons different from those which we have just now been explaining, we are of opinion that the decree of the Lower Appellate Court was right, and ought not to be disturbed upon special appeal. Accordingly, we dismiss this appeal with costs.

The 12th December 1868.

Present:

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble Dwarkanath Mitter, *Judge*.

Attachments of salaries of Railway employes—Jurisdiction of Small Cause Courts—Procedure—Sections 236, 239, and 240 of Act VIII., 1859.

Reference to the High Court by the Judge of the Small Cause Court at Monghyr.

In the matters of J. Hollick and others, Railway employés.

Salaries or other debts actually due from a Railway Company to any of its servants can be attached in satisfaction of Civil Court decrees under Section 236 of Act VIII. of 1859. A Small Cause Court need not make the High Court or any other Court the medium of attachment.

Debts are to be attached by written order made by the attaching Court, prohibiting the creditor from receiving the debts, and the debtor from making payment to any person, until the further order of the Court. Such written order is to be hung up in some conspicuous part of the Court-house, and a copy is to be addressed, directed, and sent registered by post to the Agent of the Railway Company at the head office of the Company, notwithstanding the head office is out of the jurisdiction of the Small Cause Court.

HELD, that it was a mistake of a Small Cause Court to direct the Chief Pay Master of a Railway Company to attach the pay due to the judgment-debtor (a servant of the Company). The order of attachment must be made by the Court, and a copy served upon the debtor.

Reference.—I HAVE the honor to enclose herewith two letters in original from the Chief Pay Master of the East India Railway Company, Calcutta, for the perusal of the Hon'ble the High Court, from which it will be seen that the Railway Company has "declined "to act upon attachments of this Court, "unless forwarded through the proper chan-"nel, *viz.*, the High Court."

There is no law requiring any Civil Court to make the High Court its channel in executing processes and decree within its own jurisdiction, every such Civil Court being competent, under Sections 81 to 91 of Act VIII. of 1859 (with regard to attachments before judgment), and under Sections 199 to 294 of the same Act (in the matter of executing its own decrees), to act for itself and without the assistance of any other Court, when the property of the judgment-debtor happens to be within its own jurisdiction.

From the table herewith annexed, it will be seen that out of 3,072 cases instituted from January 1867 to October 1868, there were 823 cases, in which Europeans were concerned. Out of these, no less than 670 were cases

against servants of the East India Railway Company, and more than three-fourths of these latter were for amounts up to and below 50 rupees. Thus, it is plain that a very large proportion of the suits brought in the Monghyr Small Cause Court was against the Railway servants, and as the cases are generally against fitters, firemen, drivers, guards, and others, whose salaries usually do not exceed 100 rupees (and but seldom Rupees 2 or 300 per mensem) the majority of whom board and lodge with petty hotel-keepers, khansamahs, &c., and have no furniture or property to speak of: all the means at their disposal for meeting their judgment-debts is their salary. During the four years that I have been stationed here, I have found that the European servants of the Company generally come into Court, and admit such claims as are founded upon vouchers, bills, and such other documents; but as they have nothing besides their salary to meet their debts, they generally pray for instalments.

In such cases, I either accept such instalments as they offer or use my own discretion in fixing them, but I have always taken care to leave a sufficient sum per mensem for his support, though there might be many claims against the same individual. In this manner, stated above, the business of the Court went on smoothly and quietly, and the Company always acted upon the attachments of this Court; but now, as they refuse to obey the same, I am at a loss to know what measures should be adopted in its stead for the realization of the decree-money. The result will be, I fear, that the greatest number of decrees against Railway servants will remain unsatisfied unless personal arrest be resorted to as a substitute for attachment of pay; when, as a matter of course, the men possessing no property will have to go to jail, and ultimately be dismissed from the service of the Company; which would certainly be a great hardship. On the other hand, the imprisonment and loss of service by the judgment-debtor may not only occasion inconvenience to the Railway Company and the public, but must end ultimately in the partial or total loss of the decreed amount to the judgment-creditor, to say nothing of the loss of the subsistence-money paid by him during the defendant's incarceration.

I am, therefore, compelled to refer to your Hon'ble Court (under Section 22 of Act XI. of 1865) for its consideration and orders, the following questions connected with the execution-department of the Court:—

1st question.—Whether the salaries of the Railway servants can be attached and deducted in satisfaction of Civil Court decrees?

Opinion of this Court.—I am of opinion that the salaries of Railway employés, not being Government servants or pensioners, can be considered as debt, or at all events as moveable property, and may be attached under Sections 236 and 239 of Act VIII. of 1859; and there is no reason to exempt the same from the general operation of the law.

2nd question.—Is there any necessity for this Court to make the High Court or any other Court a medium in exercising the powers of attachment and deduction of salaries of judgment-debtors belonging to the Railway or any other department?

Opinion of this Court.—All Courts of every grade are empowered to exercise such powers without making reference to other Courts, when the defendant's salary is payable within the jurisdiction of those Courts.

3rd question.—Can this Court lawfully send an order of attachment and deduction of the salary of a Railway servant residing within its jurisdiction to the Chief Pay Master, East India Railway Company, Calcutta, as well as to the Pay Master, Jumalpore, or to the head of the Pay Audit Department, Jumalpore?

Opinion of this Court.—The locality of the office of the Chief Pay Master being Calcutta or at any other place is a matter of no consequence, as every Pay Office throughout the Railway line is subject to its orders, and therefore I suppose any Court may send an order to it for the attachment of the salary of a Railway servant residing within the local jurisdiction of that Court. But if sending any such order be deemed objectionable on the ground of Chief Pay Master's Office being stationed beyond the jurisdiction of this Court, there certainly can be no objection against the sending of such an order to the Jumalpore Pay Master and East India Railway Auditing Office at that station, both of them being within the jurisdiction of this Court.

The judgment of the High Court was delivered as follows by

Peacock, C. J.—With reference to the *first* question, salaries or other debts actually due from the Railway Company to any of its servants can be attached in satisfaction of Civil Court decrees—(Section 236 of Act VIII. of 1859.)

As to the *second* question, there is no necessity for a Small Cause Court to make the High Court or any other Court the medium of attachment. By Section 236 of Act VIII. of 1859, extended to Small Cause Courts by Section 47, Act XI. of 1865, attachments of debts are to be made by written order, prohibiting the creditor from receiving the debts, and the debtor from payment thereof to any person whatever, until the further order of the Court. In order to attach a debt, the attaching Court must make a written order according to that Section.

By Section 240, after any attachment shall have been made by written order, any payment of the debt to the judgment-debtor during the continuance of the attachment is null and void, if it be made after the written order has been duly intimated, and made known in the manner directed by the Act.

By Section 239, in the case of debts the written order is to be fixed up in some conspicuous part of the Court-house, and a copy of the written order is to be delivered or sent registered by post to the debtor. In the case of the Railway Company, the Registered letter should be addressed, directed, and sent to the Agent of the Railway Company at the head office of the Company. It is not necessary, in our opinion, that the registered letter should be sent or delivered by the High Court, notwithstanding the head office is within the jurisdiction of the High Court and out of the jurisdiction of the Small Cause Court. If it were necessary for the High Court to attach the debt, because the office of the Company is within the jurisdiction of the High Court, the interference of two Courts would be required for one execution, for the order prohibiting the creditor from receiving the debt must be made by the Small Cause Court, within whose jurisdiction the creditor is residing. The execution of a debt is to be made by attachment; the attachment is to be made by written order. There is no law which requires the Court which passed the decree to make one half of the execution, and then to send a certified copy of the judgment to another Court to make another part of the execution. Two orders cannot be necessary for the attachment of one debt. A copy of the written order should also be delivered to the creditor and to the Pay-Master at Jumalpore.

The *third* question is substantially answered in our answer to the second question.

I observe that the Judge of the Small Cause Court has directed the Pay Master to attach and hold in attachment the pay due to the judgment-debtor. That is a mistake. The order attaching the debt must be made by the Court, and a copy served upon the debtor.

The 12th December 1868.

Present:

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice*, and the Hon'ble Dwarkanath Mitter, *Judge*.

Collusive deed — Inferential proof.

Case No. 353 of 1868.

Miscellaneous Appeal from an order passed by the Officiating Judge of Midnapore, dated the 30th May 1868, reversing an order of the Moonsiff of that District, dated the 13th May 1868.

Sreenath Singh Chowdhry (Decree-holder), *Appellant*,

versus

Sreemutty Hureeprea (Judgment-debtor), *Respondent*.

Baboo Anund Chunder Ghossal for Appellant.

Baboo Kalee Kishen Sein for Respondent.

Where a deed was executed conveying a man's entire property to his son, only two years old, and reserving to himself one rupee a day for his subsistence, and after execution, the conveying party remained in possession: HELD that in the absence of explanation no other inference could be drawn than that the deed was merely intended to be used as a blind.

Peacock, C. J.—THE possession did not follow in accordance with the document which is called a will, and that of itself is one of the strongest badges of fraud.

If you find a deed executed by one man conveying all his property to his own son, only two years old, reserving to himself one rupee a day for his subsistence, and after the deed has been executed, the conveying party remains in possession as before, what inference is to be drawn from that fact, except that the deed was not intended to operate, but was merely intended to be used as a blind? The first Court held that the deed was benamee. The Judge overruled that decision upon the ground that there was no evidence of fraud, and that the decree-holder had applied to execute his decree against the interest of one rupee a day reserved to his debtor. We think that the case should be

remanded to the Judge to determine the case with reference to the above remarks.

Having remanded the case for re-trial, we transfer it to this Court for the purpose of hearing the regular appeal from the decision of the first Court.

The case having been transferred and called up for argument, the Court said—We find that notwithstanding the document was executed, the property continued to be dealt with as if it had no existence; and in the absence of any explanation of that fact, we can draw no other inference than this, that the deed was never intended to operate as it professed to operate, but was merely intended to be used as a blind. The decision of the Lower Appellate Court is reversed, and the decision of the first Court upheld with the costs of the special appeal and the costs in the Lower Appellate Court.

The 12th December 1868.

Present:

The Hon'ble H. V. Bayley and A. G. Macpherson, *Judges.*

Cross-decrees — Section 209, Act VIII., 1859 — Special Appeals from ex-parte decisions — Procedure — Appeals from orders in execution.

Case No. 397 of 1868.

Miscellaneous Appeal from an order passed by the Judge of Jessore, dated the 9th June 1868, reversing an order of the Subordinate Judge of that District, dated the 31st March 1868.

Tara Chand Ghose (Decree-holder), *Appellant,*

versus

Anund Chunder Chowdhry (Judgment-debtor), *Respondent.*

Baboos Kalee Mohun Doss and *Debendro Chunder Ghose* for Appellant.

Mr. J. S. Rochfort for Respondent.

H and *R* sold a share of their rights as decree-holders against *A* and *M* to *C*, whose interest subsequently vested in *B*. *B's* right, title, and interest in the decree were sold to *T*, who, coming thus into the position of *B*, applied for execution. Upon this, *A* applied to have a decree held by his son (*J*) against *B* set off as a "cross-decree" under Section 209, Act VIII., 1859, upon the ground that it was really held by his son *benamee* for him (*A*).

HELD, that the parties to the decrees were not the same in any possible sense, and the decrees could not be set off.

A special appeal lies from an *ex-parte* decision passed by an Appellate Court in regular appeal.

Under Sections 11 and 38, Act XXIII. of 1861, the ordinary rule of procedure applicable to Civil suits before final judgment will apply to an appeal arising out of an order made in execution.

Macpherson, J.—THAT the Lower Appellate Court has erred in allowing these decrees to be set off the one against the other, I have no manner of doubt; for the decrees are not "cross-decrees between the same parties" within the meaning of Section 209 of Act VIII. of 1859, or indeed in any other sense.

Even if the facts were as stated by the Judge, I think the decision at which he arrived would be quite wrong; for so long as the parties on the record are different, it is impossible to say that the decrees are "cross-decrees between the same parties," whatever may be the position of trust or *benameeship* which exists among any of the parties. But the record shows clearly that the facts are *not* as stated by the Judge, and that it is not the case that Bhugwan obtained a decree against Anund.

The facts, stated accurately, are as follow: Haran Mahaldur and Ramjeebun Mahaldur held a decree against Anund Chunder Chowdhry and Mudoosoodun Mitter. Haran and Ramjeebun sold a 15-annas share of their rights as decree-holders to Chunderkanth Dutt, who thus became jointly interested with them as decree-holders. Subsequently, the interest of Chunderkanth became vested in Bhugwan, who thereupon, jointly with Haran and Ramjeebun, held the decree against Anund and Mudoosoodun.

One Juggut Chunder Chowdhry, the son of Anund, held a decree against Bhugwan.

Shamachurn Ghose also held a decree against Bhugwan; and in execution of that decree, the right, title, and interest of Bhugwan, as one of the holders of the decree against Anund and Mudoosoodun, was sold and was purchased by the present appellant, Tara Chand.

Tara Chand, having thus placed himself in Bhugwan's position as one of the holders of the decree against Anund and Mudoosoodun, applied to have the decree executed. Thereupon Anund applied to have the decree held by Juggut Chunder against Bhugwan *set off* as a "cross-decree between the same parties" under Section 209 of Act VIII. of 1859, upon the ground that his son Juggut Chunder really held that decree against Bhugwan merely *benamee* for him (Anund).

The parties to the decrees are not the same in any possible sense; and if Anund and Bhugwan had been the only parties to the one suit, and Juggut Chunder and Bhugwan had been the only parties to the other, I should still have held that the decrees could not be set off under Section 209, whether Juggut was or was not merely a trustee or a *benameedar* for Anund. I say nothing of the very special circumstances in this case, which also tend towards the same conclusion.

But the respondent contends that no appeal will lie.

On the 31st of March 1868, the Subordinate Judge of Jessore held that the decrees could not be set off. On the 9th of June, the Zillah Judge reversed this decision, the appeal being heard *ex parte* as the respondent did not appear. Subsequently an application was made for a re-hearing, which was rejected by the Judge on the 1st of August. Thereupon the special appeal now before us was brought, being an appeal from the decision of the 9th of June.

It is argued that, under Section 37 of Act XXIII. of 1861, a rule similar to that provided by Section 119 of Act VIII. of 1859 in the case of applications for the re-hearing of a suit which has been disposed of *ex parte*, should be applied; and that as under Section 119 no appeal will lie from a judgment passed *ex parte* against a defendant who has not appeared, so in the present case no appeal will lie. But Section 119 is inapplicable. Section 37 of Act XXIII. in no way indicates in what cases appeals will lie. It merely relates to the powers which the Appellate Court can exercise when they are dealing with appeals, *i. e., when an appeal does lie, and is before the Court.* It appears to me that the Sections of the Civil Procedure Code which apply are Section 346, 347, and 372.

Section 346 enacts that if the appellant fails to appear, his appeal shall be dismissed for default; and that if the respondent fails to appear, the appeal shall be heard *ex parte* in his absence. Section 347 provides that if an appellant whose appeal has been dismissed for want of prosecution applies, within thirty days from the date of the dismissal, for the re-admission of the appeal, the Court may re-admit it; but nothing is said as to re-hearing the case upon the application of the respondent against whom an *ex-parte* decree has been passed. No provision is made for any re-hearing in the latter case; nor is it declared that there shall be no appeal from the *ex parte* decision of the Appellate Court. Then comes Section 372, which says that "unless otherwise provided by any law for the time being in force, a special appeal will lie" from all decisions passed in regular appeal, &c. An *ex-parte* decree is none the less a decision passed in regular appeal because *ex parte;* and it is nowhere provided by any law that there shall be no appeal from a decree because *ex parte.*

I am, therefore, of opinion that a special appeal does lie from an *ex-parte* decision passed by an Appellate Court on regular appeal.

The present appeal arises out of an order made in execution of a decree; but under Sections 11 and 38 of Act XXIII. of 1861, the ordinary rule of procedure applicable to Civil suits before final judgments will apply.

I think this appeal will lie, and that the decision of the Lower Appellate Court ought to be reversed with costs, and that the original order of the Subordinate Judge declaring that these decrees cannot be set off under Section 209 ought to be affirmed.

The 12th December 1868.

Present:

The Hon'ble F. B. Kemp and E. Jackson, *Judges.*

Collusion—Presumption—Evidence—Possession.

Case No. 2032 of 1868.

Special Appeal from a decision passed by the Subordinate Judge of Hooghly, dated the 16th April 1868, reversing a decision of the Moonsiff of that District, dated the 21st December 1867.

Ram Lall Jha (Plaintiff), *Appellant,*

versus

Issur Chunder Dey and others (Defendants), *Respondents.*

Baboo Nursingh Chunder Mitter for Appellant.

Baboo Tara Prosunno Mookerjee for Respondents.

Defendant having purchased a decree, caused the judgment-debtor's (*P's*) rights and interests in certain property to be sold in execution, and bought them himself. Plaintiff, who had purchased one *B's* rights and interests in a 4-annas share of the property, intervened; but his intervention having been rejected in the summary department, he sued to set aside the summary

order, and to establish his vendor's right in the property. The vendor having admitted the sale to the plaintiff, the first Court thought it unnecessary to examine the witnesses to, and the writer of, the deed of sale, and finding the plaintiff in possession decreed the suit. This decision was reversed in appeal.

HELD that the Lower Appellate Court did wrong in presuming collusion between *B* and his vendee (the plaintiff), and ought not to have rejected the deed without examining the writer and witnesses; and that it should have decided whether plaintiff was in possession at any time under the deed of sale.

Kemp, J.—THIS case has not been properly tried by the Principal Sudder Ameen, who appears to have altogether missed the points in the case.

The plaintiff (special appellant) is the purchaser of the rights and interests of Bulloram in a four annas share of the property in dispute. It is alleged that the defendant Issur Chunder purchased a decree against Pertab Chunder, and caused the rights and interests of the said Pertab Chunder in the property in dispute to be sold in execution of that decree, and purchased those rights himself. The intervention of the plaintiff having been rejected in the summary department, the present suit was brought by the plaintiff to establish his vendor's right in the property in dispute, and to set aside the summary order rejecting the plaintiff's objections. In the first Court, the plaintiff's vendor having admitted the sale to the plaintiff, the Moonsiff thought it unnecessary to examine the witnesses to, and the writer of, the deed of sale, who were present in Court; and finding that the plaintiff was in possession, decreed the plaintiff's suit.

The Principal Sudder Ameen observes that the kobalah or bill of sale is not proved by witnesses or by the writer of the deed; that although the vendor Bulloram admitted it, his admission is collusive "as it was not "strange that, with a view to evade the "payment of the money covered by the "decree obtained by the defendant against "Bulloram, the said Bulloram has admitted "the sale and the collusive kobalah in ques-"tion."

The Principal Sudder Ameen reverses the decision of the Moonsiff without entering into the question of the possession of the plaintiff, and there is no decree on the record against Bulloram obtained or purchased by the defendant.

The Principal Sudder Ameen is, therefore, quite wrong in presuming collusion between Bulloram and his vendee (the plaintiff). The Moonsiff, having thought it unnecessary to examine the witnesses to, and the writer of, the deed, who were present in Court, on the ground that the vendor admitted the deed, the Principal Sudder Ameen ought not to have rejected this deed without examining those witnesses. He has also entirely omitted to decide whether the plaintiff was in possession at any time under this bill of sale from Bulloram.

The case is, therefore, remanded for re-trial with reference to the above remarks.

The 12th December 1868.

Present:

The Hon'ble J. B. Phear and C. Hobhouse, *Judges.*

Right of way—User.

Case No. 1860 of 1868.

Special Appeal from a decision passed by the Subordinate Judge of Backergunge, dated the 15th April 1868, affirming a decision of the Sudder Moonsiff of that District, dated the 5th December 1866.

Mohim Chunder Chuckerbutty (Plaintiff), *Appellant,*

versus

Chundee Churn Gooho and another (Defendants), *Respondents.*

Baboo Hem Chunder Banerjee for Appellant.

Baboo Chunder Madhub Ghose for Respondents.

Where defendant was occupying a plot on which stood his house, and had all along used (without any objection on the part of the plaintiff) a pathway which was the only mode of access to his house, and where it was found by the Lower Courts in a suit of which the subject-matter was the pathway, that the user of the defendant and of the persons who preceded him in the enjoyment of the plot had covered a period considerably more than 12 years, it was held that defendant had a right of way as against the owner, the plaintiff.

Quære—Ought a Court to infer from user alone that a right of way had been conferred by the owner of the land upon the person exercising the user, unless that user has extended over a period as long as that which the law would allow to the owner for bringing an action of ejectment if absolutely excluded from possession?

Phear, J.—IN this case the Lower Appellate Court, agreeing with the Court of first instance, has found, as we understand its judgment, that the defendant is occupying a certain plot of ground where he has his

house, and that ever since he has so occupied the house, namely, for about two and a half years, he has used the pathway which is the matter of suit without any opposition on the plaintiff's part; that that pathway is the only mode of access which he has to his house; that previously to the defendant's occupying this plot for a period of some years, this plot lay waste; and that antecedently again, it was occupied by other persons who dwelt there, and who then used, as the only pathway to the plot, the same pathway which the defendant now uses. The Lower Appellate Court also states, as a fact, that it is more than 20 years ago, that the persons who preceded the defendant in the occupation of this plot used this pathway as their way of access thereto. On these facts, the Subordinate Judge has come to the conclusion that the defendant has a right of way along this pathway as against the plaintiff.

Now, speaking for myself alone, I am not altogether indisposed to say that a Court which has to ascertain facts from the evidence ought not to infer from user, and from user alone, that a right of way had been conferred by the owner of the land upon the person who is shown to exercise the user, unless that user has extended over a period at least as long as the period which the law would allow to the owner of the land for bringing an action of ejectment, supposing he had been absolutely excluded from the possession of the land, instead of being only hindered in the complete enjoyment of it by the acts of user of the way.

But in this case, it seems to us that there is no necessity for judicially deciding this point. The user of the defendant and of the persons who preceded him in the enjoyment of this plot from first to last appears to have covered a period of considerably more than 12 years. In truth, the Subordinate Judge, as we have already mentioned, states that it was exercised 20 years ago. And in addition to the acts of user to which the defendant appeals, there is the very important fact found by the Lower Appellate Court, namely, that there was no other mode of access to the defendant's lands than that afforded by this pathway. In the face of all these facts found by the Lower Courts, the finding on which has not been impeached before us in special appeal, we cannot say that the conclusion which the Lower Appellate Court has drawn from them is bad in law. We therefore think that this appeal should be dismissed with costs.

The 12th December 1868.

Present:

The Hon'ble J. B. Phear and C. Hobhouse, *Judges.*

Attachment of property not belonging to the Judgment-debtor—Compulsory payment.

Case No. 2268 of 1868.

Special Appeal from a decision passed by the Judge of Backergunge, dated the 8th June 1868, affirming a decision of the Moonsiff of that District, dated the 28th August 1866.

Futtick Chunder Banerjee and others (Defendants), *Appellants,*

versus

Golam Ali Chowdhry (Plaintiff), *Respondent.*

Baboo Bama Churn Banerjee for Appellants.

Baboo Kalee Mohun Doss for Respondent.

Where plaintiff was obliged to bring a suit and carry it up to the Appellate Court, to have his title declared to his own property which defendant had seized and attempted to sell in execution of a decree against somebody else, defendant was held to have no right in either law or equity to retain money which he had compelled the plaintiff to pay him to save the property from sale.

Phear, J.—We think this is a very clear case indeed. The defendant seized the plaintiff's property, and attempted to get it sold in execution of a decree which he had obtained against some body else. He actually obliged the plaintiff to bring a suit to assert his title, and to carry that suit up to the Appellate Court before he could get his title declared. Now, that the plaintiff has obtained the declaration of a competent Court in his favor, the defendant resists paying back the money which he had caused the plaintiff to pay him, on the ground that it was his own fault that he ever paid it. A defence of this kind will hardly be listened to in a Court of equity. We think that there was clearly such compulsion put upon the plaintiff by the defendant that the latter cannot be allowed to say that the plaintiff's payment to him was voluntary. We think, the plaintiff is entitled to be paid back the money which the defendant, certainly, has no right either in law or equity to retain;

and as both the Lower Courts have taken this view of the case, we think they are right, and that this appeal should be dismissed with costs.

The 14th December 1868.

Present:

The Hon'ble H. V. Bayley and A. G. Macpherson, *Judges.*

Jurisdiction—Section 10, Act VI. (B. C.) of 1862—Jummabundee.

Case No. 734 of 1868 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of Rajshahye, dated the 30th December 1867, affirming a decision of the Deputy Collector of Serajgunge, dated the 24th August 1867.

Nesoo Sircar (Plaintiff), *Appellant,*

versus

Mr. C. J. Phillipe (Defendant), *Respondent.*

Baboo Greeja Sunkur Mojoomdar for Appellant.

Baboo Romesh Chunder Mitter for Respondent.

In a suit for rent on the basis of a jummabundee made under the provisions of Section 10, Act VI. (B. C.) of 1862, it was held, with reference to the terms of Section 20 read with Section 19, that the duty of ordering the preparation of the jummabundee and adjudicating and deciding the suit belonged to the sub-divisional Revenue Court. When a sub-division has been placed under the jurisdiction of a Deputy Collector, all proceedings under Section 10 must be taken in the Revenue office of the sub-division.

Bayley, J.—This was a suit for rent on the basis of a jummabundee made under the provisions of Section 10, Act VI. of 1862 (B. C.)

This Court, on special appeal, held that such a suit could not be brought in the Collector's Court of Pubna, but in the sub-division of Serajgunge, where the lands were.

It has been now found by the Deputy Collector of Serajgunge, that as there was in the suit a question of right as to share, the case could not be decided by a Revenue Court. The Deputy Collector, therefore, dismissed the plaintiff's suit with costs.

The Judge of the Lower Appellate Court has on this point affirmed that decision, and added that the Collector had no jurisdiction to order the preparation of the jummabundee, but that the jurisdiction was with the Deputy Collector of the sub-division.

In special appeal, it is contended that it was optional under Section 19, Act VI. of 1862 (B. C.) either for a Collector or a Deputy Collector to order such a proceeding as the preparation of the jummabundee, although the suit was, according to the direction of this Court, brought in the sub-division.

I do not think this objection valid. Section 19 clearly states that a Collector may ordinarily have a jurisdiction in a such cases, and that a Deputy Collector with powers of a Collector may have similar jurisdiction; but Section 20 proceeds to say that suits under that Act *shall*, if there be a Deputy Collector in such sub-division Court, be brought in such sub-division Court

There is no option given in that Section. The suit was under Act VI. of 1862, and the jummabundee was but a part of the suit. With reference then to the terms of Section 20, read with the preceding Section 19, I think that the duty of ordering that jummabundee, and adjudicating and finally deciding the suits for rent brought, as this was under Act VI. of 1862 on that jummabundee, was within the jurisdiction of the sub-divisional Revenue Court, and must be brought there.

The Judge's decision being right, this special appeal is dismissed with costs.

Macpherson, J.—I concur in the proposed order. I think that under Section 20 of Act VI. of 1862 (Bengal Council), all proceedings under Section 10 of that Act must be taken in the Revenue office of the sub-division, when a sub-division has been placed under the jurisdiction of a Deputy Collector, as was the case in the instance before us.

The 14th December 1868.

Present :

The Hon'ble H. V. Bayley and A. G. Macpherson, *Judges.*

Enhancement of rent—Sections 13 and 17, Act X., 1859—Ryots and intermediate holders.

Case No. 1064 of 1868 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of Tipperah, dated the 5th February 1868, affirming a decision of the Deputy Collector of that District, dated the 18th November 1867.

Buduroonissa Chowdhrain and another (Plaintiffs), *Appellants,*

versus

Chunder Coomar Dutt (Defendant), *Respondent.*

Baboo Gopal Lall Mitter for Appellants.

Baboo Sreenath Banerjee for Respondent.

Where a notice under Section 13, Act X. of 1859, clearly recognized defendants as talookdars, and at the same time sought to enhance rent under Section 17, it was held (following a decision of the Privy Council) that a suit for enhancement would not lie, as Section 17 did not apply to intermediate holders, but only to ryots having rights of occupancy.

Bayley, J.—On this appeal coming up for hearing, the respondent's vakeel took an objection, under Section 348 of Act VIII. of 1859, that the notice under Section 13, Act X. of 1859, clearly recognized his clients as talookdars, and at the same time sought to enhance rents under Section 17 of that Act; but that Section 17 did not apply to intermediate holders, but only to ryots having rights of occupancy; that consequently this suit was wrongly brought, and would not lie.

I consider this objection a valid one. It is supported by the decision of the Privy Council, in IX. Weekly Reporter, page 8, Dhunput Singh's case; and it is clear from the terms of Section 17 that the *ryots* there mentioned are ryots having rights of occupancy, and not talookdars. Now, the parties whom in this case the zemindar sues are recognized by the notice itself as talookdars: *firstly*, under the definition of talookdar; *secondly*, as having ryots under them; and, *thirdly*, as having talookdaree allowance, so that there can be no possible doubt that the plaintiffs gave the notice as to a talookdar, and not as to a ryot.

Under these circumstances, I would dismiss the special appeal with costs.

Macpherson, J.—I concur in the proposed order.

The 15th December 1868.

Present :

The Hon'ble H. V. Bayley and A. G. Macpherson, *Judges.*

Decree—Execution against legal representatives.

The representatives of Girendronath Tagore, *Petitioners,*

versus

Huronath Roy, *Opposite Party.*

Mr. R. T. Allan and *Baboo Tarucknath Dutt* for Petitioners.

Baboos Sreenath Doss and *Obhoy Churn Bose* for Opposite Party.

Where a suit is instituted, and a decree is passed, against a person who was dead at the time the suit was instituted, the decree cannot be executed against his legal representatives. Section 210, Act VIII. of 1859, contemplates only the case of a person who, being alive when the decree is passed, dies before execution has been fully had.

Macpherson, J.—I think this rule ought to be made absolute so far as regards quashing the execution-proceedings which have been taken against the petitioners as the legal representatives of Girendronath Tagore, deceased.

A decree was obtained by Huronath Roy in the Sudder Court on the 23rd February 1861 against Madhub Chunder Chowdhry, Girendronath Tagore, and others. The plaintiff in that suit, Huronath Roy, or his representatives, recently applied to the Court of the Subordinate Judge of Pubna for execution of that decree against the present petitioners as the legal representatives of Girendronath Tagore. Upon this application being made, notice was issued by the Court under Section 216 of Act VIII. of 1859, calling upon the present petitioners to show cause why the decree should not be executed against them. They thereupon showed cause, and the cause shown was this, that, although the name of their father, Girendronath Tagore, appeared as a defendant in the decree

of the 23rd February 1861, and throughout the whole of the proceedings in that suit, Girendronath Tagore had, in fact, died on the 19th December 1854, some 15 or 16 months before the plaint in that suit was filed. The present petitioners, therefore, contended before the Subordinate Judge—and as it seems to me very reasonably—that, as the suit was instituted against a dead man, and as the decree was obtained against the same dead man so long ago as 1861, the decree was practically worthless, and they were not now liable under that decree as his legal representatives, especially as they never had any notice of the proceedings in that suit until the application for execution was made against them. The decree of which execution was sought was the decree of another Court, so the Subordinate Judge did not himself dispose of the question whether execution should or should not issue, but postponed the further hearing of the matter, and gave the parties leave to apply, under the provisions of Section 290, Act VIII. of 1859, to the Court which made the decree. Thereupon the petitioners applied to this Court to quash the whole proceedings taken by the decree-holder against them, upon the ground that they are in no possible way liable under the decree of February 1861, and that the Lower Court had no jurisdiction to entertain the application against them. There is some confusion, and possibly irregularity, in the way in which the matter is brought before this Court—and some misapprehension as to the remedy to which the parties are entitled. But the substantial case made by the petitioners, and one of their prayers is that the order for execution may be quashed on the ground of the petitioners being in no way liable under the decree of February 1861.

Upon the merits, we must take it that the petitioners' case is made out. In moving for the rule *nisi*, which was obtained on the 25th of August last, the petitioners made use of an affidavit sworn to by one of the members of their family, in which the grounds of their application are distinctly set forth; and in this affidavit, it is sworn that Girendronath Tagore died before Huronath's suit was ever instituted. That affidavit, although filed in August last, has not been contradicted or answered in any way. Therefore, for the purposes of the present application, we must consider the facts stated therein to be true. As it is established that Girendronath Tagore, the person against whose legal representatives the decree is now sought to be executed, died before any decree was passed, it appears to me that execution cannot be issued, for no provision is made in the Code of Civil Procedure for the issue of execution against the legal representatives of a deceased defendant in such a case.

Section 210 of Act VIII. of 1859 is the Section which declares when execution may be issued against the legal representatives or the estate of a deceased judgment-debtor. The words of that Section are—"If any person, "*against whom a decree has been made*, shall "die *before execution has been fully had* "thereon, application for execution thereof "may be made against the legal representative "of the estate of the person so dying as afore-"said." These words do not embrace a case like the present, because they evidently contemplate only the case of a person who, being alive at the time when a decree is passed against him, dies before execution is fully had of that decree. The Section does not include or provide for the case of a person, against whom a decree is made, having died before the decree is made. And it is little to be wondered at that the Code does not provide for such a contingency, for it would not readily occur to ordinary minds that decrees would ever be asked for or made against dead men. There is no Section in the Code of Civil Procedure, excepting Section 210, under which a decree-holder is empowered to apply for execution against the legal representatives of a deceased judgment-debtor; and as Section 210 does not, as I have shown, apply to the present case, this decree cannot be executed against the legal representatives of Girendronath Tagore. I think, therefore, all the proceedings taken against the petitioners in execution of the decree of February 1861 ought to be quashed, and that the petitioners are entitled to their costs of this application.

Bayley, J.—I am of the same opinion. Section 210 of Act VIII. of 1859 is as clear as words can make it, that, if a party against whom a decree is made dies before execution is fully had of that decree, application for execution may be made against the legal representatives of the deceased.

In this case, however, there was an affidavit and a petition of objection, setting forth that Girendronath Tagore *died even before the institution of the suit*, and nothing has been adduced by the opposite party to show that the facts stated in the affidavit and in the petition of objection are incorrect,

although there was ample time for this being done. We, therefore, may legally assume the facts stated in the above papers to be correct. Girendronath thus *was not a party against whom a decree was made*, and, therefore, under the terms of Section 210, Act VIII. of 1859, the execution-proceedings could not be legally taken by the decree-holder against the defendants as representatives of Girendronath.

I concur in the order proposed to be passed by Mr. Justice Macpherson in the case.

The 15th December 1868.

Present:

The Hon'ble H. V. Bayley and A. G. Macpherson, *Judges.*

Res adjudicata—Section 2, Act VIII., 1859.

Case No. 928 of 1868 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of Rajshahye, dated the 14th January 1868, reversing a decision of the Deputy Collector of that District, dated the 17th September 1867.

Woomesh Chunder Roy and others (Plaintiffs), *Appellants,*

versus

Nobin Chunder Mojoomdar and others (Defendants), *Respondents.*

Baboo Obhoy Churn Bose for Appellants.

Mr. J. S. Rochfort and *Baboo Mohinee Mohun Roy* for Respondents.

Where the plaintiffs in a former suit were *H, R, L,* and *K,* and the plaintiffs in the present suit *O, R,* and *L,* it was held that the former suit was not between the same parties as the latter, or brought by parties under whom the present plaintiffs claim, and, therefore, that the present suit was not barred by Section 2, Act VIII., 1859, whether some of the parties were trustees for the others or not.

Macpherson, J.—The question in this case is whether the present suit is barred by the decree made in a former suit which was dismissed. The plaintiffs in the former suit were Huronath Roy, Radha Churn Roy, Chunder Coomar Roy, and Kalee Prosunno Roy. The plaintiffs in the present suit are Oomesh Chunder Roy, Radha Churn Roy, and Chunder Coomar Roy. It appears to me that the former suit cannot be said to be between the same parties or to have been brought by parties under whom the plaintiffs in the present case claim. Therefore, the present suit is not barred by Section 2, Act VIII. of 1859. Oomesh Chunder may or may not have stated in the course of the former suit that all the interest he had belonged to his father, Huronath Roy. But if he did make the statement, it will not alter the case so long as the parties to the two suits are not the same—and they are not the same, whether some of them are merely trustees for the others or not. I would, therefore, reverse the order of the Lower Appellate Court and remand the case to that Court to be tried on the merits.

The costs to depend upon the result of the remand.

Bayley, J.—I concur.

The 15th December 1868.

Present:

The Hon'ble H. V. Bayley and A. G. Macpherson, *Judges.*

Custody of idols—Offering—Damages.

Case No. 1053 of 1868.

Special Appeal from a decision passed by the Subordinate Judge of East Burdwan, dated the 23rd January 1868, modifying a decision of the Moonsiff of that District, dated the 19th June 1867.

Ramessur Mookerjee and others (Defendants) *Appellants,*

versus

Ishan Chunder Mookerjee and others (Plaintiffs), *Respondents.*

Baboo Nil Madhub Sein for Appellants.

Baboos Hem Chunder Banerjee and *Tarucknath Sein* for Respondents.

In a suit to amend a decree in a former suit, declaring that the defendants in the present case were entitled, *on the occasion of all ceremonies,* to take certain idols from the plaintiff's house and keep them a certain number of days, it was held that the plaint was bad so far as it

prayed for, a specification of the particular ceremonies on which the defendants might take the idols ; and also, so far as it prayed for damages on the ground of loss of sums (uncertain and voluntary payments), which might have been received, if plaintiffs had had the custody of the idols.

Macpherson, J.—THE object of the suit out of which this special appeal arises is to amend a decree passed some time ago in a former suit. In that decree, it was declared that the defendants in the present suit were entitled *on the occasion of all ceremonies*, to take certain idols from the plaintiff's house, and to keep them for five days for the purpose of performing such ceremonies.

The present suit is brought on the allegation that defendants, having taken the idols away for the purpose of performing certain ceremonies, did not return them at the end of the prescribed period, in consequence of which the plaintiffs have suffered damages by not receiving certain profits which they might have got if the idols had been in their custody ; and the plaint prays for a specification of the ceremonies on which the defendants are to be entitled to take the idols, and also for damages.

So far as the plaint prays for a specification of the particular ceremonies on which the defendants may take the idols, the suit is manifestly bad, for the original decree expressly declared that the defendants were entitled to the idols on *all* ceremonies. So far, also, as the plaint prays for damages on the ground that the plaintiffs have been prevented from receiving certain sums which they might have received, if they had the custody of the idols, the suit is also bad, for no suit will lie to recover damages based upon such uncertain and merely voluntary payments. If the suit had been a simple suit to recover actual possession of the idols, on the ground that they had been kept back by the defendants from the plaintiffs after the period when they ought to have been returned, possibly, the plaintiffs might have been entitled to a decree. But, although there is a prayer for possession in the plaint, that is not the real point of the plaintiff's suit, for, in both the Lower Courts what the parties have been really struggling for and contesting was the question of the specification of the particular ceremonies, and days on which the defendants were to have the idols—and the question of damages.

I would reverse the decree of the Lower Appellate Court, and, affirming that of the first Court, dismiss the plaintiff's suit with costs.

The 16th December 1868.

Present :

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice*, and the Hon'ble E. Jackson, *Judge*.

Endowment—Suit to recover possession—Appointment of a new Matwalee.

Case No. 1017 of 1868.

Special Appeal from a decision passed by the Subordinate Judge of Patna, dated the 13th February 1868, affirming a decision of the Sudder Ameen of that District, dated the 15th March 1867.

Bhurruck Chunder Sahoo and others (Defendants), *Appellants*,

versus

Golam Shuruff (Plaintiff), *Respondent*.

Mr. R. T. Allan, and *Baboo Kishen Succa Mookerjee* for Appellants.

Messrs. R. E. Twidale and *C. Gregory* for Respondent.

Where a plaintiff sued to recover certain property as *waqf* on the ground that the matwalee and his ancestor (a former matwalee) had misconducted themselves by selling to some of the defendants the property which was the subject of the endowment :

HELD that, as plaintiff had shown no title either as heir or otherwise, to partake of the benefit of the endowment, he had no right to recover possession, and that the utmost he could ask for, was to have the matwalee who had misconducted himself removed and a new matwalee appointed, provided, he showed circumstances, which, according to law, would justify the Court in selecting a matwalee.

In a case like this, where the plaintiff lay by for nearly 12 years from the time when the vendees purchased, and were put into possession, he was not entitled to the assistance of the Court, which ought not to go out of its way and permit him to amend his claim.

Peacock, C. J.—THE plaintiff in this case sues to recover certain property as *waqf* property. He does not state or prove that he was entitled to partake of the benefit of the endowment, nor does he show that he was the heir or even that he was a near relation of the person who made the endowment. He charges that the matwalee and his ancestor (a former matwalee) had misconducted themselves by selling to some of the defendants the property which was the subject of the endowment. He sues the vendees and the last matwalee to remove the matwalee, and to recover possession from the vendees.

In my opinion, he has shown no right to recover possession. The utmost that he had a right to do as a descendant of the endower was to ask to have the matwalee who had misconducted himself removed, and to have a new matwalee appointed in his place; and, in strictness, he ought to have shown circumstances which, according to law, would justify the Court in selecting a matwalee.

The first Court thought that the matwalee ought to be removed and he ordered that the sales effected by the last matwalee and his ancestor should be cancelled, and that the plaintiff should recover possession of the property from the purchasers to be held by him as matwalee.

The Subordinate Judge affirmed that decision, but ordered that the word "matwalee," used in the decretal order of the first Court, with reference to the plaintiff, should be considered as a nullity, and he observed that the trustees and the trust-rules should regulate who was to be matwalee, and that the Court could arbitrate only when some person's right to that title should be interfered with.

In short, the plaintiff, by that decree, not having shown who the trustees were, or what were the trust-rules of the endowment, was to recover and hold possession until some person could show that, by the rules of the endowment, he was entitled to be put in possession. If such rules were capable of proof, the plaintiff ought to have proved them; not having done so, the terms of the decree allow him, without such proof, to recover and hold possession until the trust-rules are proved by some one else in support of his title to be appointed matwalee. It appears to me that that decree cannot stand, and that it must be reversed.

I am not sure that, in such a suit as this, the plaintiff could be allowed in any way to amend his claim by asking the Court to appoint a new matwalee in place of the one removed, and for that purpose to order an enquiry as to who is a fit and proper person to be appointed. In a case like this, it appears to me that the Court ought not to go out of its way to assist the plaintiff, He lay by for nearly 12 years from the time, when the vendees purchased and were put into possession of the property, and only a few days before those 12 years expired, he commenced this suit. This is not, therefore, a case in which he is entitled to the assistance of the Court. Independently of this, looking to the answer of the last matwalee, the suit looks very much like a collusive one between the matwalee who sold, and the plaintiff who seeks to recover back, the property. If such is the case, the Court would be doing very great injustice by allowing the plaintiff to make a new case. He is not entitled to the relief for which he has applied, and, under these circumstances, it appears to me that his suit ought to be dismissed. The decrees of the Lower Courts are, therefore, reversed with costs.

Jackson, J.—I am of the same opinion.

The 16th December 1868.

Present:

The Hon'ble J. B. Phear and C. Hobhouse, *Judges.*

Defective plaint—Real issues—Trial on merits.

Case No. 2184 of 1868.

Special Appeal from a decision passed by the Judge of Backergunge, dated the 23rd June 1868, reversing a decision of the Sudder Ameen of that District, dated the 3rd October 1866.

Golam Ali Chowdry (Plaintiff), *Appellant,*

versus

Futtick Chunder Bundopadhya and others (Defendants), *Respondents.*

Baboo Romesh Chunder Mitter for Appellant.

Baboo Poorno Chunder Shome for Respondents.

Where a plaint charged the defendants with having put plaintiff's title in jeopardy merely by reason of having procured a decree in the Collector's Court, and the Lower Appellate Court found that the decree of the Collector did not damage the plaintiff's rights in any way:

HELD that the Lower Appellate Court should not have dismissed the suit, simply with reference to the deficiencies of the plaint, without entering upon the merits of the real issue between the parties, for the conduct of the defendants in the course of the suit in the Collector's Court did put an obstacle in the way of plaintiff's enjoying their rights, and justified the plaintiffs in bringing the present suit.

Phear, J.—WE think that the Lower Appellate Court ought to have tried this case upon its merits, and not to have dismissed the plaintiffs' suit simply with reference to the deficiencies of the plaint. . It is certain that the defendants denied the right which the plaintiffs assert that they have in the land, and the parties went to trial in the first Court upon the issue whether or not the plaintiffs had the title which they set up. It is true that, if the words of the plaint, taken strictly, charged the defendants with having put the plaintiffs' title in jeopardy merely by reason of having procured a decree in the Collector's Court, the plaint does not exhibit a good cause of complaint, for, as the Judge remarks, the decree of the Collector did not damage the plaintiffs' right in any way. But the Judge himself says that, in the course of the suit before the Collector, the defendants made the assertion "that "they purchased the rights and interests "of Gour Chunder Bhuttacherjee in the "ousut talook, and that they, at the same "time, purchased the rights and interests of "Gour Chunder Bhuttacherjee in the ta-"look also, and so obtained a title to "the talook superior and antecedent to "that of the plaintiffs." It thus appears, on the face of the judgment of the Lower Appellate Court, that, even if the decree of the Collector did not do anything to affect the plaintiffs' title, still the conduct of the defendants in the course of that suit did most certainly put an obstacle in the way of the plaintiffs' enjoying their rights, if they have them, and fully justified the plaintiffs in bringing the present suit.

Under these circumstances, we think, as I have already said, that the Judge ought not to have dismissed the suit without entering upon the merits of the real issue between the

parties—an issue which was expressly set up in the Court below and tried upon the evidence adduced by both parties. His decision, therefore, must be reversed, and this case must be remanded for re-trial upon the issue framed in the first Court. Costs will abide the event.

The 16th December 1868.

Present:

The Hon'ble G. Loch and F. A. Glover, *Judges.*

Lakheraj land—Evidence—Presumption—Onus probandi.

Case No. 1873 of 1868.

Special Appeal from a decision passed by the Subordinate Judge of Purneah, dated the 22nd April 1868, affirming a decision of the Moonsiff of that District, dated the 28th November 1867.

Dhunput Singh (Defendant), *Appellant,*

versus

Russomoyee Chowdhrain and another (Plaintiffs), *Respondents.*

Mr. R. T. Allan and *Baboo Kishen Dyal Roy* for Appellant.

Baboo Khettur Mohun Mookerjee for Respondents.

The production of a lakheraj sunnud is not necessary to prove that land is held rent-free; the fact may be legally established by long and uninterrupted possession, without payment of rent, raising the presumption that the land had been held rent-free from the decennial settlement.

Glover, J.—In this case, the point taken in the petition of special appeal is that the *onus probandi* has been improperly placed; that the plaintiff, who came in for an adjudication of his title to the disputed land as lakheraj-dar, was bound to prove his case, and in failing to do so, his suit should have been at once dismissed without calling on the zemindar defendant to prove that the land was *mál.*

It was urged by Mr. Allan for the special appellant that, as his client was in possession of the disputed land by an order of the Criminal Court passed under Section 318 of the Criminal Procedure Code, it was for the plaintiff who sought to disturb that possession to make out a good title to the land, and that mere long anterior possession would not suffice.

It appears to me that this application should be rejected. No doubt, a plaintiff coming into Court to oust a defendant in possession, on the ground that the disputed land was his (plaintiff's) lakheraj land, would be bound to prove his title; but in this case, it nowhere appears that the defendant is in possession. The Magistrate's proceeding under Section 318, did not give possession to either party, and it has been found, as a fact, by the Lower Appellate Court, that the land is plaintiff's ancient millik or lakheraj land, situate in Hurdeb, and not within the defendant's zemindary, and that he has been all along in possession of it.

In order to get over this difficulty, the special appellant's pleader contends that the evidence on which the Subordinate Judge has proceeded is not legally sufficient. But there is no law that makes the production of a lakheraj sunnud necessary to prove that land is held rent-free. The fact may by legally established by evidence of long and uninterrupted possession without payment of rent, evidence which would raise the presumption that the land had been held rent-free from the date of the decennial settlement. The Subordinate Judge appears to me to have given the plaintiff the benefit of this presumption. And he has also decided that the disputed land is situate in Hurdeb, and not in Alumgunne, the defendant's zemindary, and, that therefore, a possession of twelve years adverse to the defendant would prevent his suing to resume.

There seems to be no error of law in the Lower Court's decision, and consequently no ground for our interference in special appeal.

The special appeal should, I think, be rejected with costs.

Loch, J.—I concur.

The 16th December 1868.

Present:

The Hon'ble G. Loch and F. A. Glover, *Judges.*

Certificates under Acts XL. of 1858 and XXVII. of 1860—Mahomedan Law—Childless widow.

Case No. 414 of 1868.

Miscellaneous Appeal from an order passed by the Officiating Judge of Purneah, dated the 29th August 1868.

Raesunnissa Begum, widow of Rajah Syud Inayet Hossein (Petitioner), *Appellant,*

versus

Ranee Khujoorunnissa for self and as guardian of Syud Atta Hossein, minor son of Rajah Syud Inayet Hossein, deceased (Objector), *Respondent.*

Mr. C. Gregory for Appellant.

Messrs. G. C. Paul and *R. E. Twidale* and *Baboo Unnoda Pershad Banerjee* for Respondent.

A certificate granted under Act XL. of 1858, to administer to an estate gives the right to collect the debts due to the estate; but, if the debtor objects to pay the debt, that right cannot be enforced in Court without a certificate under Act XXVII. of 1860.

Where an applicant for a certificate under Act XXVII. of 1860 is opposed by a party claiming under a will, the Judge is bound to proceed under Section 3 of the Act, and determine which of the claimants is entitled to the certificate.

Where an applicant for a certificate is entitled to a share, the mere fact of the share being small will not debar her from getting a certificate entitling her to collect according to the share.

Under the Mahomedan Law, a widow's title to succeed to her husband's estate is not barred by the fact of her being childless.

Loch, J.—We think the reasons given by the Court below refusing to grant the application for a certificate under Act XXVII. of 1860 are wrong. A certificate granted under Act XL. of 1858, to administer to an estate, though it gives the right to the administrator to collect the debts due to the estate, is not sufficient to enable the party to whom the certificate is granted to enforce that right in Court if the debtor objects to pay the debt, for, without a certificate under Act XXVII. of 1860, no debtor of any deceased person can be compelled in any Court to pay his debt to any person claiming to be entitled to the effects of any deceased person, or any part thereof, except on the production of a certificate to be obtained under the Act.

The opposite party claimed under a will. Had that will been proved, we might have thought it unnecessary to order further enquiries in the case, because, under that will, the opposite party would be entitled to collect the debts due to the estate. But, as this Court has held in its judgment of 8th April reported in IX. Weekly Reporter, page 459, that the Judge has not pronounced in favor of the will or against it, we think that the Judge was bound on the present application to proceed as required by Section 3 of the Act, and after such enquiries as may be necessary, to determine which of the claimants was entitled to a certificate under that Act.

It has been said that as the applicant is only entitled to a small portion, if entitled to any thing, she is not entitled to a certificate, and that as the respondent has the greater interest, the certificate ought to be given to her. It has also been said that, as the petitioner was childless at the death of her husband, she is not entitled under the Sheea Law to succeed. With regard to the first objection, it seems to us that, if the petitioner is entitled to a share, the mere fact of her having a small share will not debar her from getting a certificate entitling her to collect according to the share due to her; and with regard to the other point, we have referred to Macnaghten and Baillie, and find nothing in support of the statement that a childless widow is not entitled to succeed to her husband's estate.

We, therefore, reverse the order of the Lower Court, and remand the case to the Judge to be tried in the usual manner, and to determine whether the petitioner is or is not entitled to receive a certificate. The parties will pay their own costs.

f

The 16th December 1868.

Present:

The Hon'ble G. Loch and F. A. Glover, *Judges.*

Mesne profits—Mode of calculating where wrong-doer did not cultivate.

Case No. 2042 of 1868.

Special Appeal from a decision passed by the Officiating Judge of Moorshedabad, dated the 27th April 1868, affirming a decision of the Subordinate Judge of that District, dated the 24th December 1867.

Promothonath Roy (one of the Defendants), *Appellant,*

versus

Tripoora Soonduree Dabee (Plaintiff), *Respondent.*

Baboos Sreenath Doss and *Bhuggobutty Churn Ghose* for Appellant.

Baboos Onookool Chunder Mookerjee and *Obhoy Churn Bose* for Respondent.

In a suit to recover mesne-profits of land from which plaintiff had been ousted, and of which he subsequently recovered possession, it was held that it was not the manner in which plaintiff had held possession (whether he had cultivated or not) that was to be looked to in calculating wassilat; but that the rule laid down by the Full Bench (IX. Weekly Reporter, p. 445), where the wrong-doer held possession himself and cultivated the lands, was applicable to this case where the wrong-doer did not cultivate, *viz.*, that the wassilat should be assessed "according to what would have been a fair and reasonable rent for the land if the same had been let to a tenant during the period of the unlawful occupation of the wrong-doer."

Loch, J.—The suit in this case is to recover mesne-profits of certain lands, of which the plaintiff was ousted in 1268, and of which he recoverd possession under a decree. The amount of land of which mesne-profits was claimed is about 70 beegahs, and it has been found by the Lower Court that of this area 19 beegahs are in the cultivation and occupancy of ryots, and 41 beegahs in that of the plaintiff, and that these lands were the *khas khamar* lands of the plaintiff.

The question is how are the mesne-profits to be assessed? A Full Bench of this Court, on the 4th of April 1868, in the case of Ranee Ismaed Koer and others *versus* Maharanee Indurjeet Koer, reported in IX. Weekly Reporter, page 445, lays down a very clear rule by which mesne-profits were to be ascertained in case where the wrong-doer held possession himself and cultivated the lands.

The pleader for the respondent in this case has conducted the case as if the judgment above quoted is not applicable to the present suit. He considered that there is a difference in the present suit to that decided by the Full Bench, inasmuch as the plaintiff in that case did not profess to have cultivated the lands himself, and in the present case plaintiff alleges that he had cultivated the lands in 1266 and 1267, and was dispossessed when he was going to cultivate the lands in 1268.

We do not, however, see that this difference in the possession of the plaintiff pointed out by the learned pleader, makes any difference in the mode of calculating wassilat. It appears to us that it is not so much the manner in which the plaintiff held possession that has to be looked to, as to what the defendant did with the land while he held possession; and we do not see why, if in the one case, the wrong-doer, having kept the land in his possession and cultivated it, is held liable for mesne-profits to the extent of the rent payable for such land, in the other case he should be liable for the value of the crop which might have been grown upon the land. We think that the rule laid down by the Court in the judgment above quoted is applicable to this case, and further we think that even if the land had been left uncultivated, the plaintiff would have been entitled to recover the rent for the same.

We, therefore, reverse the order of the Lower Court and remand the case to the Lower Court to assess the mesne-profits according to the rule laid down in the judgment of the Full Bench above referred to.

The 17th December 1868.

Present:

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice,* and the Hon'ble L. S. Jackson, *Judge.*

Arbitration—Reference of pending suit to arbitrators—Effect of award.

Case No. 1170 of 1868.

Special Appeal from a decision passed by the Subordinate Judge of Dacca, dated the 9th December 1867, reversing a decision of the Sudder Ameen of that District, dated the 25th June 1866.

Doorga Churn Thakoor and others (Plaintiffs), *Appellants,*

versus

Kally Doss Hazrah and others (Defendants), *Respondents.*

Baboo Nullit Chunder Sein for Appellants.

Baboos Mohinee Mohun Roy and *Romesh Chunder Sircar* for Respondents.

In a suit in which plaintiffs claimed a 6 annas odd share of certain land belonging to a mouzah, it was found on measurement that 262 beegahs of the land claimed belonged to that talook. Pending the suit all the defendants except one (*O*) agreed to a reference to arbitration, upon which it was found that 44 beegahs, in addition to the 262, belonged to the plaintiffs.

HELD that the plaintiffs were entitled to recover as against all the defendants, including *O*, a 6-annas share in 262 beegahs, and as against all except *O*, a 6-annas share in the 44 beegahs awarded by the arbitrators.

Quære.—What is the effect of an award arrived at in a pending suit, which was referred to arbitration by an order of Court otherwise than by consent of all the parties?

Peacock, C. J.—THE plaintiffs claimed a 6 annas 5 gundahs 3 cowries 1 krant share in 350 beegahs as belonging to the Mouzah Jugguunath Puttee. It was found on measurement that the lands claimed amounted to 315 beegahs. It was also found that 262 of those 315 belonged to that talook. The plaintiffs were, therefore, entitled to a decree against all the defendants for those 262 beegahs. Pending the suit, all the defendants except Odoit Churn agreed to a reference to arbitration, upon which it was found that 44 beegahs and 1 cottah, in addition to those 262 beegahs, belonged to the plaintiffs. The plaintiffs, therefore, are entitled to recover as against all the defendants, including the defendant Odoit Churn, a 6 annas 5 gundahs 3 cowries and 1 krant share in the 262 beegahs which were found to appertain to the plaintiffs' talook; and as against the other defendants, they are entitled to recover a 6 annas 5 gundahs 3 cowries 1 krant share in the share of all the defendants except Odoit Churn in the 44 beegahs and 1 cottah decided in favor of the plaintiffs against those defendants by the award of the arbitrators.

Odoit Churn is entitled to the costs of this appeal. The decree of the Lower Appellate Court will be amended accordingly, without any alteration in the amount of costs as ordered by that Court.

Jackson, J.—Under the circumstances of this case, I concur in this judgment. I wish only to reserve the expression of any opinion as to the effect of the arbitration award in this case as concluding the Court in regard to any question between the plaintiff and the defendants who consented to the reference. I am inclined at present to be of opinion that a reference to arbitration cannot be made by order of Court in a suit pending, except by consent of all the parties, and I am, therefore, doubtful as to the effect of an award arrived at in a pending suit otherwise than upon such agreement. As, however, the parties in whose favor the Court below is alleged to have erroneously set aside the award have not thought fit to appear and support that decision, I am not disposed to raise the question beyond the intimation of my doubt.

I entirely agree that the special appellant in this case should have no costs, and that the respondent Odoit Churn should have his costs of this appeal.

The 17th December 1868.

Present:

The Hon'ble H. V. Bayley and A. G. Macpherson, *Judges.*

Construction—Kubooleut.

Case No. 1106 of 1868.

Special Appeal from a decision passed by the Officiating Additional Judge of Jessore, dated the 23rd January 1868, affirming a decision of the Officiating Sudder Ameen of that District, dated the 24th August 1866.

Bhobanee Chunder Mitter and another (Plaintiffs), *Appellants,*

versus

Mr. George MacNair and others (Defendants), *Respondents.*

Baboo Kalee Mohun Doss for Appellants.

Mr. R. T. Allan for Respondents.

N and *D* having taken lease of certain lands jointly gave a kubooleut agreeing that if within the term of the lease they died, or if in any other way the concern passed into the hands of others, then their heirs, or those who would succeed to their rights, would pay the rent. After the kubooleut was given, *N* made over his interest in the lease to *D*.

HELD that, in passing from *N* and *D* to *D* alone, the lease had passed into the hands of "others" within the meaning of the kubooleut, and that *D* occupied the position of the persons contemplated by the terms—"those who will succeed to our rights."

Macpherson, J.—THE question in this case is whether both the defendants MacNair and MacDonald are liable for the rents sued for, or whether the defendant MacDonald alone is liable. There is no dispute as to the facts. The question turns upon the construction to be put upon a kubooleut given by the two defendants. The kubooleut was given by the defendants jointly; but since the kubooleut was given, MacNair has made over his rights in the Indigo Factory to the other defendant, MacDonald. MacNair contends that, having parted with his interest in the concern, he is, by the express provisions of the kubooleut, no longer liable for the rents. The words upon which the case turns are as follows: "If within the "term of this lease we shall die, or if in any "other way the concern passes into the "hands of others, then our heirs or those "who will succeed to our rights will pay "the rent according to the terms of this "kubooleut."

It is contended for the appellant that, although, if the concern had passed away from the hands of both MacDonald and MacNair into hands of a third party, neither of the defendants would be liable for the rents, still, as the concern has only passed from MacNair and MacDonald into the hands of MacDonald alone, the proviso in the kubooleut does not apply to the case which has occurred, and therefore both the defendants remain liable.

But it seems to us that the Lower Appellate Court has put a proper construction upon the language of the kubooleut, and that, although MacNair is one of the parties to the kubooleut, the concern has, in fact, now passed into the hands of "others" within the meaning of the kubooleut, seeing that it has passed from the hands of MacNair and MacDonald into the hands of MacDonald alone. It appears to us that MacDonald now occupies the position of the persons contemplated by the words of the kubooleut—"*those who will succeed to our rights*," and as he does occupy that position, he alone is liable for the rent.

The judgment of the Lower Appellate Court is affirmed, and this appeal dismissed with costs.

The 17th December 1868.

Present:

The Hon'ble J. B. Phear and C. Hobhouse, *Judges.*

Res adjudicata.

Case No. 2320 of 1868.

Special Appeal from a decision passed by the Judge of the 24-Pergunnahs, dated the 11th August 1868, affirming a decision of the Deputy Collector of Baraset, dated the 28th February 1868.

Kaleedass Ghosal (Defendant), *Appellant,*

versus

Muddoosoodun Roy and others (Defendants), *Respondents.*

Baboo Bhugobutty Churn Ghose for Appellant.

Baboo Opendur Chunder Bose for Respondents.

A Deputy Collector having, in a suit for rent, given plaintiff (*M*) a decree, determining adversely to defendant (*K*) an issue which he raised as to an arrangement of tenancy:

HELD that *K* cannot succeed as plaintiff in a new suit in the same Court in which he sets up the same arrangement, and asks to have it declared as that under which he holds the land from *M*.

Phear, J.—THE plaintiff brings this suit against the defendant, seeking to have it decreed by the Deputy Collector's Court that, as regards the lands in suit, he is, by the terms of a certain arrangement come to between him and the defendant, only liable to pay a rent of 42 rupees and odd annas. It appears that, on a former occasion, the present defendant, as zemindar, sued the present plaintiff as tenant, seeking to recover a rent of 83 rupees odd annas, in respect of this same land; and, in defence to that suit, the present plaintiff set up the exact arrangement of tenancy which he now asks to have in effect declared as the arrangement under which he holds the land of the defendant. In that former suit, the Deputy Collector gave a decree in favor of the plaintiff, and in express terms determined adversely to the defendant the issue which he then raised as to the present arrangement, *i. e.*, the very arrangement which he now wishes the Deputy Collector's Court to establish.

We do not wish to express any opinion as to whether the cause of action alleged by the plaintiff in his present suit is one which the Deputy Collector could properly try. If it be, it is quite clear to our minds that the very same issue has been tried between the same parties and by the same Court on

a former occasion, and that the decree was then given exactly in the same words in which the decree would have to be given in this case, if the plaintiff is entitled to succeed, with the single exception, that the claim of the present plaintiff was then refused, while he now asks to have it declared in his favor. Under these circumstances, we think that the present suit does not lie, and that the plaint ought to be dismissed. We, therefore, decree this appeal, reverse the decision of the Lower Appellate Court, and dismiss the plaintiff's suit with costs in all the Courts.

The 17th December 1868.

Present:

The Hon'ble G. Loch and H. V. Bayley, *Judges.*

Tenancy—Registration in zemindar's office—Receipt of rent.

Case No. 888 of 1868.

Special Appeal from a decision passed by the Officiating Additional Judge of Jessore, dated the 16th January 1868, reversing a decision of the Sudder Ameen of that District, dated the 18th August 1866.

Mirtunjoy Sircar (Plaintiff), *Appellant,*

versus

Gopal Chunder Sircar and others (Defendants), *Respondents.*

Baboos Bungshee Dhur Sein and *Greeja Sunkur Mojoomdar* for Appellant.

Mr. R. T. Allan and *Baboos Bhowanee Churn Dutt* and *Mohinee Mohun Roy* for Respondents.

When a party wishes to make known to a zemindar that he has a right to a tenure, the rent of which the zemindar refuses to take from him, it is not sufficient for him to put money into the Collector's office in the name of the recorded tenant along with his own name, without stating what his claim is; he should give distinct notice to the zemindar of the interest which he claims.

Where a zemindar clearly takes rent from a party as holder of a tenure, he cannot afterwards, in any suit he may bring for rent, draw back and ignore the position of such party, even though the latter may not have been registered in the zemindar's office.

Loch, J.—A CERTAIN jote registered in the zemindar's books in the name of Joheerooddeen was sold in satisfaction of a decree for arrears of rent obtained by the zemindar against the said Joheerooddeen.

Plaintiff alleges that the jote did not belong to Joheerooddeen, but to him under his purchase from Joheerooddeen, and that he and Kalee Koomar had deposited the rents which the zemindar had received, and consequently he could not ignore their relationship as tenants, notwithstanding the zemindar had sold the tenure under a collusive *ex-parte* decree for rent against Joheerooddeen.

The first Court gave a decree for the plaintiff, which was reversed by the Judge on appeal, and though we do not concur with the Judge's reasons for coming to the conclusion he has drawn, still, we think, his order must be affirmed.

In special appeal, the plaintiff alleges that the Judge is wrong in holding that the law required his purchase to be registered in the zemindar's office, for, as he is a cultivating ryot, no registration is required, he not being the holder of a tenure intermediate between the zemindar and the cultivator. This contention is, however, at once contradicted by the fact admitted by plaintiff that he holds kubooleuts from tenants under him for the lands in question.

He then goes on to urge that, even if registration were necessary, the zemindar has condoned any omission on the part of the plaintiff by receiving rent from him, and he refers to several deposits of rent made by him into the Collector's office on account of this tenure from 1268 to 1271, which he avers the zemindar took away. On referring, however, to the mode in which these deposits are entered, we find that they have been made in the joint names of Joheerooddeen, Mirtunjoy, and Kalee Koomar, but there is nothing to show what was the particular interest belonging to plaintiff in the tenure. Nor in the declaration made by the plaintiff's agent under Section 5, Bengal Act VI. of 1862, is anything disclosed as to the plaintiff's *status*, nor is it shown to us that any notice in which the plaintiff claimed to be the purchaser of the tenure was served on defendant; so that, even if defendant has, as alleged, taken all the money in deposit, it is impossible to say that he took it, knowing that plaintiff had any interest in the tenure, or that he was thereby admitting plaintiff's title as a tenant. We think that, when a party wishes to make known to the zemindar that he has a right to a tenure, the rent of which the zemindar refuses to take from him, he should distinctly state what is the interest he claims, and the notice to the zemindar should comprise this information. It is not sufficient for a man wishing to protect his special interests of which the zemindar may have no knowledge to put money into the Collector's office in the name of the recorded tenant along with his

own, without stating what his claim is; for, unless he do so, the zemindar is not obliged to enquire as to his *status*. The payments, as made by plaintiff, might have been voluntary payments, or payments such as that of a mortgagee to save his own interest, which a zemindar is not bound to recognize. We think, therefore, plaintiff has failed to prove the acceptance of rent as condoning his omission to register the tenure. We think the Judge is quite wrong in holding that the acceptance of rent by the zemindar would not be a sufficient acknowledgment of the plaintiff as a tenant, and would not cure the defect of non-registration. We think, if the zemindar clearly took rent from plaintiff as holder of the tenure, he could not afterwards draw back and ignore his position in any suit for rent he might bring.

* * * * * * *
* * * * * * *

Bayley, J.—I concur.

The 17th December 1868.

Present:

The Hon'ble J. B. Phear and C. Hobhouse, *Judges.*

Under-tenants—Recognition by zemindar—Section 16, Act VIII. (B. C.), 1865.

Case No. 2406 of 1868.

Special Appeal from a decision passed by the Subordinate Judge of the 24-Pergunnahs, dated the 16th June 1868, affirming a decision of the Moonsiff of Barripore, dated the 31st October 1867.

Sreenath Chuckerbutty (one of the Defendants), *Appellant,*

versus

Sreemunto Lushkur and others (Plaintiffs), *Respondents.*

Baboos Chunder Madhub Ghose and *Romesh Chunder Mitter* for Appellant.

Baboo Poornoo Chunder Shome for Respondents.

Shareholders with a tenant are primarily liable with him to the zemindar for the rent of the tenure, unless the zemindar comes to a separate agreement with them for the payment of their share. Where parties hold under or through the tenant, the zemindar is not bound to recognize their holding as a separate holding; and his taking the rent of the whole tenure, or a part of it, from their hands, does not of itself amount to such a recognition as is contemplated in Section 16, Act VIII. of 1865 of the Bengal Code.

Phear, J.—We think that the decision of the Lower Appellate Court is wrong. There is nothing in the facts found by that Court which goes at all to show that the decree obtained by the zemindar against Baluck Ram was not a valid decree—a decree made in an actual suit. It, therefore, follows that any process for execution of this decree issued against the property of Baluck Ram would be a good foundation for the sale by the Court of that property as against any one who claimed through or under Baluck Ram. It appears also from the judgment of the Lower Appellate Court that the tenure which has been sold in execution of the decree was certainly at one time, in its entirety, the property of Baluck Ram; and, even if the contention of the plaintiffs is correct, a portion of it still remains Baluck Ram's property.

Further, the plaintiffs' claim at the utmost makes them shareholders with Baluck Ram, and, therefore, primarily liable with him to the zemindar for the rent of the tenure, unless the zemindar has come to a separate agreement with them for the payment of their share. If they were shareholders with Baluck Ram, and liable with him for the payment of the rent, it might be that the zemindar's suit ought to have failed for want of making them defendants with Baluck Ram; but that of itself does not vitiate the decree as it stands. It seems to us that the evidence to which the Lower Appellate Court refers as showing that the zemindar recognized the assignment by Baluck Ram to the plaintiffs really does not amount to evidence of their having with the sanction of the zemindar a separate holding. It may be that he was well aware that they were, in some respect or other, holding under Baluck Ram or through him; but this would be matter of no consequence to him. He was not bound to recognize it. His taking the rent of the whole tenure, or a part of it, from their hands, would not of itself amount to such a recognition of their separate holding as is contemplated in Section 16, Act VIII. of 1865 of the Bengal Code.

We think, then, that the matter stands thus—that there is a good decree against Baluck Ram; that the tenure which has been seized and sold in execution of the decree is properly treated as being liable to be sold in execution of the zemindar's decree against Baluck Ram; that there is no evidence of such recognition of the plaintiffs' interests in the tenure by virtue of an assignment or sale from Baluck Ram as binds the zemindar,

or creates a valid incumbrance under the provisions of Section 16, Act VIII. of 1865. In other words, that there is no evidence of the plaintiffs either being tenants themselves of the zemindar by reason of his recognition of their holding, or of their being incumbrancers upon Baluck Ram's holding under such circumstances as would serve to protect their incumbrances by reason of the provisions of the Section we have just mentioned. Consequently, the Lower Appellate Court ought not to have declared that they had made out the right which they claim as against the defendant (auction-purchaser) from the zemindar. We accordingly decree this appeal, reverse the decree of the Lower Appellate Court, and dismiss the plaintiffs' suit. The special appellant must have his costs in all the Courts.

The 17th December 1868.

Present:

The Hon'ble H. V. Bayley and A. G. Macpherson, *Judges.*

Mortgage—Money-decree—Declaration of lien.

Case No. 1200 of 1868.

Special Appeal from a decision passed by the Judge of East Burdwan, dated the 13th February 1868, affirming a decision of the Sudder Ameen of that District, dated the 2nd August 1867.

Kusseemoonissa Bebee (Defendant), *Appellant,*

versus

Hoorunissa Bebee (Plaintiff), *Respondent.*

Mr. C. Gregory and *Baboo Umbica Churn Banerjee* for Appellant.

Baboo Bama Churn Banerjee for Respondent.

In a suit to recover possession of property from which plaintiffs had been ejected by the holders of a money-decree, who had had the property sold in execution and purchased it themselves (plaintiffs being strangers to the decree), defendants pleaded that they had a lien on the property by reason of its having been hypothecated to them by a simple mortgage.

HELD that the plea disclosed no sufficient defence as the defendants had not, in the decree in execution of which the property was sold, obtained from the Court a declaration of their rights as mortgagees.

Macpherson, J.—I THINK this appeal ought to be dismissed with costs. I do not, however, concur in all that is said by the Lower Appellate Court, because I think that, if the appellants really held a simple mortgage of this property as alleged, they might have obtained a decree declaring their right as mortgagees, and their right to have the lands sold in execution of the decree free from all incumbrances accruing subsequent to the date of the mortgage. But the mortgagees got no such decree. They got a simple decree for money; and in execution of that decree they caused the property to be sold, and themselves became the purchasers of it. Thereupon they ejected the plaintiffs (respondents) who were entire strangers to their decree; and when the plaintiffs sued to recover possession, the appellants opposed them upon the ground that, although they (the appellants) had not got a decree establishing their lien, or declaring the property to be subject to it at the time that the property was sold in execution, still, in fact, they had a lien on it by reason of its being hypothecated to them by a simple mortgage, and therefore the plaintiffs ought not to be allowed to recover possession.

I have no doubt that, if a mortgagee who holds a simple mortgage-bond wishes to sell the property *so as to get the full benefit of his mortgage*, he must get a distinct declaration from the Court of his rights over the property as mortgagee, as well as a decree for its sale. This was decided by a Full Bench in the case of Gopeenath Singh *versus* Sheo Suhaye Singh (I. Weekly Reporter, page 315). A mortgagee who sells the property without having obtained such a declaration cannot get the full benefit of his mortgage by setting up a plea of lien, if he has become the purchaser under his own decree, and has contrived to get himself put into actual possession. If the course contended for could be followed, a third party, such as is the plaintiff in the present case, would be exposed to what might be a very great hardship; for he would be deprived of what is otherwise his undoubted right, *i. e.*, the option of satisfying the decree rather than having the property sold in execution. The view I now express accords with the decision of the Full Bench I have already referred to, and also with a decision of a Division Bench reported in Weekly Reporter, Volume IX., page 82.

I think the appeal ought to be dismissed with costs.

Bayley, J.—I am of the same opinion.

The 7th December 1868.

Present:

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble Dwarkanath Mitter, *Judge*.

Witnesses—Adverse testimony—Remands—Section 354, Act VIII., 1859—Relation of Vakeel and Client—Champerty—Benamee purchase—Lis pendens—Acknowledgment of a daughter.

Case No. 98 of 1868.

Regular Appeal from a decision passed by the Subordinate Judge of Beerbhoom, dated the 15th February 1868.

Fuzeelun Beebee, widow and heiress of Shaikh Abdool Wahed (Plaintiff), *Appellant*,

versus

Omdah Beebee and Shah Jonab Ali (Defendants), *Respondents*.

Mr. J. W. B. Money and *Baboo Juggadanund Mookerjee* for Appellant.

Baboos Ashootosh Chatterjee, Grija Sunkur Mojoomdar, and *Gopeenath Mookerjee* for Respondents.

A party who calls a witness to give testimony on his behalf (*e. g.*, to prove the execution of a document) is not necessarily bound by the evidence which that witness gives; but if such evidence is at variance with the truth of his case (*e. g.*, if the witness swears that the document was not executed and has the means of knowing the fact) it throws such a suspicion upon the case as to render the clearest testimony necessary before its truth can be established.

After a case is closed in the Lower Court and is brought up in appeal to the superior Court, it cannot be remanded for re-trial on fresh evidence on the ground that the Judge below failed to try one of the issues. The Court of appeal is bound, under Section 353, Act VIII. of 1859, to decide the case itself.

The principle, that while the relation of client and attorney subsists in full vigor, the latter shall derive no benefit to himself from the contracts or bounty or other negotiations of the former, applies with equal force to the relation of vakeel and client.

A suit to recover possession of property which was purchased by a vakeel from his client *benamee* in the name of another, and which was never made over to that other, cannot be maintained in the name of the ostensible purchaser.

By the rule of *lis pendens* a decree pending a suit is not to be got rid of by a sale by one of the parties while the suit is pending.

When a man acknowledges a person to be his daughter, he must be taken to mean his legitimate daughter, unless the contrary appears.

Peacock, C. J.—One of the issues on the merits in this case, *viz.*, the 2nd, was whether or not it is a fact that out of the properties in dispute, defendant No. 1 let out in mokurruree her 5 annas 6 gundahs 2 cowries 2 krants share in properties Nos. 2, 3, and 4, and subsequently sold 2 annas 13 gundahs 1 cowrie 1 krant share in all the properties in suit by a deed of sale to the plaintiff?

The *onus* of proving that issue lay on the plaintiff; and he called several witnesses to prove that the defendant No. 1 executed the mokurruree pottah of one part of the property, and subsequently a bill of sale of the other. Putting out of consideration for the present moment the evidence of the husband of the defendant No. 1, I should have hesitated in acting upon the evidence of the other witnesses in support of the second issue. Two deeds were executed at different periods, one about a year before the other; and the evidence of two of the witnesses evidently tended to show that the two deeds were executed at the same time. The other witnesses would not have been sufficient to have convinced me that the lady did execute the deeds.

The plaintiff's legal adviser in the mofussil appears also to have entertained that view. He did not seem to think that he had done enough by calling those witnesses, and therefore he called the husband of the defendant No. 1; and that witness most distinctly swears that his wife never did execute the deeds; that she never authorized the execution of them, and that she was not aware of their having been executed; and that he himself signed her name without her authority.

The evidence of the other witnesses, unsatisfactory as it was before the husband

was called, was rendered still more unreliable by the evidence which he gave. The plaintiff, therefore, has failed to prove to my mind that either of the deeds was executed by the defendant No. 1.

The suit is valued at 13,767 rupees odd annas; and according to the evidence, even if it is to be believed, the whole money which was paid for that property was 600 rupees—100 for the mokurruree, and 500 in part payment of the bill of sale. The whole purchase-money which, according to the bill of sale was to be paid for the purchase, was 3,000 rupees. The deed recites that Rupees 2,500 of that 3,000 was to be satisfied by setting off a debt. The word "debt" is used in its most general term, and whether it was a bond-debt or not is not stated in the deed.

The husband stated in his evidence that he executed the deed in his wife's name in collusion with Keramut Ali, the vakeel who had been employed to conduct a suit on the part of the wife. Some evidence was given to show that when the 500 rupees on account of the purchase-money was taken to the husband, some bonds wrapped up in a paper were also taken with it; but the witness does not appear ever to have seen the bonds, nor is it anywhere said from whom the bonds were due, or to whom or when they were payable, or at what time they were executed or the debts contracted. I can scarcely think that if bonds for 2,500 rupees were to be given up as part payment of 3,000 rupees purchase-money, some notice would not have been taken either in the body of the deed or at the foot of it, specifying the dates and amounts of the bonds which were given up. The witness who proves that he took the bonds wrapped up in paper says that he received them from Moonshee Keramut Ali, the pleader, with whom the husband swore that he was acting in collusion. If the pleader did really give the bonds to the witness towards satisfying part of the purchase-money, and gave them on behalf of his son-in-law, the plaintiff, he would, one would think, have kept a note of the fact, and have made a memorandum of the bonds having been given to the witness. But in his evidence he says nothing whatever of part of the purchase-money having been paid by his son-in-law by giving up bonds. On the contrary, having stated that he himself had no interest in the property, and that it really belonged to the plaintiff, his son-in-law, he went on to give evidence to show how it was that his son-in-law was able to pay the purchase-money. He says: "Previous "to the purchase of a portion of the said pro-"perty, I made a gift of some money to "plaintiff, as he is my son-in-law, and I "have this son-in-law, and no son. With "that money the plaintiff purchased, and took "in mokurruree the said property." That is not the evidence which one would have expected if he had really given bonds in part payment of the purchase-money. He would probably have said that "a portion of that money was lent by my son-in-law to the wife, and that, she having given bonds for the re-payment, it was agreed that the bonds should be given up to her in part satisfaction of the purchase-money, and that I, having those bonds in my possession on behalf of my son-in-law, sent them with the 500 rupees for the purpose of being handed over."

In cross-examination he said: "I made "the gift of the money subsequent to mar-"riage. I cannot exactly remember in what "year I made a gift. However, I made a "gift of Rupees 4,600 previous to 1270, and "gave some money also in that year"—1270 being the year in which the mokurruree was given; and it is exceedingly improbable that if that money was given to the son-in-law in 1270, bonds for the re-payment of loans made out of it to the defendant No. 1 would, in that year, be made over in part payment of the purchase-money for the mokurruree, and no note kept of the fact of their having been so made over.

Then he says: "I have no interest in the "suit. Plaintiff is paying the costs of this "suit, and I am conducting it on his behalf." It is unnecessary for the purpose of this issue to decide whether the suit was the suit of the plaintiff, or whether it was not really the suit of Keramut Ali, the vakeel. It is unnecessary to determine whether the evidence of Keramut Ali was true or not. The plaintiff has called the husband, and he has proved most distinctly that the deeds were never executed by his wife.

A party who calls a witness to give testimony on his behalf is not necessarily bound by the evidence which that witness gives: but the truth of his case ought to be very clearly made out if it is at variance with the evidence of such witness. If a man calls a witness to prove the execution of a document, and that witness solemnly swears that the document was not executed, and he has the means of knowing the fact, it throws such a suspicion upon the case that

the truth of the execution ought to be established by the clearest testimony.

In the face of the evidence of the defendant's husband, the testimony of the other witnesses has not satisfied my mind that the wife did execute the deeds, or authorize the execution of them; and it is sufficient for me for the purposes of this issue to say that the plaintiff has failed to prove the affirmative of that issue.

We have been asked to allow the plaintiff to call the defendant No. 1 as a witness, and also to allow the witness Keramut Ali to be re-called with reference to the evidence which was given by the defendant's husband. This application, if made at all, ought to have been made before the case was left to the decision of the Principal Sudder Ameen. The plaintiff's case was closed, and the Principal Sudder Ameen had to decide upon the evidence as it then stood. He decided another issue in favor of the defendant, and he, therefore, thought it unnecessary to try the issue which we are now trying. He was wrong in point of law in determining the issue which he did find in favor of the defendant, and it consequently became necessary for us to decide the issue which we are investigating; and, as a general rule, we ought to try it upon the same evidence upon which the Principal Sudder Ameen would have tried it, if he had pronounced his judgment upon it at the time. It would be dangerous, as a general rule, after a case is closed and a case comes up to this Court on appeal, to send it back again to be tried upon fresh evidence upon the ground that the Judge below has failed to try one of the issues. In fact, under Section 354, Act VIII. of 1859, we ought not to remand the case to the Principal Sudder Ameen and are bound to decide it ourselves.

The learned Counsel for the plaintiff (appellant) has stated that he was under the impression at first that this case would have been remanded to the Principal Sudder Ameen for re-trial, and he urges us upon that ground to allow further evidence to be given. Even if we had the power to send the case back to the Principal Sudder Ameen to try the issues which he failed to try, we should have directed him, as in many cases we do when we remand cases in special appeal, to try the case upon the evidence as it stood at the time of his decision.

We think we ought not to allow the plaintiff to amend his case by examining the defendant No. 1 or Keramut Ali with reference to the evidence given by the husband of the defendant No. 1.

A case has been made out by the husband of the defendant sufficient to induce the Court to call upon Keramut Ali, who is a vakeel of the Court at Beerbhoom and enrolled in this Court, to show cause why he should not be dismissed or suspended; and therefore a rule will be drawn up calling upon him to show cause to that effect within two weeks after the service of the notice upon him. He is now, as it appears by a telegram, on his way to the Court by a passenger train to give evidence; and if he wish it, he may show cause to-morrow, otherwise the rule will be served upon him.

Our attention has been called to Section 351, Act VIII. of 1859, and we are asked to remand the case under that Section. The case does not fall within it. The Principal Sudder Ameen has not disposed of the case upon a preliminary point so as to exclude any evidence of fact essential to the rights of the parties. He heard all the evidence which the parties wished to offer, although he thought it unnecessary afterwards to try one of the issues. The case is complete, and we can try the issues upon the evidence. There are cases in which the Court may dispose of a case upon a preliminary point without taking evidence on the rest of the case; as, for instance, a case may be disposed of upon the point of limitation. But here, the Principal Sudder Ameen has merely omitted to try certain issues upon the evidence which both parties had given because he thought it unnecessary, having decided the case upon another issue which applied to the whole cause of action. The object of the Act was that the Appellate Court should not remand cases when it has the materials for determining them itself. It would have caused great delay and inconvenience and additional expense to the parties if we had sent this case back to the Principal Sudder Ameen instead of determining the issue ourselves and probably when the Principal Sudder Ameen had determined the other issues, the parties would have been harassed and vexed by another appeal to this Court, either regular or special, upon the new findings. The object of the Legislature was that legislation between parties should come to an end as soon as it could, consistently with justice.

The case not coming within Section 351 falls within Section 352, which says: "It "shall not be competent to the Appellate "Court to remand a case for a second deci-"sion by the Lower Court, except as provid-"ed in the last preceding Section."

If a case had been made out which had rendered it clear to us that justice would be promoted by calling for additional evidence, we should do so under Section 355. We have already given our reasons for not having the pleader Keramut Ali re-examined. If we were to allow him to be examined, we should have to allow the husband of defendant No. 1 to be re-examined.

We might stop here, but as the case is one which is appealable to the Privy Council, we will proceed to try the other issues.

The first issue in bar is whether the suit is bad by reason of Keramut Ali not having been made a co-plaintiff in it.

That involves two questions, *first*, assuming that a sale took place by Mussamut Omdah Beebee, the defendant No. 1, whether Abdool Wahed was the real purchaser, or whether his father-in-law, Keramut Ali, the vakeel of Omdah Beebee, was the real purchaser of the estate from his client.

The suit is valued at 13,764 rupees. Of part of the property for which the suit is brought, a mokurruree was purchased for 100 rupees in the name of the plaintiff, Abdool Wahed. As to the residue of the property, it is said that it was sold to the plaintiff for the sum of 3,000 rupees, of which 500 rupees were paid, and the residue settled by giving up certain debts. There is no evidence in the case to induce me to believe that bonds legally due from Omdah Beebee to the extent of 2,500 rupees, either to Abdool Wahed or to Moonshee Keramut Ali, were ever delivered up. If Keramut Ali was the real purchaser, I believe that no more was actually paid than the 100 rupees and 500 rupees for this property valued at 13,764 rupees. I have already pointed out on delivering judgment upon the second issue on the merits, that the bill of sale speaks of debts generally, and not of bonds; and there is no specification anywhere, either in the bill of sale or in any memorandum at the foot of it, of what the alleged debts for 2,500 rupees consisted, or of the dates or amounts of the alleged bonds. It may be, but it is unnecessary to enter into that question now, that Keramut Ali had some claim against some one for costs which had been incurred in the suit between No. 1 and No. 2 defendants; but there is no evidence to induce me to think that defendant No. 1 ever owed any money whatever to the plaintiff Abdool Wahed. If, therefore, Keramut Ali was the real purchaser, and the name of his son-in-law, Abdool Wahed, was used as a blind, and that it might not appear that the purchase was a purchase by the vakeel for his client, Keramut Ali ought to have been made a party to the suit as plaintiff, in order that the sale of the mokurruree and the absolute interest in the land might have been impeached.

Speaking of the relationship of client and attorney, Mr. Justice Story in his Equity Jurisprudence, Section 310, says: "It is obvious "that this relationship must give rise to great "confidence between the parties, and to very "strong influences over the actions and "rights and interests of the client. The "situation of an attorney or solicitor puts it "in his power to avail himself not only "of the necessities of his client, but of "his good nature, liberality, and credulity, "to obtain undue advantages, bargains, "and gratuities. Hence the law, with a "wise providence, not only watches over all "the transactions of parties in this predica-"ment, but it often interposes to declare "transactions void, which between other par-"ties would be held unobjectionable. It "does not so much consider the bearing or "hardship of its doctrine upon particular "cases, as it does the importance of preventing a general public mischief (which may "be brought about by means secret and "inaccessible to judicial scrutiny) from the "dangerous influences arising from the con-"fidential relation of the parties. By estab-"lishing the principle that while the rela-"tion of client and attorney subsists in its "full vigour, the latter shall derive no benefit "to himself from the contracts, or bounty, "or other negotiations of the former, it "supersedes the necessity of any enquiry "into the particular means, extent, and "exertion of influence in a given case, a "task often difficult and ill-supported by "evidence, which can be drawn from any "satisfactory sources."

The same remarks apply with equal force to the relationship of vakeel and client, and it is very important that this principle should be generally known; and it is equally important that the Courts should in these cases take care that they are not blinded by allowing transactions of this nature between plead-

ers and their clients to be enforced in the name of a third person put forward as the real purchaser.

Assuming, therefore, that the husband had the authority of the wife to execute the mokurruree pottah and the bill of sale, or assuming that the fact was, as some of the witnesses would wish to make it appear, that she actually touched the pen with which her name was signed by the husband, I have no doubt that Keramut Ali, the vakeel, was the person really interested in those documents, and that his son-in-law, Abdool Wahed's name was used as a mere color. The husband swears that the whole transaction took place between him and the vakeel in collusion, and that the wife knew nothing about it. I do not believe the evidence of Keramut Ali in which he states that he "has neither taken nor purchased the property in the *benam* of plaintiff, Abdool Wahed, and that the plaintiff had full right in the disputed property." He wishes it to appear that his son-in-law had purchased the property out of some money which had been previously given to him; and if his evidence is to be believed it would appear that the whole purchase-money was paid, for he says nothing of debts or bonds being given up as a part-payment of the purchase-money. He says: "Previous "to the purchase of a portion of the said "property, I made a gift of some money to "plaintiff, as he is my son-in-law, and I "have this son-in-law, and no son. With "that money, the said plaintiff purchased and "took in mokurruree the said property." On cross-examination he says: "I made the "gift of the money subsequent to mar-"riage. I cannot exactly remember in what "year I made a gift. However, I made a "gift of Rupees 4,600 previous to 1270, and "gave some money also in that year. My "son-in-law (the plaintiff) did not mess jointly "with me. Plaintiff is paying the costs of "this suit, and I am conducting it on his "behalf. I have no interest in the suit."

I do not believe that the plaintiff did pay or was paying the costs of the suit, or any part of it. If the son-in-law, to whom this liberality had been extended, was really paying his father-in-law in advance the costs of conducting the suit, much clearer and more reliable evidence upon that subject could and ought to have been given.

Two Mohurrirs of the pleader, Keramut Ali, both prove that he was the man who advanced the money, and the witness, Zamin Ali, specially proves that the said Moonshee, Keramut Ali, having purchased certain property with his own money in the name of his son-in-law, Abdool Wahed, said one day in the presence of respectable witnesses that he had caused the mokurruree and the bill of sale to be purchased in the name of his son-in-law, and had made them over to him.

We have therefore clear evidence that the purchase was made by Keramut Ali benamee in the name of his son-in-law, and we have Keramut Ali's own evidence to show that he never made them over to his son-in-law, for he swears that his son-in-law originally purchased it. I have no doubt that if the defendant No. 1, Omdah Bebee, executed those conveyances, Keramut Ali, and not the plaintiff, was the real purchaser. I therefore think that the first issue in bar must be decided in the affirmative, that is to say, that the suit cannot be maintained in the name of the plaintiff. That, I think, is the substance of the issue.

As to the second issue in bar, it appears that the defendant No. 2 instituted a suit against the defendant No. 1 for confirmation of his possession and title by setting aside an order under Act XIX. of 1841. That suit was decreed in favor of defendant No. 2. The sale of part of the property for which this suit was brought, if the sale took place at all, was effected whilst that suit was pending; and the plaintiff had notice of the pendency of that suit, for it was stipulated that the vendor was not to disclaim. In that suit, the defendant No. 2 obtained a decree against the defendant No. 1, declaring his right to the property as against No. 1, and by that decree the purchaser *pendente lite* was bound, the effect of the rule of *lis pendens* being that a decree pending a suit is not to be got rid of by a sale by one of the parties whilst the suit is pending. Defendant No. 1 appealed against that decision to the High Court. One of the issues in the suit between defendant No. 2 and defendant No. 1 was whether defendant No. 1 was the legitimate daughter of Shah Bundah Ali. That issue was decided in favor of defendant No. 2. In the appeal preferred by defendant No. 1 to the High Court, it was considered that the Principal Sudder Ameen had made a mistake in the manner in which he had dealt with the question of the legitimacy of defendant No. 1. The Court pointed out the error, directed that the appeal should remain on the files of the Court, and that the Principal Sudder Ameen should take further evidence and return it to the Court. There

was no reversal of the decree which had been pronounced in favor of defendant No. 2. Afterwards, the defendant No. 1 withdrew from the appeal and entered a disclaimer.

In the 9th article of the answer of Shah Jonah Ali in *this* suit, he says: "By a decision of the Civil Court, your petitioner was "declared heir to, and proprietor of, the "whole of the property in the presence of "the party under whom plaintiff claims; and "the said decision has become final. Plaintiff "cannot, therefore, maintain a fresh action in "respect of the whole or a portion of the "said property."

In the 5th article of defendant Omdah Bebee's answer, she says: "The plaint "itself shows that defendant No. 2 brought "a suit against your petitioner regarding "this very property. On the 10th July "1865, the Principal Sudder Ameen of "Hooghly found a decree for the said defendant. True your petitioner preferred an "appeal to the High Court against that "decree, but at last considering the circumstances of the case, and afraid of being "unnecessarily saddled with costs, she withdrew from it, and the appeal was in consequence struck off the file, and the decree "of the Zillah Court confirmed on the 23rd "January 1867. Plaintiff does not seek to "set aside these decrees. His suit cannot "therefore be sustained."

Upon those answers, the 2nd issue in bar was raised by the Principal Sudder Ameen. "The plaintiff's vendor, defendant No. 1, "having filed a disclaimer in the previous "suit, whether the present action can be "maintained or not." The meaning of that evidently is, with reference to those two paragraphs, whether the disclaimer being entered, the decree would have the same effect as if the disclaimer had not been entered. It appears to me that the disclaimer and the withdrawal of the appeal by defendant No. 1 does not get rid of the effect of the decree which was pronounced in favor of defendant No. 1 against defendant No. 2, which still remains in force. The fact of this Court's having sent back the case to the Principal Sudder Ameen to take further evidence on a particular issue in the cause between defendant No. 1 and defendant No. 2 did not amount to a reversal of that decree. The appeal having been withdrawn the decree has the same effect as if the appeal had never been preferred, and it is consequently binding upon the purchaser *pendente lite*. This decision affects only that portion of the property in the present suit which was conveyed by the bill of sale. As regards the property conveyed to the plaintiff by the mokurruree pottah, the plaintiff's rights are not affected by the decision, inasmuch as the mokurruree was executed before the commencement of the suit between defendant No. 1 and defendant No. 2. The finding upon the second issue is that, as regards the property included in the bill of sale, the present action cannot be maintained in consequence of the decree in the suit between defendants No. 1 and No. 2, notwithstanding the disclaimer of the plaintiff.

With reference to the first issue on the merits, we think there is evidence of several acknowledgments on the part of Shah Bundah Ali, that the defendant No. 1 was his daughter. Those acknowledgments unexplained amount to acknowledgments that she was his legitimate daughter. When a man acknowledges a person to be his daughter, he must be taken to mean his legitimate daughter, unless the contrary appears.

It is unnecessary to decide the first portion of the issue whether the mother of defendant No. 1 was the married wife of Shah Bundah Ali. I should consider that the acknowledgment by a man that a certain person was his daughter amounts *primâ facie* to an acknowledgment that the mother of that person was his wife. The defendant, Jonab Ali, in the 6th article of his written statement, says: "Defendant No. 1 is the daughter of Phela Doomnee, a Dome by caste." But there is no evidence in this suit to show that Omdah Bebee is the daughter of Phela Doomnee, or to identify her as the child whom Phela Doomnee brought with her when she entered the service of Bundah Ali. In deciding the first issue in the affirmative, that the defendant No. 1 is the legitimate daughter of Bundah Ali, we express no opinion as to whether she was the daughter of Phela Doomnee, or whether Phela Doomnee was ever married to Bundah Ali.

There is no proof in support of the third issue that the property in dispute in this action was *nozoarat* or *wuqf* estate. That part of the issue, therefore, will be found in the negative. The other part of the issue consequently does not arise.

There is no evidence in support of the fourth issue, and therefore that must be found in the negative.

b

The fifth issue is whether the disclaimer was collusively filed. It is immaterial to determine that issue, for whether the disclaimer was filed collusively or not, the decree in the suit between defendant No. 2 and defendant No. 1 has not as yet been reversed. As I understand the meaning of that issue, it is whether the defendant No. 1 filed her disclaimer in collusion with defendant No. 2 for the purpose of defeating the claim of the plaintiff in this suit. It appears to me that there is no evidence whatever to affect the defendant No. 1 with any collusion. The suit between the defendant No. 2 and the defendant No. 1 related to much larger property than that which was the subject of the bill of sale and of the mokurruree pottah in this suit, and it appears that the disclaimer was entered in consequence of a compromise effected in that suit with defendant No. 2 by which certain advantages were secured to her. According to the view which we have expressed in delivering judgment on the second issue, it appears very doubtful whether when the disclaimer was entered by defendant No. 1 she was even aware that the mokurruree pottah and the bill of sale had been executed by her husband. If the husband's evidence is to be believed, she was never informed that he had executed those documents in her name. If so, it follows that the disclaimer could not have been filed collusively to get rid of the effect of those documents. But even if she was ever aware of the fact that those documents had been executed, there appears to be no evidence of collusion. In any view of the case, therefore, we think that the 5th issue, which, however, we think is an immaterial issue, must be found in the negative.

According to our decision on these issues, the plaintiff is not entitled to recover mesne-profits from the defendant No. 2. It is unnecessary, therefore, at present to institute any enquiry as to the amount of those mesne-profits.

The appeal will be dismissed with costs.

The 10th December 1868.

Present:

The Hon'ble F. B. Kemp and E. Jackson, *Judges.*

Mortgage — Conditional sale — Lien on other property.

Case No. 100 of 1868.

Regular Appeal from a decision passed by the Subordinate Judge of Tirhoot, daled the 8th January 1866.

Mohunt Pursoo Ram (one of the Defendants), *Appellant,*

versus

Byjnath Lall (Plaintiff), *Respondent.*

Baboo Chunder Madhub Ghose for Appellant.

Baboos Kally Mohun Doss, Mohesh Chunder Chowdhry, and *Bhowanee Churn Dutt* for Respondent.

In a suit on the basis of a deed of conditional sale to recover property which had been obtained by mortgagor (in the course of a butwarra after the sale) in lieu of property contained in the deed, but which defendant had purchased in execution of a decree against the mortgagor:

HELD that plaintiff had no lien on this property which he did not purchase.

Jackson, J.—WE think that the Principal Sudder Ameen's decision in this case cannot be sustained. The plaintiff sues on the basis of a deed of conditional sale to recover certain landed property, which it is admitted is not included in the deed of sale, but which it is said that Gopal Narain Singh, who executed the deed of sale, obtained in lieu of other property contained in the deed in the course of a butwarra which was carried on and confirmed after the sale had been entered into. The defendant is a purchaser in execution of a decree against Gopal Narain Singh, and, as appellant in this Court, urges that he is entitled to the estate which he has bought, and which it is admitted did not form the subject of sale to plaintiff, and that the judgment of the Principal Sudder Ameen which awards this estate to the plaintiff in lieu of the estate sold to him is wrong in law. We think it is wrong in law. The precedent* quoted by him by no means supports the view of the law taken by him. As between mortgagor and mortgagee it may be that the mortgagee might follow what property remained in the mortgagor's possession, if he alienated what he had conditionally mortgaged. But the question here is not between those parties, but be-

* S. D. A. Reps., 1857, page 358.

tween two purchasers from the same person. The defendant purchased this estate. The plaintiff did not. He may have some lien on the estate he did purchase; but he has no lien on this estate which he did not purchase.

The decision of the Principal Sudder Ameen is reversed, and the plaintiff's suit, as far as it relates to this defendant and this estate, is dismissed with costs.

The 18th December 1868.

Present:

The Hon'ble L. S. Jackson and E. Jackson, *Judges.*

Mortgagor—Foreclosure in respect of a share.

Case No. 1645 of 1868.

Special Appeal from a decision passed by the Judge of Shahabad, dated the 25th March 1868, reversing a decision of the Moonsiff of Buxar, dated the 29th November 1867.

Bhora Roy and others (Plaintiffs), *Appellants,*

versus

Abilack Roy and others (Defendants), *Respondents.*

Baboo Annund Chunder Ghossal for Appellants.

Baboos Poorno Chunder Shome and *Shib Chunder Chatterjee* for Respondents.

Where several parties have an interest in a mortgage, it is not competent for one of them to foreclose in respect of his fractional share.

A party suing for possession of a share of mortgaged property (after its release has been effected by an arrangement made between the mortgagees and mortgagor) on the ground that he had an interest in the mortgage and in the funds advanced by the mortgagees, must show that the mortgagor had notice of such interest.

L. S. Jackson, J.—I THINK the plaintiff in this case cannot succeed. The allegation was that the plaintiff had been a member of a joint Hindoo family with one Bechun Roy and Leka Roy; that the defendants Abilack and others had executed in 1254 a deed of conditional sale of certain immoveable properties to Leka and Bechun; that in 1862 the plaintiff had brought his suit against Leka and Bechun (making the mortgagors parties thereto) in which he established his right to an interest in the mortgage, and recovered from his co-sharers a portion of the profits which they had derived from a ticca lease which they held of the same property; that he subsequently issued a notice of foreclosure to the extent of his fractional share in the mortgage, and he now sues to recover possession of the said share, foreclosure having been completed according to law.

It appeared that a few years after the execution of the deed, and previous to the suit by this plaintiff against his co-sharers, the mortgagors had come to a settlement with Leka and Bechun, by virtue of which the original deed was given up and a fresh deed was executed to them. The Judge dismissed the plaintiff's suit on appeal on the ground of limitation, holding that as 12 years had elapsed since they were denied any participation in the profits by their co-sharers, they could not now maintain the suit.

This decision being brought before us in special appeal, the respondent admits that it cannot be supported, but he contends that the plaintiff's suit must fail for other reasons, and we think this is so.

In the first place, it appears that there has been no foreclosure of the mortgaged property as required by law. The plaintiff, as he alleges, was one of certain parties having an interest in the mortgage. We are not aware of any authority to show that any one of such parties is at liberty to foreclose in respect of his fractional share. That is all the plaintiff has done in the present case, and it seems to us, therefore, that no valid foreclosure having taken place, he is not entitled to sue for possession.

In addition to this, it seems to me that the plaintiff had really no case. If it be supposed, as probably it must be conceded, that the plaintiff had an interest in the mortgage and in the funds advanced by Leka and Bechun, it would still be necessary to show that the mortgagor had notice of that interest so as to render the arrangement afterwards entered into with Leka aud Bechun insufficient to release the mortgagor. It appears to me that there was no evidence to show that he had any such notice of that interest. We have been asked to remand the case to the Court below with a view to a decision on this point on the evidence, but the only evidence which has been brought to our notice is an averment in the written statement, that at the time of the mortgage the plaintiff and the parties named in the deed were members of a joint Hindoo family, but that partition subsequently took place whereby the interest in the mortgage was assigned to Bechun alone. This, it seems to me quite clear, is no admission at all that the mortgagor was aware

of the interest of the plaintiff at the time. It is an admission probably that he is aware of it now, but not that he knew it at the time of the mortgage or at the time of the subsequent arrangement in 1857. In addition to this, it may be said that if the plaintiff permitted his co-sharers to deal with his money by effecting the mortgage in 1254 in their two names, he did thereby give them such dominion over his money as to be bound by the subsequent arrangement entered into by them in 1857.

For these reasons, it seems to me quite manifest that the plaintiffs had no case, and that, instead of obtaining relief as against their co-sharers, they have sought to make the mortgagor liable, when, in fact, no liability exists. Whether or no the plaintiff is entitled to share in the benefit of the arrangement of 1857 is a question which we are not at present called upon to decide.

I think, therefore, that the judgment of the Lower Appellate Court must be affirmed, and this special appeal dismissed with costs.

E. Jackson, J.—I concur in the judgment and in the reasons stated.

The 18th December 1868.

Present:

The Hon'ble L. S. Jackson and E. Jackson, *Judges.*

Evidence—Recital in a decree between other parties—Possession by tenant.

Case No. 1808 of 1868.

Special Appeal from a decision passed by the Judge of Shahabad, dated the 16th April 1868, affirming a decision of the Sudder Ameen of that District, dated the 18th February 1868.

Sheo Dyal Pooree and another (two of the Defendants), *Appellants,*

versus

Mohabeer Pershad (Plaintiff), *Respondent.*

Baboos Chunder Madhub Ghose and *Romesh Chunder Mitter* for Appellants.

Baboos Unnoda Pershad Banerjee, Mohesh Chunder Chowdhry, Poorno Chunder Shome, and *Mohinee Mohun Roy* for Respondent.

A recital in a decree in a suit not between the parties to the present suit or those under whom they claim, cannot be evidence to bind the defendants in the present suit.

Possession by a tenant does not in itself lead to any inference as to the character of the tenant; the fact of his having occupied the land, and paid rent, 12 years and even 20 years, being equally consistent with his being a tenant-at-will, a farmer, or a mokurrureedar.

L. S. Jackson, J.—The plaintiff in this case alleged that he held a mokurruree tenure of the lands in dispute under the party from whom the defendant, Sheo Churn, had purchased, and under the defendant, Sheo Dyal; and that having brought a suit in the Revenue Court against the defendants for damages on account of an alleged injury to his crops committed by them, he had been found by the Revenue Court not to be in possession, and that consequently by reason of that decision, and on the date of the decision he had been dispossessed; he, therefore, asked the Court to adjudicate upon his mokurruree title and re-place him in possession.

The Lower Appellate Court seems to me to have distinctly found that the alleged mokurruree title of the plaintiff was not proved but having allowed the plaintiff an opportunity of adducing further evidence on the question of possession, and the plaintiff having given such evidence, the Judge considered that possession for more than 12 years had been made out on the plaintiff's part and therefore on the ground simply of his possession affirmed the decree which the plaintiff had obtained. The contention before us in special appeal is that under the circumstances of this case mere proof of possession is not sufficient to entitle the plaintiff to a verdict.

For the respondent it is urged that, in the first place, there was evidence, and conclusive evidence, in favor of the plaintiff as to his mokurruree right, and that no objection to the finding of the Court below on that point has been tendered, but also it is urged that proof of possession was sufficient.

As to the so-called conclusive evidence regarding the plaintiff's mokurruree, it appears to me that it was not such evidence. The re-

spondent's vakeel refers to an arbitration-award made in 1836 and to an admission of Sucheedanund, an ancestor of the defendant Sheo Churn's vendor, as being conclusive as to the arbitration-award. If it be conceded that the award is admissible and has been properly proved, it amounts only to a determination of the arbitrators that the plaintiff's vendor ought to have a mokurruree lease, and it would have to be shown that the mokurruree lease had in fact been executed in pursuance of the award. Then it is said that the admission of Sucheedanund supplies that want. That admission has not been laid before us. A recital of it is said to be contained in a decree of the Benares Court in a suit between Sucheedanund and Sheo Dyal, Sheo Dyal being then plaintiff. It seems to me that such a recital taken from a decree not between the parties to the present suit, or those under whom they claim, cannot be evidence to bind the defendants.

The question remains whether the Judge was right in holding that the plaintiff was entitled to a judgment on merely proving his possession. The respondent's pleader cites a decision of this Bench, to be found in Volume X. of the Weekly Reporter, page 61, Bissonath Komilla and others, appellants. That case appears to me clearly distinguishable from the present. In that case, the plaintiff held the lands in dispute as lakherajdar, and his possession was consequently adverse to that of the defendant who was the zemindar; and in that case Mr. Justice Mitter and myself, properly as I think, applied the ruling of the Judicial Committee of the Privy Council which is cited in our judgment. In the present case, the plaintiff was by his own admission the tenant of the defendants, and he states that he paid them rent; his possession, therefore, does not in itself lead to any inference as to the character of the tenure. The fact of his having occupied the land and paid rent for twelve years, or even twenty years, is equally consistent with his being a tenant-at-will, farmer, or a mokurrureedar. I think, therefore, that the Judge was wrong in holding that on proof of possession, the plaintiff was entitled to a decree. Moreover, he did not merely ask for possession, but he asked the Court to adjudicate upon his alleged mokurruree title and to restore him to possession as mokurrureedar. I think the decision of the Lower Appellate Court must be reversed with costs.

E. Jackson, J.—I am wholly of the same opinion.

The 19th December 1868.

Present:

The Hon'ble J. B. Phear and C. Hobhouse, *Judges.*

Mortgage—Limitation—Foreclosure—Possession.

Case No. 130 of 1868.

Regular Appeal from a decision passed by the Judge of Sarun, dated the 19th March 1868.

Runjeet Narain Singh and others (Plaintiffs), *Appellants,*

versus

Mussummat Shureefoonissa and others (Defendants), *Respondents.*

Mr. R. T. Allan and *Baboos Unnoda Pershad Banerjee* and *Kalee Mohun Doss* for Appellants.

Mr. C. Gregory and *Moonshee Mahomed Eusuff* for Respondents.

Where a mortgage has not legally been put an end to, the mortgagor (or his representatives) is entitled to come into Court and ask to be allowed to redeem, provided 60 years have not elapsed since the last recognition by the mortgagee of the plaintiff's title to the mortgaged property.

Where, in proceedings held before the issue of Circular Order of 22nd July 1813, a mortgagor had the opportunity, in a Court competent to decide the matter, to contest as against the mortgagees all questions of fact necessary to give a good and absolute title to the mortgagees, and though called upon did not show that the mortgage was a bad one, but admitted that the mortgagees were not paid off and that an extension of the year of grace had elapsed without his performing any of the conditions which would have saved the property from being foreclosed: it was HELD, that even if the proceedings did not possess the character of a regular suit, they were sufficient in themselves to effect a foreclosure, if such was their purpose.

Where a party originally a mortgagee out of possession has been put into possession by the act and permission of the mortgagors, he has really (inasmuch as a parol contract is sufficient in this country to pass immoveable property) obtained a new title altogether different from that which he possessed before and having its foundation in the act of the parties themselves when they put him into possession.

Phear, J.—THE plaintiffs sue jointly to redeem certain joint properties specified in the plaint, which they allege were mortgaged under bonds, dated 14th March, 29th August, and 14th September 1806, 8th June 1807, and 9th March 1809, executed by Doorg Beejoy and Hurruck Narain. The plaint is exceedingly imperfect, and it is much to be regretted that it was received by the Lower Court. But although the cause of action is no farther disclosed by it than we have just explained, a written statement was afterwards put in by the plaintiffs in which they

say that "Doorg Beejoy, having overstepped "the bounds of his right, executed ikrarna-"mahs in 1806 and 1807 in reference to "the entire 8-annas share in favor of the "defendant's ancestor, without notifying the "shares of Sheo Dyal Singh and Bunnoo "Singh." They then state that the heirs and representatives of Sheo Dyal Singh and Bunnoo Singh, by certain civil proceedings, recovered their two-thirds share of the property of their ancestor, and that according to an ikrarnamah, dated 9th March 1809, the foreclosure of the property which is now in suit, namely, as they state, the remaining one-third share of the property of the common ancestor, has not taken place: it is still under mortgage.

From the plaint and this written statement taken together, we gather that the plaintiffs sue to redeem certain property as being their joint property; that they rely upon the fact of the property having originally belonged jointly to two brothers whom they now represent, namely, Doorg Beejoy and Hurruck Narain; that this joint property was mortgaged by one of the two brothers, Doorg Beejoy; and that by an ikrarnamah, dated 9th March 1809, the foreclosure of this property which had been attempted by the mortgagees had not taken place, and that therefore the property under mortgage was still under mortgage.

Upon reference to the deeds of 1806, 1807, and 1809, it appears that those of 1806 were executed by Doorg Beejoy alone, that of 1807 by Hurruck Narain, and again that of 1809 by Doorg Beejoy. It is in argument contended by the plaintiffs that the result of these deeds must be treated as if there were two separate mortgages, one by Doorg Beejoy of his share in the property, and the other by Hurruck Narain of his share in the property. But it is observable that the *kul-kobalas* executed in 1806 by Doorg Beejoy make no mention of Hurruck Narain's share. They treat the whole of the property as belonging to Doorg Beejoy himself. The ikrarnamah of 1807 executed by Hurruck Narain represents that Hurruck Narain executed the document as agent of Doorg Beejoy and shareholder of the property. Finally, the ikrarnamah of 1809 is in the sole name of Doorg Beejoy. It appears to us from these facts, and also from the statements which have been made in the argument, that it is impossible to come to any other conclusion than that the property which the plaintiffs now seek to redeem, has been from first to last, until the commencement of this suit, treated as the joint property of Doorg Beejoy and Hurruck Narain, of which the dispositions made by Doorg Beejoy have been effectual as against both brothers. The present suit to redeem is founded, in terms, upon the ikrarnamah of 9th March 1809, and that ikrarnamah is the sole act of Doorg Beejoy. We think, therefore, that the argument put forward by the plaintiffs to the effect that the mortgages were several, and must be treated in this suit upon their separate merits, has not been supported by the facts of the case; and we further feel that it would be extremely difficult, in a suit of this kind, to treat them so even if the facts tended to support the allegation of the mortgages being separate. This is a suit brought by persons alleging themselves to be co-owners, to redeem jointly one property; and we think it would be exceedingly inconvenient, if not entirely out of the power of this Court, to decree a suit in favor of one of the plaintiffs relative to a portion of the property, and to dismiss it relative to the other plaintiff and the other portion of the property. We are of opinion that the facts upon which the plaintiffs rely in their plaint and in their written statement, and the documents referred to by them, show distinctly that the mortgage so made by Doorg Beejoy of the whole of the property was intended by both brothers to be effectual as against them both; and the proceedings from the date of the several mortgages in 1806 till the time when the ikrarnamah of March 1809 was executed, took place with the knowledge of both brothers, and with the intention that these proceedings and the acts connected with them should be the proceedings and acts of both.

In this view, the question that we have to decide is simply this, whether the mortgage of the whole of the property which the plaintiffs say was the result of these several deeds and ikrarnamahs, is still subsisting, and whether the plaintiffs have a right to redeem as against the defendants.

Mr. Allan on behalf of the plaintiffs urges very forcibly that nothing in the shape of foreclosure of this property, that is to say, nothing that in law amounts to a foreclosure, has yet been effected, and therefore, although he is obliged to admit that the last recognition by the defendants, or any one who preceded them, of the plaintiffs' title to the mortgaged property was made 59 years and 10 months before the commencement of the suit, yet the

plaintiffs have a right by law to set up their claim to redeem in a Court of Justice, and that this Court must decide that claim upon the facts of the case, and without regard to the lapse of time which has occurred. We need hardly say that we entirely agree with Mr. Allan in the position which he has thus taken. If the mortgage has not legally been put an end to, then, as 60 years have not elapsed since the last recognition by the mortgagee, there can be no doubt that the plaintiffs are entitled to come into Court and ask to be allowed to redeem. The question, therefore, as we have already said, for the Court to decide is simply this, whether or not the original mortgage upon which the plaintiffs rely has come to an end.

The plaintiffs contend that the ikrarnamah of 9th March 1809 has the effect of keeping the mortgage open, at least for the month succeeding that date, and that, as no proceedings were afterwards taken to foreclose the mortgage from that date until the date of the institution of the suit, the mortgage is still subsisting. We find, upon looking into the documents in this case, a roobakaree of December 1809; and from that it appears that the ikrarnamah of March 1809 was preceded by some sort of process which brought Doorg Beejoy, if not Hurruck Narain also, into Court, and that it was in consequence of Doorg Beejoy having thus been brought into Court by the mortgagees that he made the petition, the substance of which is given in the ikrarnamah of 9th March 1809. By that ikrarnamah certainly, taken into consideration with the other facts mentioned in the roobakaree, we think that Doorg Beejoy at that time very clearly admitted that he had had notice of foreclosure of these very properties more than twelve months antecedently to that day; that the mortgage-money had not been paid within the year of grace which followed upon the notice; and that it was not indeed paid on the date of this ikrarnamah. On the footing of these facts, he begged that the year of grace might be extended for at least a month longer, and that he might have that time within which to pay the money and thus to protect the property from becoming the absolute property of the mortgagees. The roobakaree of December, to our minds, is but the last of the proceedings in Court, which commenced before the execution of the ikrarnamah of the 9th March 1809 by Doorg Beejoy, and that roobakaree states that the month had elapsed, and that within that month (the extension of the year of grace) Doorg Beejoy had failed to pay the mortgage-money, or any portion of it. And we think that it is also clear from the roobakaree that this last proceeding took place in the presence, at any rate, of Doorg Beejoy. Our conclusion is that, whether we call those proceedings, proceedings in a regular suit or not, Doorg Beejoy had an opportunity in a Court competent to decide the matter, to contest as against the mortgagees all questions of fact necessary to give a good and absolute title to the mortgagees. He had the opportunity, and was, in fact, called upon, if he could, to show that the mortgagees were paid off, or that the mortgage was a bad one, or that the year of grace had not elapsed. That he did not do this, that he never attempted to do it, but that on the contrary he admitted every one of the facts at the date of the ikrarnamah, is clear from the roobakaree; and we further conclude that in December, he, in the Court whose roobakaree we are referring to, admitted that at that time the money was not paid, and that the extension of the year of grace had elapsed without his having performed any of the conditions which would have saved the property from being foreclosed. We thus think that the declaration of foreclosure contained in that roobakaree of December 1809, was a declaration as between parties who had appeared before the Court, and who had had every opportunity of establishing such facts in their favor as would have prevented the property from being foreclosed, if such facts could have been established.

Assuming that these proceedings in Court are not equivalent to a regular suit, it is necessary to see whether the decision of the Privy Council reported in Volume V. Weekly Reporter, Privy Council Rulings, page 47, makes them a nullity, so far as regards the validity of the foreclosure. The Privy Council in that case, after reciting the Regulations of Bengal which bear upon the matter of foreclosure and redemption, say as follows: "The general effect of these Regulations is that if any thing is due on the mortgage, and the mortgagor makes an insufficient deposit, and *à fortiori* if he makes no deposit at all, the right of redemption is gone at the expiration of the year of grace. The title of the mortgagee, however, is not even then complete. It was ruled by the Circular Order of the 22nd of July 1813, No. 37, and has ever since been settled law, that the function

"of the Judge under Regulation XVII. of "1806, Section 8, are purely ministerial. "and that a mortgagee after having done all "that this Regulation requires to be done in "order to foreclose the mortgage and make "the conditional sale absolute, must bring a "regular suit to recover possession if he is "out of possession, or to obtain a declara-"tion of his absolute title if he is in posses-"sion."

We observe, in passing, that the passage which we have just now quoted is not a judicial decision. It is merely a statement of the law and practice, preliminary, no doubt, to a final decision in the case before the Privy Council, but in no way necessary to that decision. Mr. Allan has, however, referred to it with the desire, as we understand his argument, of making out that the proceedings before the Court, such as they were, in March 1809, followed by the roobakaree of December, only amounted to the exercise of such of the functions of the Judge as are here mentioned, and referred to as being purely ministerial. We think that Mr. Allan is slightly mistaken in his argument. In referring to the functions of the Judge, under Section 8, Regulation XVII. of 1806, that is, to the functions of the Judge relative to the issuing of the notice, the Privy Council do not in any way refer to the actions of the Judge of such a nature as those which we have spoken of, and which followed the lapse of the year of grace, not preceded it. In truth, what took place in March 1809, and December 1809, had no reference to the Regulations at all; and if, as is probably correct, they do not exactly possess the character of a regular suit, they still were proceedings in which each party had a fair opportunity to represent his case before the Court; and the final decision come to was a decision upon the merits put forward by both parties. It is worthy of remark, as bearing upon this point, that the Privy Council prefaced their judgment in the case to which we have referred by saying "that it is desirable, before going fur-"ther, to state what the law of foreclo-"sure, as established by the Regulations and "the *practice* of the Courts of Bengal, is." They evidently considered proceedings in foreclosure to be matter of practice as well as of Regulation law.

Now, the proceedings with which we are concerned, took place before the Circular Order of 22nd July 1813 was issued, and, as far as any thing we have heard to-day goes to show, they were the proceedings which were regularly practised in the Civil Courts antecedently to the issuing of that order for the purpose of determining between parties the relative claims of redemption and foreclosure. It thus seems that even if this passage of the Privy Council's judgment were to be taken as Mr. Allan wishes us to take it, that is, as an authoritative declaration of the existing law and practice of the Courts of Bengal in reference to suits for redemption and foreclosure, it appears from the express words of the Privy Council that that very law and practice date from July 1813, and were, therefore, not necessarily the law and practice which obtained antecedently to that date.

Mr. Allan further contended, as we understood him, that, in the absence of any thing to the contrary, it must be considered that the Circular Order of July 1813 was declaratory of the previous law and practice, and not the institution of anything new. We do not think that we ought to accept that suggestion. We think that we ought to take what we find to have been the acts of Court as having been properly authorized by law and practice, unless we see some evidence to the contrary. We are therefore of opinion, even having regard to the decision passed by the Privy Council in the case from which I have quoted, that the proceedings of foreclosure, which took place in 1809, were sufficient in themselves to have effected a foreclosure, if such was their purpose. We have already said that we think, that as far as regards Doorg Beejoy, these proceedings in their terms do effect such a foreclosure. But, we also think, from the very words of the written statement of the plaintiffs in the case, to which we have already more than once referred, that the actions of Doorg Beejoy in March 1809, are relied upon in this case as being actions which affected the whole of the property, that is to say, Hurruck Narain's interest as well as Doorg Beejoy's. The plaintiffs say that the ikrarnamah of 9th March 1809 did have the effect of keeping the mortgage of the whole of the property open. That was the ikrarnamah, as we have already said, executed by Doorg Beejoy, in which he admitted knowledge of notice of foreclosure, the pendency of foreclosure-proceedings, and asked for time, and by which time was given. The plaintiffs, by relying upon this as the foundation of their claim to redeem, do, we think, oblige us to come to the conclusion that Hurruck Narain at that time not only had

notice of foreclosure, but that he accepted the acts of Doorg Beejoy in regard to the property and the matter of redemption as being acts which were good as well against himself as against Doorg Beejoy. It follows that the foreclosure which the proceedings of 1809 effected, although in name made against Doorg Beejoy alone, was operative also to bind the property against Hurruck Narain.

This disposes of the case. We wish, however, to add that we think that the second branch of Mr. Gregory's argument would alone have been sufficient to have ensured success to his client. It seems to us impossible, on the written statement of the parties and such of the evidence in the case as we have had a glimpse of, to resist the conclusion that in December 1809 the predecessors of the defendants were allowed to take possession of the property by the permission of Hurruck Narain and Doorg Beejoy. It is here necessary that we should refer once more to the judgment of the Privy Council. The passage which we have already quoted says that, in order to foreclose the mortgage and make the conditional sale absolute, the mortgagee must, after having done all that this Regulation requires, "bring a regular "suit to recover possession, if he is out of pos-"session: or to obtain a declaration of his ab-"solute title, if he is in possession."

Now, we think that these alternatives exhibit two cases quite distinct from the one which Mr. Gregory puts before us. We think that the words refer in the first alternative to the mortgagee being out of possession as mortgagee, and in the second alternative to his being in possession as mortgagee. In either of these cases, he cannot alter his character without bringing a suit, or taking such proceedings as would be equivalent to a suit according to the practice of the Court. But the third alternative which Mr. Gregory puts before us is this, namely, that having been originally a mortgagee out of possession, he has been put into possession by the act and permission of the mortgagor. In other words, inasmuch as a parol contract is sufficient in this country to pass immoveable property, he has really obtained a new title, altogether different from that which he possessed before and having its foundation in the act of the parties themselves when they put him into possession. On the state of facts, which we have already mentioned, we think it is almost incontestable, having regard to the lapse of time which has occurred, that the defendants are justified in maintaining that the mortgage-relationship was put an end to by the act of the mortgagors themselves, and that they, the defendants, or rather their predecessors, obtained possession of, and absolute right to, the land by actual delivery at the hands of those mortgagors.

There is one more defence to this suit which we also think valid as regards a portion of the property. In the suits of December 1823 and May 1824, the very issue which is the cardinal issue in the present suit was, in our opinion, raised between the parties and decided by a competent Court although it then only related to a portion of the lands which are the lands in suit. We understand from the explanation which has been given in the course of the argument on both sides that these suits were suits brought by the present defendant's ancestors, seeking to recover rent from the present plaintiff's ancestors, and that in those suits, the defendants resisted the plaintiff's claim on the ground that the lands were not the lands of the plaintiffs, but belonged to them, the then defendants. Consequently, it was impossible for the Courts to proceed to a decision on the claim of the plaintiffs without determining the issue which was so raised, and that issue having once been raised between the parties, it being the substantial issue in the case, and determined by a competent Court which had full power as between the parties to determine it, it is not now open to those who succeed to the title of the parties in that suit to again re-open it in reference to the same subject of contest. We are reminded that we omitted to mention the names of the villages to which those decrees refer. They are an 8 annas of Mouzah Bhyara and Mouzah Bhugmanpore.

Then, with regard to Rampore, we think it is quite clear, as Rampore was certainly not one of the properties which were mortgaged by the deeds upon which the plaintiffs rely, they can have no right under those deeds to make it their own by redeeming it. It is not necessary that we should express any opinion upon the character of the suit in which the ancestors of the present defendants succeeded in obtaining a decree for the possession of Rampore. We confine ourselves to the remark that it cannot, in our opinion, be made the subject of the title to redeem which the plaintiffs set up under deeds which undoubtedly do not embrace it, or in any way refer to it.

To recapitulate, we think that Rampore was never the subject of the mortgage at

all, and that the mortgage which did exist over other properties was terminated either by complete foreclosure or by the act of the plaintiffs' predecessors in 1809. The plaintiffs' suit, therefore, in our judgment, fails entirely and ought to be dismissed. This appeal is, therefore, dismissed with costs.

The 19th December 1868.

Present:

The Hon'ble F. B. Kemp and E. Jackson, *Judges.*

Registration — Remedy for refusal — Section 84, Act XX., 1866.

Case No. 1422 of 1868.

Special Appeal from a decision passed by the Judge of Tirhoot, dated the 18th February 1868, reversing a decision of the Sudder Ameen of that District, dated the 19th July 1867.

Toolsee Sahoo and others (Plaintiffs), *Appellants,*

versus

Mohadeo Doss and another (Defendants), *Respondents.*

Mr. R. E. Twidale for Appellants.

Mr. C. Gregory for Respondents.

Where a Registrar refuses to register an instrument, the remedy is by a petition to the Judge under Section 84, Act XX. of 1866, a regular suit to enforce registration does not lie.

Kemp, J.—THIS was a suit to enforce registration of a deed being a ticca pottah, which the defendant before the Registrar of Deeds denied the execution of. The Judge held that the suit would not lie, inasmuch as Act XVI. of 1864 had been repealed by Act XX. of 1866, and that Section 15 of the former Act, under which a suit may be brought to enforce registration, had been re-placed by Section 84 of the latter Act, in which Section the course is laid down which ought to be pursued when a Registrar refuses to register a document the registration of which is compulsory. The suit of the plaintiff was, therefore, dismissed with costs.

The decision of this appeal was postponed for the decision of a Full Bench in a case referred by this Bench. That decision* has now been received. Although the point for decision in this case has not been distinctly decided by the Full Bench, inasmuch as the point referred to them was a different one, still from the remarks of some of the learned Judges who formed the Full Bench we think it may be gathered that although the point was not actually before them, they were of opinion that a regular suit to enforce registration, the party having neglected to pursue the steps laid down in Section 84 of Act XX. of 1866, would not lie.

Under the former Act, Act XVI. of 1864, and under Section 15 of that Act, if a District Registrar or a Deputy Registrar refused to register an instrument, it was lawful for any person interested to institute a regular suit to establish his right to have such instrument registered; but the provisions of this Section of the older law are omitted in the latter law, namely, Act XX. of 1866, and from the report of the Select Committee of the Council of the Governor-General of India upon the latter law, it is clear that the Legislature intentionally abolished the regular suit which, under Section 15 of the former law, a party, whose deed the Registrar had refused to register, could bring to establish his right to have such instrument registered, for in paragraph 16 of the Report of the said Committee, the following passage occurs: "Sections 82, 83, and "84 made plainer the remedy for refusing "to register; Section 83 abolishes the propos-"ed regular suit and substitutes an appli-"cation to the Court by a petition." From this it is clear that in the first draft of Act XX. of 1866, it was proposed to make it lawful for any person interested to institute a regular suit, and this privilege was, therefore, intentionally withdrawn when the bill was passing through the Select Committee.

In the present case, the plaintiff having neglected to avail himself of the remedy which the law gave him under Section 84, has only himself to blame. We may also observe that, as remarked by the learned Chief Jus-

* See *infra*, Full Bench Rulings, p. 51.

notice of foreclosure, but that he accepted the acts of Doorg Beejoy in regard to the property and the matter of redemption as being acts which were good as well against himself as against Doorg Beejoy. It follows that the foreclosure which the proceedings of 1809 effected, although in name made against Doorg Beejoy alone, was operative also to bind the property against Hurruck Narain.

This disposes of the case. We wish, however, to add that we think that the second branch of Mr. Gregory's argument would alone have been sufficient to have ensured success to his client. It seems to us impossible, on the written statement of the parties and such of the evidence in the case as we have had a glimpse of, to resist the conclusion that in December 1809 the predecessors of the defendants were allowed to take possession of the property by the permission of Hurruck Narain and Doorg Beejoy. It is here necessary that we should refer once more to the judgment of the Privy Council. The passage which we have already quoted says that, in order to foreclose the mortgage and make the conditional sale absolute, the mortgagee must, after having done all that this Regulation requires, "bring a regular "suit to recover possession, if he is out of pos-"session; or to obtain a declaration of his ab-"solute title, if he is in possession."

Now, we think that these alternatives exhibit two cases quite distinct from the one which Mr. Gregory puts before us. We think that the words refer in the first alternative to the mortgagee being out of possession as mortgagee, and in the second alternative to his being in possession as mortgagee. In either of these cases, he cannot alter his character without bringing a suit, or taking such proceedings as would be equivalent to a suit according to the practice of the Court. But the third alternative which Mr. Gregory puts before us is this, namely, that having been originally a mortgagee out of possession, he has been put into possession by the act and permission of the mortgagor. In other words, inasmuch as a parol contract is sufficient in this country to pass immoveable property, he has really obtained a new title, altogether different from that which he possessed before and having its foundation in the act of the parties themselves when they put him into possession. On the state of facts, which we have already mentioned, we think it is almost incontestable, having regard to the lapse of time which has occurred, that the defendants are justified in maintaining that the mortgage-relationship was put an end to by the act of the mortgagors themselves, and that they, the defendants, or rather their predecessors, obtained possession of, and absolute right to, the land by actual delivery at the hands of those mortgagors.

There is one more defence to this suit which we also think valid as regards a portion of the property. In the suits of December 1823 and May 1824, the very issue which is the cardinal issue in the present suit was, in our opinion, raised between the parties and decided by a competent Court, although it then only related to a portion of the lands which are the lands in suit. We understand from the explanation which has been given in the course of the argument on both sides that these suits were suits brought by the present defendant's ancestors, seeking to recover rent from the present plaintiff's ancestors, and that in those suits, the defendants resisted the plaintiff's claim on the ground that the lands were not the lands of the plaintiffs, but belonged to them, the then defendants. Consequently, it was impossible for the Courts to proceed to a decision on the claim of the plaintiffs without determining the issue which was so raised, and that issue having once been raised between the parties, it being the substantial issue in the case, and determined by a competent Court which had full power as between the parties to determine it, it is not now open to those who succeed to the title of the parties in that suit to again re-open it in reference to the same subject of contest. We are reminded that we omitted to mention the names of the villages to which those decrees refer. They are an 8 annas of Mouzah Bhyara and Mouzah Bhugmanpore.

Then, with regard to Rampore, we think it is quite clear, as Rampore was certainly not one of the properties which were mortgaged by the deeds upon which the plaintiffs rely, they can have no right under those deeds to make it their own by redeeming it. It is not necessary that we should express any opinion upon the character of the suit in which the ancestors of the present defendants succeeded in obtaining a decree for the possession of Rampore. We confine ourselves to the remark that it cannot, in our opinion, be made the subject of the title to redeem which the plaintiffs set up under deeds which undoubtedly do not embrace it, or in any way refer to it.

To recapitulate, we think that Rampore was never the subject of the mortgage at

all, and that the mortgage which did exist over other properties was terminated either by complete foreclosure or by the act of the plaintiffs' predecessors in 1809. The plaintiffs' suit, therefore, in our judgment, fails entirely and ought to be dismissed. This appeal is, therefore, dismissed with costs.

The 19th December 1868.

Present:

The Hon'ble F. B. Kemp and E. Jackson, *Judges.*

Registration — Remedy for refusal — Section 84, Act XX., 1866.

Case No. 1422 of 1868.

Special Appeal from a decision passed by the Judge of Tirhoot, dated the 18th February 1868, reversing a decision of the Sudder Ameen of that District, dated the 19th July 1867.

Toolsee Sahoo and others (Plaintiffs), *Appellants,*

versus

Mohadeo Doss and another (Defendants), *Respondents.*

Mr. R. E. Twidale for Appellants.

Mr. C. Gregory for Respondents.

Where a Registrar refuses to register an instrument, the remedy is by a petition to the Judge under Section 84, Act XX. of 1866, a regular suit to enforce registration does not lie.

Kemp, J.—THIS was a suit to enforce registration of a deed being a ticca pottah, which the defendant before the Registrar of Deeds denied the execution of. The Judge held that the suit would not lie, inasmuch as Act XVI. of 1864 had been repealed by Act XX. of 1866, and that Section 15 of the former Act, under which a suit may be brought to enforce registration, had been re-placed by Section 84 of the latter Act, in which Section the course is laid down which ought to be pursued when a Registrar refuses to register a document the registration of which is compulsory. The suit of the plaintiff was, therefore, dismissed with costs.

The decision of this appeal was postponed for the decision of a Full Bench in a case referred by this Bench. That decision* has now been received. Although the point for decision in this case has not been distinctly decided by the Full Bench, inasmuch as the point referred to them was a different one, still from the remarks of some of the learned Judges who formed the Full Bench we think it may be gathered that although the point was not actually before them, they were of opinion that a regular suit to enforce registration, the party having neglected to pursue the steps laid down in Section 84 of Act XX. of 1866, would not lie.

Under the former Act, Act XVI. of 1864, and under Section 15 of that Act, if a District Registrar or a Deputy Registrar refused to register an instrument, it was lawful for any person interested to institute a regular suit to establish his right to have such instrument registered; but the provisions of this Section of the older law are omitted in the latter law, namely, Act XX. of 1866, and from the report of the Select Committee of the Council of the Governor-General of India upon the latter law, it is clear that the Legislature intentionally abolished the regular suit which, under Section 15 of the former law, a party, whose deed the Registrar had refused to register, could bring to establish his right to have such instrument registered, for in paragraph 16 of the Report of the said Committee, the following passage occurs: "Sections 82, 83, and "84 made plainer the remedy for refusing "to register; Section 83 abolishes the propos-"ed regular suit and substitutes an appli-"cation to the Court by a petition." From this it is clear that in the first draft of Act XX. of 1866, it was proposed to make it lawful for any person interested to institute a regular suit, and this privilege was, therefore, intentionally withdrawn when the bill was passing through the Select Committee.

In the present case, the plaintiff having neglected to avail himself of the remedy which the law gave him under Section 84, has only himself to blame. We may also observe that, as remarked by the learned Chief Jus-

* See *infra*, Full Bench Rulings, p. 51.

tice in the decision of the Full Bench above alluded to, a purchaser or lessee, as the present plaintiff is, can always protect himself, and if he does not, it is his own fault. He should take care before he pays his purchase-money—or as in this instrument, advances money on a zur-i-peshgee lease—to get the deed registered, or to obtain an authenticated power-of-attorney from the vendor or lessor authorizing some one in whom the purchaser or lessee has confidence to register the deed or lease as agent of the vendor or lessee.

We are, therefore, of opinion that the Judge was right in law in holding that the suit of the plaintiff would not lie.

We dismiss the special appeal with costs, bearing interest.

Jackson, J.—In the decision which I recorded on the occasion of the former suit which has been referred to by my learned colleague, and which was subsequently decided by a Full Bench of this Court, I stated my opinion that the right to bring a separate suit to enforce registration had not been taken away by Act XX. of 1866. The Judges who decided the Full Bench suit have nearly all stated their opinion that that power to bring a suit no longer exists, and therefore I do not press that opinion any longer. In addition to that, it would appear very distinctly, from what we have since elicited on examination of the report of the Select Committee of the Legislature which passed this law, that the Legislature did intend to abolish, and did abolish in fact, the power to bring a separate suit. In the Draft Act which was originally published, there was a distinct Section which stated that a person who had failed in obtaining registry could bring a regular suit, and it was distinctly declared in that Section that, for the purposes of that suit, the unregistered deed might be received in evidence. The Select Committee deliberately altered that Section and substituted in its place the procedure by petition. I think it would have been better had it been distinctly stated in the Act that the power to bring a suit was abolished. I think that many people may be misled by its not having been so distinctly stated. I think that the plaintiff in this case has certainly been misled by it. However that may be, as it is for this Court to carry out the law as it has been passed, if the plaintiff has made a mistake the Court cannot assist him. The plaintiff's remedy was by petition to the Judge and not by a civil suit.

The civil suit must, therefore, be dismissed.

The 21st December 1868.

Present:

The Hon'ble H. V. Bayley and A. G. Macpherson, *Judges.*

Disappearance of a Hindoo — Presumption of death — Succession.

Case No. 1869 of 1868.

Special Appeal from a decision passed by the Additional Judge of Jessore, dated the 5th March 1868, reversing a decision of the Sudder Ameen of that District, dated the 2nd October 1866.

Junmajoy Mojoomdar (Plaintiff), *Appellant,*

versus

Keshub Laul Ghose (Defendant), *Respondent.*

Mr. R. E. Twidale and *Baboo Bhowanee Churn Dutt* for Appellant.

Mr. J. S. Rochfort and *Baboos Romanath Bose* and *Mohendro Lall Shome* for Respondent.

When a Hindoo disappears and is not heard of for a length of time, no right accrues to any person as his heir until after the expiry of 12 years from the date on which he was last heard of.

Macpherson, J.—We think the judgment of the Lower Appellate Court is right, and this appeal ought to be dismissed. As the case is placed before us, the real contest is as to the right of succession to one Gora Chand. This Gora Chand, it is found by the Lower Appellate Court, disappeared about the year 1258, and has not since been heard of. A grandson, Punchanun, and Umbica, the widow of a deceased son, having both died, the respondent Keshub Laul Ghose contends that he, as the next heir of Gora Chand, at

d

the time of expiry of 12 years from the date of Gora Chand's disappearance, is entitled to possession of the property which is the subject of the present suit. The Lower Court has found, as a fact, that Punchanun died in Srabun or Bhadur 1270; that Umbica died in April of the same year; and that both of them died within 12 years of the date of Gora Chand's disappearance.

The plaintiff in this suit claims under a mortgage from Punchanun; but the respondent Keshub Laul contends that as Punchanun, if he did mortgage the property, did so within 12 years of Gora Chand's disappearance, he did it before any right accrued to him and at a time when he could not deal with the property, and that, therefore, the mortgage does not affect or interfere with the rights of Keshub Laul as the next heir of Gora Chand. The question is whether, when a Hindoo disappears, and is not heard of for a length of time, any person can succeed to or take any interest in his property as heir, until after the expiry of 12 years from the date on which he was last heard of.

We think that no right accrues to any person as heir to the person disappearing until the 12 years have been completed. There is not much authority on the subject; but this appears to be the opinion of such writers as have touched upon the point. In the course of the argument, we have been referred to Macnaghten's Hindoo Law, Volume II., page 9; a case reported in Sir Hyde East's Notes and to be found in Morley's Digest, page 152; another case in Select Reports, Volume III., page 29; Strange's Hindoo Law, Volume I., page 853; Vyavastha Durpana by Baboo Shama Churn Sircar, pages 10 and 11; and an unreported case, Regular Appeal No. 46 of 1868, decided by a Division Court (Loch and Glover, JJ.) on the 3rd December 1868.

Being of the opinion which we have expressed, we think the judgment of the Lower Appellate Court is substantially right.

It has been further urged in special appeal that the plaintiff is entitled to a decree on the ground that Gora Chand became a Byragee before or when he disappeared; but that was not one of the issues raised in the first Court, nor was it a part of the case as originally made by the plaintiff; and further, the Lower Appellate Court finds as a fact that it is not proved that Gora Chand became a Byragee. We, therefore, think that on this ground also the special appellant fails, and that this appeal should be dismissed with costs.

The 21st December 1868.

Present:

The Hon'ble J. B. Phear and C. Hobhouse, *Judges.*

Procedure—Execution—Suit—Wrongful payment by order of Court.

Case No. 2471 of 1868.

Special Appeal from a decision passed by the Judge of the 24-Pergunnahs, dated the 5th June 1868, affirming a decision of the 2nd Subordinate Judge of that District, dated the 30th December 1867.

Omanath Roy Chowdhry (one of the Defendants), *Appellant,*

versus

Suroop Chunder Bose (Plaintiff), *Respondent.*

Mr. R. T. Allan and *Baboo Motee Lall Mookerjee* for Appellant.

Baboo Chunder Madhub Ghose for Respondent.

A question already decided by a Court of special jurisdiction cannot be tried again in course of executing the decree passed by that Court.

Money paid over at the instance of a judgment creditor under a wrongful order of Court may be recovered by means of a suit in the Civil Court.

Phear, J.—We think that the Lower Appellate Court is quite correct in its view of the law. Indeed, if we held otherwise, we should be holding that a question which had already been decided by a Court of special jurisdiction could nevertheless in the course of executing the decree passed by that Court be tried over again, and the decision then come to be reviewed in the Civil Court. After the decree for arrears of rent was passed by the Deputy Collector against Koylash, all that remained for the Deputy Collector's Court to do was to execute the decree against Koylash, and that Court had no jurisdiction to execute the decree as if it had been passed against some other person.

It seems to us that there is also another ground upon which the judgment of the Court below can be supported, namely, that even had this decree of the Deputy Collector been passed against Suroop Chunder himself, the order made by the Deputy Collector for the payment of money into Court, and the subsequent payment of that money over to the judgment-creditor would not have

tween two purchasers from the same person. The defendant purchased this estate. The plaintiff did not. He may have some lien on the estate he did purchase; but he has no lien on this estate which he did not purchase.

The decision of the Principal Sudder Ameen is reversed, and the plaintiff's suit, as far as it relates to this defendant and this estate, is dismissed with costs.

The 18th December 1868.

Present:

The Hon'ble L. S. Jackson and E. Jackson, *Judges.*

Mortgagor—Foreclosure in respect of a share.

Case No. 1645 of 1868.

Special Appeal from a decision passed by the Judge of Shahabad, dated the 25th March 1868, reversing a decision of the Moonsiff of Buxar, dated the 29th November 1867.

Bhora Roy and others (Plaintiffs), *Appellants,*

versus

Abilack Roy and others (Defendants), *Respondents.*

Baboo Annund Chunder Ghossal for Appellants.

Baboos Poorno Chunder Shome and *Shib Chunder Chatterjee* for Respondents.

Where several parties have an interest in a mortgage, it is not competent for one of them to foreclose in respect of his fractional share.

A party suing for possession of a share of mortgaged property (after its release has been effected by an arrangement made between the mortgagees and mortgagor) on the ground that he had an interest in the mortgage and in the funds advanced by the mortgagees, must show that the mortgagor had notice of such interest.

L. S. Jackson, J.—I THINK the plaintiff in this case cannot succeed. The allegation was that the plaintiff had been a member of a joint Hindoo family with one Bechun Roy and Leka Roy; that the defendants Abilack and others had executed in 1254 a deed of conditional sale of certain immoveable properties to Leka and Bechun; that in 1862 the plaintiff had brought his suit against Leka and Bechun (making the mortgagors parties thereto) in which he established his right to an interest in the mortgage, and recovered from his co-sharers a portion of the profits which they had derived from a ticca lease which they held of the same property; that he subsequently issued a notice of foreclosure to the extent of his fractional share in the mortgage, and he now sues to recover possession of the said share, foreclosure having been completed according to law.

It appeared that a few years after the execution of the deed, and previous to the suit by this plaintiff against his co-sharers, the mortgagors had come to a settlement with Leka and Bechun, by virtue of which the original deed was given up and a fresh deed was executed to them. The Judge dismissed the plaintiff's suit on appeal on the ground of limitation, holding that as 12 years had elapsed since they were denied any participation in the profits by their co-sharers, they could not now maintain the suit.

This decision being brought before us in special appeal, the respondent admits that it cannot be supported, but he contends that the plaintiff's suit must fail for other reasons, and we think this is so.

In the first place, it appears that there has been no foreclosure of the mortgaged property as required by law. The plaintiff, as he alleges, was one of certain parties having an interest in the mortgage. We are not aware of any authority to show that any one of such parties is at liberty to foreclose in respect of his fractional share. That is all the plaintiff has done in the present case, and it seems to us, therefore, that no valid foreclosure having taken place, he is not entitled to sue for possession.

In addition to this, it seems to me that the plaintiff had really no case. If it be supposed, as probably it must be conceded, that the plaintiff had an interest in the mortgage and in the funds advanced by Leka and Bechun, it would still be necessary to show that the mortgagor had notice of that interest so as to render the arrangement afterwards entered into with Leka aud Bechun insufficient to release the mortgagor. It appears to me that there was no evidence to show that he had any such notice of that interest. We have been asked to remand the case to the Court below with a view to a decision on this point on the evidence, but the only evidence which has been brought to our notice is an averment in the written statement, that at the time of the mortgage the plaintiff and the parties named in the deed were members of a joint Hindoo family, but that partition subsequently took place whereby the interest in the mortgage was assigned to Bechun alone. This, it seems to me quite clear, is no admission at all that the mortgagor was aware

of the interest of the plaintiff at the time. It is an admission probably that he is aware of it now, but not that he knew it at the time of the mortgage or at the time of the subsequent arrangement in 1857. In addition to this, it may be said that if the plaintiff permitted his co-sharers to deal with his money by effecting the mortgage in 1254 in their two names, he did thereby give them such dominion over his money as to be bound by the subsequent arrangement entered into by them in 1857.

For these reasons, it seems to me quite manifest that the plaintiffs had no case, and that, instead of obtaining relief as against their co-sharers, they have sought to make the mortgagor liable, when, in fact, no liability exists. Whether or no the plaintiff is entitled to share in the benefit of the arrangement of 1857 is a question which we are not at present called upon to decide.

I think, therefore, that the judgment of the Lower Appellate Court must be affirmed, and this special appeal dismissed with costs.

E. Jackson, J.—I concur in the judgment and in the reasons stated.

The 18th December 1868.

Present:

The Hon'ble L. S. Jackson and E. Jackson, *Judges.*

Evidence—Recital in a decree between other parties—Possession by tenant.

Case No. 1808 of 1868.

Special Appeal from a decision passed by the Judge of Shahabad, dated the 16th April 1868, affirming a decision of the Sudder Ameen of that District, dated the 18th February 1868.

Sheo Dyal Pooree and another (two of the Defendants), *Appellants,*

versus

Mohabeer Pershad (Plaintiff), *Respondent.*

Baboos Chunder Madhub Ghose and *Romesh Chunder Mitter* for Appellants.

Baboos Unnoda Pershad Banerjee, Mohesh Chunder Chowdhry, Poorno Chunder Shome, and *Mohinee Mohun Roy* for Respondent.

A recital in a decree in a suit not between the parties to the present suit or those under whom they claim, cannot be evidence to bind the defendants in the present suit.

Possession by a tenant does not in itself lead to any inference as to the character of the tenant; the fact of his having occupied the land, and paid rent, 12 years and even 20 years, being equally consistent with his being a tenant-at-will, a farmer, or a mokurrureedar.

L. S. Jackson, J.—The plaintiff in this case alleged that he held a mokurruree tenure of the lands in dispute under the party from whom the defendant, Sheo Churn, had purchased, and under the defendant, Sheo Dyal; and that having brought a suit in the Revenue Court against the defendants for damages on account of an alleged injury to his crops committed by them, he had been found by the Revenue Court not to be in possession, and that consequently by reason of that decision, and on the date of the decision he had been dispossessed; he, therefore, asked the Court to adjudicate upon his mokurruree title and re-place him in possession.

The Lower Appellate Court seems to me to have distinctly found that the alleged mokurruree title of the plaintiff was not proved but having allowed the plaintiff an opportunity of adducing further evidence on the question of possession, and the plaintiff having given such evidence, the Judge considered that possession for more than 12 years had been made out on the plaintiff's part and therefore on the ground simply of his possession affirmed the decree which the plaintiff had obtained. The contention before us in special appeal is that under the circumstances of this case mere proof of possession is not sufficient to entitle the plaintiff to a verdict.

For the respondent it is urged that, in the first place, there was evidence, and conclusive evidence, in favor of the plaintiff as to his mokurruree right, and that no objection to the finding of the Court below on that point has been tendered, but also it is urged that proof of possession was sufficient.

As to the so-called conclusive evidence regarding the plaintiff's mokurruree, it appears to me that it was not such evidence. The re-

spondent's vakeel refers to an arbitration-award made in 1836 and to an admission of Sucheedanund, an ancestor of the defendant Sheo Churn's vendor, as being conclusive as to the arbitration-award. If it be conceded that the award is admissible and has been properly proved, it amounts only to a determination of the arbitrators that the plaintiff's vendor ought to have a mokurruree lease, and it would have to be shown that the mokurruree lease had in fact been executed in pursuance of the award. Then it is said that the admission of Sucheedanund supplies that want. That admission has not been laid before us. A recital of it is said to be contained in a decree of the Benares Court in a suit between Sucheedanund and Sheo Dyal, Sheo Dyal being then plaintiff. It seems to me that such a recital taken from a decree not between the parties to the present suit, or those under whom they claim, cannot be evidence to bind the defendants.

The question remains whether the Judge was right in holding that the plaintiff was entitled to a judgment on merely proving his possession. The respondent's pleader cites a decision of this Bench, to be found in Volume X. of the Weekly Reporter, page 61, Bissonath Komilla and others, appellants. That case appears to me clearly distinguishable from the present. In that case, the plaintiff held the lands in dispute as lakherajdar, and his possession was consequently adverse to that of the defendant who was the zemindar; and in that case Mr. Justice Mitter and myself, properly as I think, applied the ruling of the Judicial Committee of the Privy Council which is cited in our judgment. In the present case, the plaintiff was by his own admission the tenant of the defendants, and he states that he paid them rent; his possession, therefore, does not in itself lead to any inference as to the character of the tenure. The fact of his having occupied the land and paid rent for twelve years, or even twenty years, is equally consistent with his being a tenant-at-will, farmer, or a mokurrureedar. I think, therefore, that the Judge was wrong in holding that on proof of possession, the plaintiff was entitled to a decree. Moreover, he did not merely ask for possession, but he asked the Court to adjudicate upon his alleged mokurruree title and to restore him to possession as mokurrureedar. I think the decision of the Lower Appellate Court must be reversed with costs.

E. Jackson, J.—I am wholly of the same opinion.

The 19th December 1868.

Present:

The Hon'ble J. B. Phear and C. Hobhouse, *Judges.*

Mortgage—Limitation—Foreclosure—Possession.

Case No. 130 of 1868.

Regular Appeal from a decision passed by the Judge of Sarun, dated the 19th March 1868.

Runjeet Narain Singh and others (Plaintiffs), *Appellants,*

versus

Mussummat Shureefoonissa and others (Defendants), *Respondents.*

Mr. R. T. Allan and *Baboos Unnoda Pershad Banerjee* and *Kalee Mohun Doss* for Appellants.

Mr. C. Gregory and *Moonshee Mahomed Eusuff* for Respondents.

Where a mortgage has not legally been put an end to, the mortgagor (or his representatives) is entitled to come into Court and ask to be allowed to redeem, provided 60 years have not elapsed since the last recognition by the mortgagee of the plaintiff's title to the mortgaged property.

Where, in proceedings held before the issue of Circular Order of 22nd July 1813, a mortgagor had the opportunity, in a Court competent to decide the matter, to contest as against the mortgagees all questions of fact necessary to give a good and absolute title to the mortgagees, and though called upon did not show that the mortgage was a bad one, but admitted that the mortgagees were not paid off and that an extension of the year of grace had elapsed without his performing any of the conditions which would have saved the property from being foreclosed: it was HELD, that even if the proceedings did not possess the character of a regular suit, they were sufficient in themselves to effect a foreclosure, if such was their purpose.

Where a party originally a mortgagee out of possession has been put into possession by the act and permission of the mortgagors, he has really (inasmuch as a parol contract is sufficient in this country to pass immoveable property) obtained a new title altogether different from that which he possessed before and having its foundation in the act of the parties themselves when they put him into possession.

Phear, J.—THE plaintiffs sue jointly to redeem certain joint properties specified in the plaint, which they allege were mortgaged under bonds, dated 14th March, 29th August, and 14th September 1806, 8th June 1807, and 9th March 1809, executed by Doorg Beejoy and Hurruck Narain. The plaint is exceedingly imperfect, and it is much to be regretted that it was received by the Lower Court. But although the cause of action is no farther disclosed by it than we have just explained, a written statement was afterwards put in by the plaintiffs in which they

f

say that "Doorg Beejoy, having overstepped "the bounds of his right, executed ikrarnamahs in 1806 and 1807 in reference to "the entire 8-annas share in favor of the "defendant's ancestor, without notifying the "shares of Sheo Dyal Singh and Bunnoo "Singh." They then state that the heirs and representatives of Sheo Dyal Singh and Bunnoo Singh, by certain civil proceedings, recovered their two-thirds share of the property of their ancestor, and that according to an ikrarnamah, dated 9th March 1809, the foreclosure of the property which is now in suit, namely, as they state, the remaining one-third share of the property of the common ancestor, has not taken place: it is still under mortgage.

From the plaint and this written statement taken together, we gather that the plaintiffs sue to redeem certain property as being their joint property; that they rely upon the fact of the property having originally belonged jointly to two brothers whom they now represent, namely, Doorg Beejoy and Hurruck Narain; that this joint property was mortgaged by one of the two brothers, Doorg Beejoy; and that by an ikrarnamah, dated 9th March 1809, the foreclosure of this property which had been attempted by the mortgagees had not taken place, and that therefore the property under mortgage was still under mortgage.

Upon reference to the deeds of 1806, 1807, and 1809, it appears that those of 1806 were executed by Doorg Beejoy alone, that of 1807 by Hurruck Narain, and again that of 1809 by Doorg Beejoy. It is in argument contended by the plaintiffs that the result of these deeds must be treated as if there were two separate mortgages, one by Doorg Beejoy of his share in the property, and the other by Hurruck Narain of his share in the property. But it is observable that the *kut-kobalas* executed in 1806 by Doorg Beejoy make no mention of Hurruck Narain's share. They treat the whole of the property as belonging to Doorg Beejoy himself. The ikrarnamah of 1807 executed by Hurruck Narain represents that Hurruck Narain executed the document as agent of Doorg Beejoy and shareholder of the property. Finally, the ikrarnamah of 1809 is in the sole name of Doorg Beejoy. It appears to us from these facts, and also from the statements which have been made in the argument, that it is impossible to come to any other conclusion than that the property which the plaintiffs now seek to redeem, has been from first to last, until the commencement of this suit, treated as the joint property of Doorg Beejoy and Hurruck Narain, of which the dispositions made by Doorg Beejoy have been effectual as against both brothers. The present suit to redeem is founded, in terms, upon the ikrarnamah of 9th March 1809, and that ikrarnamah is the sole act of Doorg Beejoy. We think, therefore, that the argument put forward by the plaintiffs to the effect that the mortgages were several, and must be treated in this suit upon their separate merits, has not been supported by the facts of the case; and we further feel that it would be extremely difficult, in a suit of this kind, to treat them so even if the facts tended to support the allegation of the mortgages being separate. This is a suit brought by persons alleging themselves to be co-owners, to redeem jointly one property; and we think it would be exceedingly inconvenient, if not entirely out of the power of this Court, to decree a suit in favor of one of the plaintiffs relative to a portion of the property, and to dismiss it relative to the other plaintiff and the other portion of the property. We are of opinion that the facts upon which the plaintiffs rely in their plaint and in their written statement, and the documents referred to by them, show distinctly that the mortgage so made by Doorg Beejoy of the whole of the property was intended by both brothers to be effectual as against them both; and the proceedings from the date of the several mortgages in 1806 till the time when the ikrarnamah of March 1809 was executed, took place with the knowledge of both brothers, and with the intention that these proceedings and the acts connected with them should be the proceedings and acts of both.

In this view, the question that we have to decide is simply this, whether the mortgage of the whole of the property which the plaintiffs say was the result of these several deeds and ikrarnamahs, is still subsisting, and whether the plaintiffs have a right to redeem as against the defendants.

Mr. Allan on behalf of the plaintiffs urges very forcibly that nothing in the shape of foreclosure of this property, that is to say, nothing that in law amounts to a foreclosure, has yet been effected, and therefore, although he is obliged to admit that the last recognition by the defendants, or any one who preceded them, of the plaintiffs' title to the mortgaged property was made 59 years and 10 months before the commencement of the suit, yet the

plaintiffs have a right by law to set up their claim to redeem in a Court of Justice, and that this Court must decide that claim upon the facts of the case, and without regard to the lapse of time which has occurred. We need hardly say that we entirely agree with Mr. Allan in the position which he has thus taken. If the mortgage has not legally been put an end to, then, as 60 years have not elapsed since the last recognition by the mortgagee, there can be no doubt that the plaintiffs are entitled to come into Court and ask to be allowed to redeem. The question, therefore, as we have already said, for the Court to decide is simply this, whether or not the original mortgage upon which the plaintiffs rely has come to an end.

The plaintiffs contend that the ikrarnamah of 9th March 1809 has the effect of keeping the mortgage open, at least for the month succeeding that date, and that, as no proceedings were afterwards taken to foreclose the mortgage from that date until the date of the institution of the suit, the mortgage is still subsisting. We find, upon looking into the documents in this case, a roobakaree of December 1809; and from that it appears that the ikrarnamah of March 1809 was preceded by some sort of process which brought Doorg Beejoy, if not Hurruck Narain also, into Court, and that it was in consequence of Doorg Beejoy having thus been brought into Court by the mortgagees that he made the petition, the substance of which is given in the ikrarnamah of 9th March 1809. By that ikrarnamah certainly, taken into consideration with the other facts mentioned in the roobakaree, we think that Doorg Beejoy at that time very clearly admitted that he had had notice of foreclosure of these very properties more than twelve months antecedently to that day; that the mortgage-money had not been paid within the year of grace which followed upon the notice; and that it was not indeed paid on the date of this ikrarnamah. On the footing of these facts, he begged that the year of grace might be extended for at least a month longer, and that he might have that time within which to pay the money and thus to protect the property from becoming the absolute property of the mortgagees. The roobakaree of December, to our minds, is but the last of the proceedings in Court, which commenced before the execution of the ikrarnamah of the 9th March 1809 by Doorg Beejoy, and that roobakaree states that the month had elapsed, and that within that month (the extension of the year of grace) Doorg Beejoy had failed to pay the mortgage-money, or any portion of it. And we think that it is also clear from the roobakaree that this last proceeding took place in the presence, at any rate, of Doorg Beejoy. Our conclusion is that, whether we call those proceedings, proceedings in a regular suit or not, Doorg Beejoy had an opportunity in a Court competent to decide the matter, to contest as against the mortgagees all questions of fact necessary to give a good and absolute title to the mortgagees. He had the opportunity, and was, in fact, called upon, if he could, to show that the mortgagees were paid off, or that the mortgage was a bad one, or that the year of grace had not elapsed. That he did not do this, that he never attempted to do it, but that on the contrary he admitted every one of the facts at the date of the ikrarnamah, is clear from the roobakaree; and we further conclude that in December, he, in the Court whose roobakaree we are referring to, admitted that at that time the money was not paid, and that the extension of the year of grace had elapsed without his having performed any of the conditions which would have saved the property from being foreclosed. We thus think that the declaration of foreclosure contained in that roobakaree of December 1809, was a declaration as between parties who had appeared before the Court, and who had had every opportunity of establishing such facts in their favor as would have prevented the property from being foreclosed, if such facts could have been established.

Assuming that these proceedings in Court are not equivalent to a regular suit, it is necessary to see whether the decision of the Privy Council reported in Volume V. Weekly Reporter, Privy Council Rulings, page 47, makes them a nullity, so far as regards the validity of the foreclosure. The Privy Council in that case, after reciting the Regulations of Bengal which bear upon the matter of foreclosure and redemption, say as follows: "The general effect of these Regulations is that if any thing is due on the mortgage, and the mortgagor makes an insufficient deposit, and *à fortiori* if he makes no deposit at all, the right of redemption is gone at the expiration of the year of grace. The title of the mortgagee, however, is not even then complete. It was ruled by the Circular Order of the 22nd of July 1813, No. 37, and has ever since been settled law, that the function

"of the Judge under Regulation XVII. of "1806, Section 8, are purely ministerial. "and that a mortgagee after having done all "that this Regulation requires to be done in "order to foreclose the mortgage and make "the conditional sale absolute, must bring a "regular suit to recover possession if he is "out of possession, or to obtain a declara-"tion of his absolute title if he is in posses-"sion."

We observe, in passing, that the passage which we have just now quoted is not a judicial decision. It is merely a statement of the law and practice, preliminary, no doubt, to a final decision in the case before the Privy Council, but in no way necessary to that decision. Mr. Allan has, however, referred to it with the desire, as we understand his argument, of making out that the proceedings before the Court, such as they were, in March 1809, followed by the roobakaree of December, only amounted to the exercise of such of the functions of the Judge as are here mentioned, and referred to as being purely ministerial. We think that Mr. Allan is slightly mistaken in his argument. In referring to the functions of the Judge, under Section 8, Regulation XVII. of 1806, that is, to the functions of the Judge relative to the issuing of the notice, the Privy Council do not in any way refer to the actions of the Judge of such a nature as those which we have spoken of, and which followed the lapse of the year of grace, not preceded it. In truth, what took place in March 1809, and December 1809, had no reference to the Regulations at all; and if, as is probably correct, they do not exactly possess the character of a regular suit, they still were proceedings in which each party had a fair opportunity to represent his case before the Court; and the final decision come to was a decision upon the merits put forward by both parties. It is worthy of remark, as bearing upon this point, that the Privy Council prefaced their judgment in the case to which we have referred by saying "that it is desirable, before going fur-"ther, to state what the law of foreclo-"sure, as established by the Regulations and "the *practice* of the Courts of Bengal, is." They evidently considered proceedings in foreclosure to be matter of practice as well as of Regulation law.

Now, the proceedings with which we are concerned, took place before the Circular Order of 22nd July 1813 was issued, and, as far as any thing we have heard to-day goes to show, they were the proceedings which were regularly practised in the Civil Courts antecedently to the issuing of that order for the purpose of determining between parties the relative claims of redemption and foreclosure. It thus seems that even if this passage of the Privy Council's judgment were to be taken as Mr. Allan wishes us to take it, that is, as an authoritative declaration of the existing law and practice of the Courts of Bengal in reference to suits for redemption and foreclosure, it appears from the express words of the Privy Council that that very law and practice date from July 1813, and were, therefore, not necessarily the law and practice which obtained antecedently to that date.

Mr. Allan further contended, as we understood him, that, in the absence of any thing to the contrary, it must be considered that the Circular Order of July 1813 was declaratory of the previous law and practice, and not the institution of anything new. We do not think that we ought to accept that suggestion. We think that we ought to take what we find to have been the acts of Court as having been properly authorized by law and practice, unless we see some evidence to the contrary. We are therefore of opinion, even having regard to the decision passed by the Privy Council in the case from which I have quoted, that the proceedings of foreclosure, which took place in 1809, were sufficient in themselves to have effected a foreclosure, if such was their purpose. We have already said that we think, that as far as regards Doorg Beejoy, these proceedings in their terms do effect such a foreclosure. But, we also think, from the very words of the written statement of the plaintiffs in the case, to which we have already more than once referred, that the actions of Doorg Beejoy in March 1809, are relied upon in this case as being actions which affected the whole of the property, that is to say, Hurruck Narain's interest as well as Doorg Beejoy's. The plaintiffs say that the ikrarnamah of 9th March 1809 did have the effect of keeping the mortgage of the whole of the property open. That was the ikrarnamah, as we have already said, executed by Doorg Beejoy, in which he admitted knowledge of notice of foreclosure, the pendency of foreclosure-proceedings, and asked for time, and by which time was given. The plaintiffs, by relying upon this as the foundation of their claim to redeem, do, we think, oblige us to come to the conclusion that Hurruck Narain at that time not only had

notice of foreclosure, but that he accepted the acts of Doorg Beejoy in regard to the property and the matter of redemption as being acts which were good as well against himself as against Doorg Beejoy. It follows that the foreclosure which the proceedings of 1809 effected, although in name made against Doorg Beejoy alone, was operative also to bind the property against Hurruck Narain.

This disposes of the case. We wish, however, to add that we think that the second branch of Mr. Gregory's argument would alone have been sufficient to have ensured success to his client. It seems to us impossible, on the written statement of the parties and such of the evidence in the case as we have had a glimpse of, to resist the conclusion that in December 1809 the predecessors of the defendants were allowed to take possession of the property by the permission of Hurruck Narain and Doorg Beejoy. It is here necessary that we should refer once more to the judgment of the Privy Council. The passage which we have already quoted says that, in order to foreclose the mortgage and make the conditional sale absolute, the mortgagee must, after having done all that this Regulation requires, "bring a regular "suit to recover possession, if he is out of pos-"session; or to obtain a declaration of his ab-"solute title, if he is in possession."

Now, we think that these alternatives exhibit two cases quite distinct from the one which Mr. Gregory puts before us. We think that the words refer in the first alternative to the mortgagee being out of possession as mortgagee, and in the second alternative to his being in possession as mortgagee. In either of these cases, he cannot alter his character without bringing a suit, or taking such proceedings as would be equivalent to a suit according to the practice of the Court. But the third alternative which Mr. Gregory puts before us is this, namely, that having been originally a mortgagee out of possession, he has been put into possession by the act and permission of the mortgagor. In other words, inasmuch as a parol contract is sufficient in this country to pass immoveable property, he has really obtained a new title, altogether different from that which he possessed before and having its foundation in the act of the parties themselves when they put him into possession. On the state of facts, which we have already mentioned, we think it is almost incontestable, having regard to the lapse of time which has occurred, that the defendants are justified in maintaining that the mortgage-relationship was put an end to by the act of the mortgagors themselves, and that they, the defendants, or rather their predecessors, obtained possession of, and absolute right to, the land by actual delivery at the hands of those mortgagors.

There is one more defence to this suit which we also think valid as regards a portion of the property. In the suits of December 1823 and May 1824, the very issue which is the cardinal issue in the present suit was, in our opinion, raised between the parties and decided by a competent Court although it then only related to a portion of the lands which are the lands in suit. We understand from the explanation which has been given in the course of the argument on both sides that these suits were suits brought by the present defendant's ancestors, seeking to recover rent from the present plaintiff's ancestors, and that in those suits, the defendants resisted the plaintiff's claim on the ground that the lands were not the lands of the plaintiffs, but belonged to them, the then defendants. Consequently, it was impossible for the Courts to proceed to a decision on the claim of the plaintiffs without determining the issue which was so raised, and that issue having once been raised between the parties, it being the substantial issue in the case, and determined by a competent Court which had full power as between the parties to determine it, it is not now open to those who succeed to the title of the parties in that suit to again re-open it in reference to the same subject of contest. We are reminded that we omitted to mention the names of the villages to which those decrees refer. They are an 8 annas of Mouzah Bhyara and Mouzah Bhugmanpore.

Then, with regard to Rampore, we think it is quite clear, as Rampore was certainly not one of the properties which were mortgaged by the deeds upon which the plaintiffs rely, they can have no right under those deeds to make it their own by redeeming it. It is not necessary that we should express any opinion upon the character of the suit in which the ancestors of the present defendants succeeded in obtaining a decree for the possession of Rampore. We confine ourselves to the remark that it cannot, in our opinion, be made the subject of the title to redeem which the plaintiffs set up under deeds which undoubtedly do not embrace it, or in any way refer to it.

To recapitulate, we think that Rampore was never the subject of the mortgage at

all, and that the mortgage which did exist over other properties was terminated either by complete foreclosure or by the act of the plaintiffs' predecessors in 1809. The plaintiffs' suit, therefore, in our judgment, fails entirely and ought to be dismissed. This appeal is, therefore, dismissed with costs.

The 19th December 1868.

Present:

The Hon'ble F. B. Kemp and E. Jackson, *Judges.*

Registration — Remedy for refusal — Section 84, Act XX., 1866.

Case No. 1422 of 1868.

Special Appeal from a decision passed by the Judge of Tirhoot, dated the 18th February 1868, reversing a decision of the Sudder Ameen of that District, dated the 19th July 1867.

Toolsee Sahoo and others (Plaintiffs), *Appellants,*

versus

Mohadeo Doss and another (Defendants), *Respondents.*

Mr. R. E. Twidale for Appellants.

Mr. C. Gregory for Respondents.

Where a Registrar refuses to register an instrument, the remedy is by a petition to the Judge under Section 84, Act XX. of 1866, a regular suit to enforce registration does not lie.

Kemp, J.—This was a suit to enforce registration of a deed being a ticca pottah, which the defendant before the Registrar of Deeds denied the execution of. The Judge held that the suit would not lie, inasmuch as Act XVI. of 1864 had been repealed by Act XX. of 1866, and that Section 15 of the former Act, under which a suit may be brought to enforce registration, had been re-placed by Section 84 of the latter Act, in which Section the course is laid down which ought to be pursued when a Registrar refuses to register a document the registration of which is compulsory. The suit of the plaintiff was, therefore, dismissed with costs.

The decision of this appeal was postponed for the decision of a Full Bench in a case referred by this Bench. That decision* has now been received. Although the point for decision in this case has not been distinctly decided by the Full Bench, inasmuch as the point referred to them was a different one, still from the remarks of some of the learned Judges who formed the Full Bench we think it may be gathered that although the point was not actually before them, they were of opinion that a regular suit to enforce registration, the party having neglected to pursue the steps laid down in Section 84 of Act XX. of 1866, would not lie.

Under the former Act, Act XVI. of 1864, and under Section 15 of that Act, if a District Registrar or a Deputy Registrar refused to register an instrument, it was lawful for any person interested to institute a regular suit to establish his right to have such instrument registered; but the provisions of this Section of the older law are omitted in the latter law, namely, Act XX. of 1866, and from the report of the Select Committee of the Council of the Governor-General of India upon the latter law, it is clear that the Legislature intentionally abolished the regular suit which, under Section 15 of the former law, a party, whose deed the Registrar had refused to register, could bring to establish his right to have such instrument registered, for in paragraph 16 of the Report of the said Committee, the following passage occurs: "Sections 82, 83, and "84 made plainer the remedy for refusing "to register; Section 83 abolishes the propos-"ed regular suit and substitutes an appli-"cation to the Court by a petition." From this it is clear that in the first draft of Act XX. of 1866, it was proposed to make it lawful for any person interested to institute a regular suit, and this privilege was, therefore, intentionally withdrawn when the bill was passing through the Select Committee.

In the present case, the plaintiff having neglected to avail himself of the remedy which the law gave him under Section 84, has only himself to blame. We may also observe that, as remarked by the learned Chief Jus-

* See *infra*, Full Bench Rulings, p. 51.

tice in the decision of the Full Bench above alluded to, a purchaser or lessee, as the present plaintiff is, can always protect himself, and if he does not, it is his own fault. He should take care before he pays his purchase-money—or as in this instrument, advances money on a zur-i-peshgee lease—to get the deed registered, or to obtain an authenticated power-of-attorney from the vendor or lessor authorizing some one in whom the purchaser or lessee has confidence to register the deed or lease as agent of the vendor or lessee.

We are, therefore, of opinion that the Judge was right in law in holding that the suit of the plaintiff would not lie.

We dismiss the special appeal with costs, bearing interest.

Jackson, J.—In the decision which I recorded on the occasion of the former suit which has been referred to by my learned colleague, and which was subsequently decided by a Full Bench of this Court, I stated my opinion that the right to bring a separate suit to enforce registration had not been taken away by Act XX. of 1866. The Judges who decided the Full Bench suit have nearly all stated their opinion that that power to bring a suit no longer exists, and therefore I do not press that opinion any longer. In addition to that, it would appear very distinctly, from what we have since elicited on examination of the report of the Select Committee of the Legislature which passed this law, that the Legislature did intend to abolish, and did abolish in fact, the power to bring a separate suit. In the Draft Act which was originally published, there was a distinct Section which stated that a person who had failed in obtaining registry could bring a regular suit, and it was distinctly declared in that Section that, for the purposes of that suit, the unregistered deed might be received in evidence. The Select Committee deliberately altered that Section and substituted in its place the procedure by petition. I think it would have been better had it been distinctly stated in the Act that the power to bring a suit was abolished. I think that many people may be misled by its not having been so distinctly stated. I think that the plaintiff in this case has certainly been misled by it. However that may be, as it is for this Court to carry out the law as it has been passed, if the plaintiff has made a mistake the Court cannot assist him. The plaintiff's remedy was by petition to the Judge and not by a civil suit.

The civil suit must, therefore, be dismissed.

The 21st December 1868.

Present:

The Hon'ble H. V. Bayley and A. G. Macpherson, *Judges.*

Disappearance of a Hindoo — Presumption of death — Succession.

Case No. 1869 of 1868.

Special Appeal from a decision passed by the Additional Judge of Jessore, dated the 5th March 1868, reversing a decision of the Sudder Ameen of that District, dated the 2nd October 1866.

Junmajoy Mojoomdar (Plaintiff), *Appellant,*

versus

Keshub Laul Ghose (Defendant), *Respondent.*

Mr. R. E. Twidale and *Baboo Bhowanee Churn Dutt* for Appellant.

Mr. J. S. Rochfort and *Baboos Romanath Bose* and *Mohendro Lall Shome* for Respondent.

When a Hindoo disappears and is not heard of for a length of time, no right accrues to any person as his heir until after the expiry of 12 years from the date on which he was last heard of.

Macpherson, J.—We think the judgment of the Lower Appellate Court is right, and this appeal ought to be dismissed. As the case is placed before us, the real contest is as to the right of succession to one Gora Chand. This Gora Chand, it is found by the Lower Appellate Court, disappeared about the year 1258, and has not since been heard of. A grandson, Punchanun, and Umbica, the widow of a deceased son, having both died, the respondent Keshub Laul Ghose contends that he, as the next heir of Gora Chand, at

d

the time of expiry of 12 years from the date of Gora Chand's disappearance, is entitled to possession of the property which is the subject of the present suit. The Lower Court has found, as a fact, that Punchanun died in Srabun or Bhadur 1270; that Umbica died in April of the same year; and that both of them died within 12 years of the date of Gora Chand's disappearance.

The plaintiff in this suit claims under a mortgage from Punchanun; but the respondent Keshub Laul contends that as Punchanun, if he did mortgage the property, did so within 12 years of Gora Chand's disappearance, he did it before any right accrued to him and at a time when he could not deal with the property, and that, therefore, the mortgage does not affect or interfere with the rights of Keshub Laul as the next heir of Gora Chand. The question is whether, when a Hindoo disappears, and is not heard of for a length of time, any person can succeed to or take any interest in his property as heir, until after the expiry of 12 years from the date on which he was last heard of.

We think that no right accrues to any person as heir to the person disappearing until the 12 years have been completed. There is not much authority on the subject; but this appears to be the opinion of such writers as have touched upon the point. In the course of the argument, we have been referred to Macnaghten's Hindoo Law, Volume II., page 9; a case reported in Sir Hyde East's Notes and to be found in Morley's Digest, page 152; another case in Select Reports, Volume III., page 29; Strange's Hindoo Law, Volume I., page 853; Vyavastha Durpana by Baboo Shama Churn Sircar, pages 10 and 11; and an unreported case, Regular Appeal No. 46 of 1868, decided by a Division Court (Loch and Glover, JJ.) on the 3rd December 1868.

Being of the opinion which we have expressed, we think the judgment of the Lower Appellate Court is substantially right.

It has been further urged in special appeal that the plaintiff is entitled to a decree on the ground that Gora Chand became a Byragee before or when he disappeared; but that was not one of the issues raised in the first Court, nor was it a part of the case as originally made by the plaintiff; and further, the Lower Appellate Court finds as a fact that it is not proved that Gora Chand became a Byragee. We, therefore, think that on this ground also the special appellant fails, and that this appeal should be dismissed with costs.

The 21st December 1868.

Present:

The Hon'ble J. B. Phear and C. Hobhouse, *Judges.*

Procedure—Execution—Suit—Wrongful payment by order of Court.

Case No. 2471 of 1868.

Special Appeal from a decision passed by the Judge of the 24-Pergunnahs, dated the 5th June 1868, affirming a decision of the 2nd Subordinate Judge of that District, dated the 30th December 1867.

Omanath Roy Chowdhry (one of the Defendants), *Appellant,*

versus

Suroop Chunder Bose (Plaintiff), *Respondent.*

Mr. R. T. Allan and *Baboo Motee Lall Mookerjee* for Appellant.

Baboo Chunder Madhub Ghose for Respondent.

A question already decided by a Court of special jurisdiction cannot be tried again in course of executing the decree passed by that Court.

Money paid over at the instance of a judgment creditor under a wrongful order of Court may be recovered by means of a suit in the Civil Court.

Phear, J.—We think that the Lower Appellate Court is quite correct in its view of the law. Indeed, if we held otherwise, we should be holding that a question which had already been decided by a Court of special jurisdiction could nevertheless in the course of executing the decree passed by that Court be tried over again, and the decision then come to be reviewed in the Civil Court. After the decree for arrears of rent was passed by the Deputy Collector against Koylash, all that remained for the Deputy Collector's Court to do was to execute the decree against Koylash, and that Court had no jurisdiction to execute the decree as if it had been passed against some other person.

It seems to us that there is also another ground upon which the judgment of the Court below can be supported, namely, that even had this decree of the Deputy Collector been passed against Suroop Chunder himself, the order made by the Deputy Collector for the payment of money into Court, and the subsequent payment of that money over to the judgment-creditor would not have

been warranted by law. It, therefore, appears to us to follow that the money which had been thus paid over at the instance of the judgment-creditor under a wrongful order of the Court might be recovered by the person from whom it was extorted, by means of a suit in the Civil Court. We think that this appeal must be dismissed with costs.

The 21st December 1868.

Present:

The Hon'ble H. V. Bayley and A. G. Macpherson, *Judges.*

Mesne profits—Res adjudicata.

Case No. 140 of 1868.

Regular Appeal from a decision passed by the Subordinate Judge of Gya, dated the 24th March 1868.

Byjnath Pershad (Plaintiff), *Appellant,*

versus

Badhoo Singh and others (Defendants), *Respondents.*

Mr. R. T. Allan for Appellant.

Baboos Onookool Chunder Mookerjee and *Nil Madhub Sein* for Respondents.

In a suit for possession wassilat was not treated as one of the matters in issue, and the right to recover it was not decided one way or other, although the plaint contained a prayer for wassilat: HELD that the question of wassilat could not be regarded as a cause of action "heard and determined" in that suit within the meaning of Section 2, Act VII., 1859.

Where the amount of mesne-profits cannot be ascertained till after the end of the year, the cause of action does not arise until the end of the year.

Parties in possession are liable for wassilat to the legal owners whom they keep out of possession, even though there was no *mala fides* on their part.

Macpherson, J.—THIS is a suit for wassilat.

The respondents take the objection that the suit is bad under Section 2 of Act VIII. of 1859, and ought to be dismissed altogether, upon the ground that in the plaint which was filed in the suit, under which the appellant obtained possession of the property, the mesne-profits of which he now claims, there was a prayer for wassilat. It is contended that, as the plaint in the former suit asked for wassilat, and the decree gave only possession and did not allude in any way to the prayer for wassilat, it must be taken that, as regards the latter, that suit was dismissed. It should be added that the appellant having been declared by the High Court to be entitled to a decree for possession, he subsequently applied for a review of judgment and that, at the hearing of the application for review (but not in the written grounds which were filed in support of the application), it was urged that the question of wassilat ought to have been disposed of. The High Court expressed an opinion that it was too late then to enter into any question of wassilat, and that, if there was any such defect as alleged, the appellant might (if so advised) apply to the Court of first instance. The appellant did, therefore, apply (by petition in the course of proceedings which were taken for executing the decree) to the Lower Court; but that Court held that the application ought to be made by way of review of the original judgment, and not by a mere summary petition. No further step was taken in the matter until the present suit was instituted.

We find that no allusion to the question of wassilat was ever made by any of the parties or by the Court, save and except the mention of it in the plaint, and what passed on the application made to the High Court for review, and subsequently before the Judge of the Zillah. Wassilat was never treated as one of the matters at issue in the suit, and the right to recover it has not been decided one way or other by any Court. Under the circumstances, we think it impossible to say that the cause of action in the present suit is one which has been "heard and determined" in a former suit within the meaning of Section 2 of Act VIII. of 1859; and, therefore, we see no reason why the Court should not take cognizance of the present suit.

On the merits, it appears to us that the appellant is entitled to succeed on the second ground of appeal stated in his written memorandum of appeal, but upon no other ground. We think the claim for mesne-profits for the year 1268 is not barred by limitation, because the amount of the mesne-profits for that year could not be ascertained until after the end of that year, and, therefore, there was no cause of action until the end of the year, which is within six years from the date of the institution of the present suit.

In other respects, the decision of the Lower Court is right. The amount of wassilat has been assessed upon the proper principle; and the Court was, in our opinion, right in adopting the rate at which the ap-

pellant had himself granted a *ticca lease* of his share to Norool Hossein, rather than the higher rates spoken to by the putwaree, whose evidence is (as the Lower Court has held) very unsatisfactory, and not such as we are prepared to act upon.

For the respondents it has been contended that, as there was no *mala-fides* on their part, they are not liable for wassilat. But there is no possible doubt (indeed, the point is not arguable), that, having been in possession, as they admit they were, they are liable now to make good to the plaintiff the loss which he has sustained by being kept out of possession.

The decree will be amended by giving the appellant wassilat for 1268, in addition to that allowed to him by the Lower Court.

We shall make no order as to the costs of this appeal.

The 22nd December 1868.

Present:

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble L. S. Jackson, *Judge.*

Partition—Possession—Collusion on part of co-sharer—Preparation of decrees.

Case No. 1978 of 1868.

Special Appeal from a decision passed by the Judge of Chittagong, dated the 27th April 1868, affirming a decision of the Moonsiff of that District, dated the 2nd May 1867.

Rustum Ally (Defendant), *Appellant*,

versus

Ameer Ally Soudagur (Plaintiff), *Respondent.*

Baboo Rajendronath Bose for Appellant.

Baboo Grish Chunder Ghose for Respondent.

In a suit to recover possession of a specified share of land, plaintiff charged defendant No. 1, who was jointly interested with him in the land, with being in collusion with the other defendants, and complained that they had ousted him from his share, and asked for partition of the land and possession of his share. It having been found that plaintiff was entitled to a small portion only of the share he claimed, it was held that he was not entitled in this suit to have a partition at all; but that, as his co-sharer was in collusion with the other defendants, plaintiff was entitled to relief by a decree awarding him joint possession with defendant No. 1 of the portion to which they were entitled.

The duty of Judges in seeing that decrees are properly drawn up pointed out.

Peacock, C. J.—THE plaintiff in this case charges that he is entitled to a share of certain lands comprising in round numbers 123 droons; but it was found that of that quantity of land he was only entitled to a share in 2 droons and 4 kanees, of which the boundaries are pointed out in the judgment of the Judge. He charges that the defendant No. 1 is in collusion with the other defendants, and that they have ousted the plaintiff from his share, and he asks to have partition in a particular form of the lands in which he is entitled to a share, and to recover possession of his share, when divided, from all the defendants. It has been correctly held that he is not entitled to have the partition in the form in which he asks, and consequently, that he is not entitled in this suit to have a partition at all. But it has been found that he is entitled jointly with defendant No. 1 to the 2 droons 4 kanees. The question is, ought his suit to be dismissed or ought he to obtain any relief?

He is not entitled to partition; but, if the defendant No. 1 were not in collusion with the other defendants, and the other defendants had ousted him, as well as the plaintiff, from possession of the land in which the plaintiff and he are jointly interested, he and the defendant No. 1 might have maintained a suit against the other defendants to recover possession of that to which they were jointly entitled. But the defendant No. 1, being in collusion with the other defendants and holding possession with others, will not voluntarily become a party to the suit as plaintiff. The plaintiff is, therefore, entitled to make him a party to the suit as defendant, and to obtain the same relief which he would have obtained if defendant No. 1 had been a co-plaintiff. If defendant No. 1 had been a co-plaintiff, there would have been a decree that the two joint plaintiffs should recover possession of their land against the other defendants. The relief, therefore, which the Judge has given to the plaintiff is sub-

stantially correct, *viz.*, that he recover possession from the defendants of the 2 droons and 4 kanees to be held jointly with the defendant No. 1.

The decree of the Judge is very inaccurately drawn up; for he merely recites the grounds of appeal and limits the decree of the Lower Court to that extent, that is, to the extent mentioned in the grounds of appeal; whereas, the extent to which he ought to have limited it, according to his judgment, should have been to the extent that the plaintiff should recover 2 droons 4 kanees of the original talook Dropo Chowdry, as described in the judgment of the Judge, to be held by the plaintiff and the defendant No. 1 as a joint talook; and that is the decree which ought to be made.

I have often remarked very great want of care on the part of Judges and of Subordinate Judges in seeing that their decrees are drawn up in accordance with their judgments; and it appears to me to be of very great importance that the Judges should see that the decrees which they record are so drawn up, and that they are drawn up in such a manner that they can be understood in the execution-department. The decree is the thing to be executed. The judgment is merely a record of the reasons on which the decree is passed.

The decree must be amended in the manner in which I have stated; and as that is substantially in conformity with the judgment of the Judge, and as the contention of the appellant is that the suit ought to have been wholly dismissed, it appears to me that he ought to pay the costs of the appeal.

Jackson, J.—I concur in thinking that the portion of the plaint which asks for possession as against the defendants generally is separable from that portion of it which asks for partition in a specified form against the defendant No. 1, and that consequently it was not necessary under the circumstances to dismiss the entire suit.

The defect in drawing up the decree on which the Chief Justice has remarked is one which is of too frequent occurrence. If the Judge had taken the trouble to peruse the decree which he signed, he would have seen that the officer who prepared it had saved himself all mental labor by tacking the ordering portion of the judgment to the grounds contained in the memorandum of appeal. As, however, that ordering portion referred to the previous part of the judgment, the result of course was that the decree was unintelligible and incapable of execution. There was no reason, however, because the officer had neglected his duty, that his neglect should pass unnoticed by the Judge. This Court has frequently called the attention of the subordinate Courts to the necessity of drawing up decrees with such precision and conformity to the Code of Civil Procedure that decrees shall be capable of execution when taken singly, and that it shall not be necessary for the purpose of execution to refer to the entire record. It was in view of this very imperfection that the recent order was issued by which the Lower Courts were directed to obtain the signatures of the vakeels of both sides to the decrees when drawn up, and before the decree was signed by the Judge. Judges cannot be too attentive to this portion of their duties, because from the inaccurate way in which decrees are constantly drawn, parties are afterwards put to much unnecessary trouble and expense, and the time of the Courts themselves, both inferior and superior, is unnecessarily wasted.

The 22nd December 1868.

Present:

The Hon'ble F. B. Kemp and E. Jackson, *Judges.*

Hindoo law—Betrothed daughter—Streedhun—Succession.

Regular Appeal from a decision passed by the Officiating Subordinate Judge of Rungpore, dated the 19th September 1867.

Case No. 8 of 1868.

Sreenath Gangooly and others (Defendants), *Appellants,*

versus

Surbo Mongola Debia (Plaintiff), *Respondent.*

Baboos Onookool Chunder Mookerjee, Sreenath Doss, and *Kishen Dyal Roy* for Appellants.

Baboo Ashootosh Chatterjee for Respondent.

And the cross-appeal No. 15 of 1868.

Under the Hindoo Law, a betrothed daughter does not inherit her mother's *streedhun*, or any part of it.

When a woman's separate property has once devolved as *streedhun* upon an heir, it no longer devolves as *streedhun*, but according to the ordinary rules of Hindoo Law.

Jackson, J.—BOTH these appeals are from the decision of the Principal Sudder Ameen of Rungpore in a suit brought by Surbo Mongola Debia against Sreenath Gungo-

paddeah and others. Surbo Mongola Debia sued to recover possession of 10 different properties, alleging that these were *streedhun* belonging to her mother, Doorga Monee Debia, and that she, as heiress of her mother, was entitled to them in preference to her brothers, the defendants. She alleged that, since the death of her mother Doorga Monee, she had lived in commensality with her brothers as a joint Hindoo family; and that, in the month of Bysack 1273, a dispute had arisen between her and her brothers regarding a sum of money which she wanted out of the profits of the estate, and which they refused to give, and on this account a quarrel had arisen; the plaintiff had been dispossessed, and preferred this suit. The defendants allege that the plaintiff had no right or title whatever in any one of these properties.

The Principal Sudder Ameen of Rungpore has given a very careful decision in the case. His conclusion is that the plaintiff is entitled to a portion of her claim, but not to the remainder. From his decision these two appeals have been preferred, and they, in fact, open out the whole case. The plaintiff appeals against that portion of her claim which has been rejected; the defendants appeal against that portion of the claim which has been decreed, and they urge again, both that limitation bars the claim, and that they are entitled to the property upon the merits.

The first property, property No. 1, which is at issue, was a certain estate which it appears to be admitted was given by Sowdaseeb Roy, the father of Doorga Monee, by a verbal will which was carried into effect by his widow after his death, and under which the estate was made over as *streedhun* to Doorga Monee. As regards this property, the Principal Sudder Ameen has dismissed the plaintiff's suit, on the ground that, in the deed which made over this property, it was distinctly stated that it was given to Doorga Monee, and after her to her sons and grandsons. We are of opinion that the grounds given by the Principal Sudder Ameen are good. We think that the deed is the best evidence of the intention of the donor. It is a very old document, and one which has been acted upon for a great many years.

As regards properties Nos. 2 and 3, these seem to have been made over to Doorga Monee, the plaintiff's mother, as *streedhun* in consequence of the adoption of a son by her mother, Bimolah Debia. It was agreed on that occasion that a certain amount of property should be set aside for Doorga Monee, and a certain income should be secured to her, and these properties were purchased to secure that income. The question as regards these properties turns partly on a question of fact, and partly on a question of law.

First, what are the facts as regards the state of the family on the death of Doorga Monee? The plaintiff states that, on the death of her mother, she was the sole maiden daughter surviving. The defendants allege that she was not at that time a maiden daughter, but a betrothed daughter; that Doorga Monee died very shortly after having given birth to another girl who was the sole maiden daughter who survived her mother, and who appears to have survived her but for a few days. Upon these questions of fact, after hearing the evidence, we are inclined to agree with the Principal Sudder Ameen that Doorga Monee did die very shortly after having given birth to a daughter who lived for some days. Upon this point the plaintiff's witnesses and her own statement are contradictory; in one place stating that no child was born at all, in another place some of the witnesses admitting that she was born and lived a few days, but adding that she died before her mother.

On the *second* point, as to whether the plaintiff was betrothed at the time of the death of Doorga Monee, there is very conflicting evidence, but we are not prepared to differ from the decision passed by the Principal Sudder Ameen, holding that she was then a betrothed girl.

The question then arises whether, under the Hindoo law, the plaintiff, as a betrothed daughter, was entitled to a share in this property with her brothers. On turning to the *Dyabhaga*, Chapter IV., Section 2, on the succession of a woman's children to her separate property in the third *sloke*, the law is thus laid down: "A woman's "property goes to her children, and the "daughter is a sharer with them, provided "she be unaffianced, but, if married, she shall "not receive the material wealth." In the next paragraph, the commentator interprets the meaning of the above sentence by saying "Here the word 'children' intends sons, and "they share their mother's goods with un-"betrothed daughters."

The Principal Sudder Ameen has decided that the betrothed or unbetrothed daughter inherits her mother's property with sons. We think that the quotations which we have above made from the *Dyabhaga* dis-

tinctly show that, under the Hindoo law, the unbetrothed daughter alone inherits with sons. Taking, therefore, the evidence as showing that the plaintiff was a betrothed daughter, we are of opinion that she is not entitled to inherit.

In paragraph 4 and paragraph 6 of the same Section the law is laid down on this point by other commentators, but it is not equally distinct. The words are that "the brothers are entitled to succeed with unmarried daughters." It may be a question whether "unmarried" is used as distinguished from "unbetrothed." The Sanscrit word which is used on both these occasions is the word "*coomaree*," which is the word used generally for an unbetrothed daughter; and that the word "unmarried" does here mean "unbetrothed" is clear from what precedes it, which we have already quoted.

The remaining properties all come under the same head as these Nos. 1, 2, and 3. If the plaintiff had obtained a decree for Nos. 1, 2, and 3, she might possibly be entitled to some share in the remaining property; but if the plaintiff fails in these, she is not entitled to any share in the other properties. We are of opinion that as a betrothed daughter, the plaintiff was not, at the time of her mother's death, entitled to any share in her mother's "*streedhun*." An attempt has been made to show that, even if the maiden daughter inherited, the plaintiff is entitled to inherit on the death of the maiden daughter; but the Hindoo law on this point is undoubted, namely, that, when *streedhun* has once devolved as *streedhun* upon an heir, it does not continue to devolve as *streedhun*, but afterwards devolves according to the ordinary rules of Hindoo law.

Looking, then, to the facts found in this case, the plaintiff being, at the time of her mother's death, a betrothed daughter, we consider that she is not entitled to any share of the properties which she now claims; and, further, we think it necessary to state that, in our opinion, her claim is wholly barred by the Law of Limitation, and on this point we differ from the decision passed by the Principal Sudder Ameen. The plaintiff may have lived in commensality with the defendants in the same house, but it is quite evident from the depositions, more especially of her married sister and also of other witnesses, that she has never been in possession of any share of the property as a member of a joint Hindoo family.

Holding this view of the case, we decree the appeal No. 8 of 1868, and dismiss the appeal No. 15 of 1868, dismissing the plaintiff's suit with all costs.

The 22nd December 1868.

Present:

The Hon'ble G. Loch and F. A. Glover.
Judges.

Evidence—Proof of receipts—Special appeal.

Case No. 1890 of 1868 under Act X. of 1859.

Special Appeal from a decision passed by the Judge of Purneah, dated the 24th April 1868, affirming a decision of the Deputy Collector of that District, dated the 28th November 1867.

Luchmeeput Singh Doogur (Plaintiff), *Appellant,*

versus

Woomanath Mundul (Defendant), *Respondent.*

Mr. R. T. Allan and *Baboos Sreenath Dass* and *Rash Beharee Ghose* for Appellant.

Moulvie Murhamut Hossein for Respondent.

In a suit for enhancement of rent, where defendant filed receipts, with a written statement duly verified, as proving uniform payment of jumma, but was not examined as to the genuineness of the receipts filed: HELD (by the senior Judge, whose opinion prevailed) that the receipts were not proved.

HELD (by Glover, J.) that there was legal evidence of uniform payment, and as the Lower Court believed that evidence, however weak, its decision could not be interfered with in special appeal.

Loch, J.—PLAINTIFF sued to enhance the rent of lands held by the defendant, on the ground that, on measurement, the lands found in defendant's possession were more than covered by his engagement.

Defendant pleaded a right of occupancy and payment of a uniform rate of rent for more than 20 years, and in support of his statement filed certain receipts extending from 1248 to 1273.

The first Court, distrusting the plaintiff's measurement, directed a local investigation to be made, the result of which showed that defendant held more land than he was entitled to. The Court, therefore, gave plaintiff a decree for rent at Rupee 1 per beegah for the land in excess, but rejected plaintiff's claim to assess the whole of the defendant's holding at a uniform rate of Rupee 1 per beegah, holding it to be proved that defendant had paid rent at a uniform rate for more

than 20 years; and this judgment was confirmed by the Judge on appeal.

In special appeal, it is urged that the Lower Courts have accepted the defendant's receipts without requiring them to be proved; and this contention appears to have some force in it.

The receipts were filed with a written statement duly verified by the defendant, in which he refers to those receipts as proving uniform payment of jumma on the same day his evidence was taken down; but the first Court, instead of examining him as to the genuineness of the receipts which he had filed, and on which his case rested, confined the examination to the rates of land which was also a matter of difference between the parties; so that defendant has not proved the receipts by his own evidence. He has, however, called a witness to prove that the receipts were given by the persons whose names they bear; but as the witness does not say that the receipts were written or given in his presence, his evidence amounts to nothing but an opinion as to the handwriting, or as to his belief that the receipts were given by the parties whose signatures they bear. The gomashta of the plaintiff has also been examined, but he can only speak to the receipts from 1266; and though he admits having given them on account of rent received from defendant, his evidence does not carry the case for defendant back far enough, nor raise the presumption that the lands have been held at a uniform rate of rent. The Judge says that many of the receipts are of old date and prove themselves; but the oldest receipt, which is for the rents of 1248 and 1249, is in the name of the defendant and his father; and the receipt of 1256 was in defendant's own name, and therefore these were capable of being proved.

It appears to me, therefore, that the Judge's conclusion is not based on legal evidence, and the defendant has failed to make out his allegation of payment of rent at a uniform rate for more than 20 years, and his case must fail. The order of the Lower Court should, therefore, be set aside.

Glover, J.—It appears to me that there was sufficient evidence on the record to justify the Lower Appellate Court in raising the presumption under Section 4, Act X. of 1859, in favor of the defendant.

The defendant's verified written statement is supported by his deposition and by various dakhilahs for rent paid, which the Judge holds to be genuine, and to some extent by the evidence of the plaintiff's gomashta.

It cannot, therefore, I think, be said that there was no evidence on which the Lower Appellate Court could base its decision, for receipts were filed with the defendant's written statement, and are distinctly referred to and relied upon therein. No doubt, the Deputy Collector would have done better to have examined the defendant categorically as to each particular receipt, but I do not think that his failure to do so should damage the defendant's case. And as the Judge below believed the evidence in support of the claim to hold at fixed rates, it seems to me that in special appeal we cannot interfere with his decision, however weak that evidence may be. I would dismiss this appeal with costs.

The 23rd December 1868.

Present:

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice*, and the Hon'ble L. S. Jackson, *Judge*.

Remand—New issue—Rights of parties.

Case No. 2341 of 1868.

Special Appeal from a decision passed by the Additional Subordinate Judge of Chittagong, dated the 30th July 1868, affirming a decision of the Moonsiff of Pulteah, dated the 23rd January 1867.

Kisto Churn Chuckerbutty (one of the Defendants), *Appellant*,

versus

Muggun Chuckerbutty and others (Plaintiffs), *Respondents*.

Baboo Greeja Sunkur Mojoomdar for Appellant.

Baboo Aukhil Chunder Sein for Respondents.

Where a case is remanded for the trial of an issue which had not been laid down by the Court which

tried the case, the parties are entitled to have the opportunity of giving evidence upon it, although the order of remand contains no express direction to that effect.

Jackson, J.—In this case, when last it came before the Court, it appeared to Mr. Justice Mitter and myself that the matter really in issue before the parties was whether the defendants had any right of easement or use in the tank which had admittedly been dug by the plaintiff (vendor). The defendants allege that the land on which the tank had been excavated belonged partially to them, and it might well be that from that circumstance, or from vicinage or local custom, the defendants were entitled to resort to the tank, to use the water, and to take the fruits. The Lower Appellate Court was, therefore, directed to enquire into those facts and to determine whether the act of which the plaintiff complained was done in pursuance of any right which the defendants had, or was, in fact, a trespass.

It seems that, on the record going back to the Lower Appellate Court, the defendants applied for leave to examine witnesses on this point, and the Principal Sudder Ameen, instead of granting or refusing leave, simply ordered that the "application be laid before the Court with the papers." It seems to me that, as the issue directed to be tried was one which had not been laid down by the Court that tried the case, the parties were in fairness entitled to have the opportunity of giving evidence upon it, although the order of remand contains no express direction to that effect.

I think, therefore, that the case must again go down to the Court below, and that the witnesses whom the defendants desired to call may be summoned and examined, and the plaintiff, if he should now desire it, will also be at liberty to examine witnesses and tender evidence.

The Subordinate Judge, in giving the judgment of which the special appellant complains, concludes with these words: "Be it known "also that, if, agreeably to any local custom, "the defendants Kisto Churn and others "use the water of the disputed tank, or per-"form upon its banks the preliminary and "*shradh* ceremonies of deceased persons, "the plaintiffs shall have no right to object "to such proceedings."

Now, the Subordinate Judge was directed by our order of remand to apply the law according to the ascertained rights of the parties. We used these words: "The Prin-"cipal Sudder Ameen will proceed to apply "the law, with reference to local custom or "otherwise, in respect of the right to use the "tank." It is clear that, in concluding his judgment in the words which I have read, the Subordinate Judge has failed to comply with the direction of the Court, and has left unsettled the very question between the parties which it was the object of this suit to set at rest. The decision which the Subordinate Judge will now come to will be such as to dispose finally of the rights of the parties to the tank. In coming to a decision, the evidence already on the record will receive fresh consideration. The costs of the present special appeal will abide the event of the trial.

Peacock, C. J.—Concurred.

The 23rd December 1868.

Present:

The Hon'ble F. B. Kemp and E. Jackson, *Judges.*

Deposit under Section 4, Act VI. (B. C.), 1862 — Set-off.

Case No. 1580 of 1868 under Act X. of 1859.

Special Appeal from a decision passed by the Officiating Judge of Mymensingh, dated the 17th March 1868, modifying a decision of the Deputy Collector of Jumalpore, dated the 29th July 1867.

Grish Chunder Sein (Defendant), *Appellant,*

versus

The Eastern Bengal Jute Manufacturing Company (Plaintiff), *Respondent.*

d

hunder Mitter and *Mohinee oy* for Appellant.

nder Chuckerbutty and *Dutt* for Respondent.

In a suit for rent, where defendant claimed credit for a sum which he had deposited under the provisions of Section 4, Act VI. (B. C.) of 1862, in the Deputy Collectorate of the Sub-division within which plaintiff's mâl-cutcherry was situated, giving notice to plaintiff under Section 5: HELD that defendant was entitled to a set-off.

Kemp, J.—THE plaintiff, an izardar, sued the defendant, a dur-izardar, for rent on account of the year 1273. The defendant alleged that the rent of kist Cheyt, amounting to 107 rupees 2 annas 10 pies, was not due at the time of the suit; that Rs. 46-7-5 had been collected by the plaintiff from the ryots; that the defendant had deposited 216 rupees under the provisions of Section 4 of Act VI. of 1862 in the Serajgunge Deputy Collectorate; and that Rs. 59-1 had been paid to the zemindar by *barrat* or assignment; in short, that nothing was due.

The first Court found every thing in favor of the defendant, dismissed the plaintiff's suit, and awarded damages at the rate of 25 per cent. on the claim to the defendant. On appeal, the Judge has considerably modified the decision of the first Court, the only item allowed by the Judge being that of Rs. 46-7-5 collected by the plaintiff from the ryots before the dur-izardar, the defendant, got possession, and that item was not seriously disputed. With reference to the sum deposited, the Judge held that the Serajgunge Deputy Collector had no jurisdiction to receive the money, and that the deposit cannot be treated as a set-off to the plaintiff under the provisions of Act VI. of 1862. With regard to the item of Rs. 59-1 covered by the assignment, the Judge is of opinion that, as the defendant was bound by his agreement to make over to the plaintiff the receipts of the zemindary for any sums paid to the zemindar on account of the plaintiff, and as the defendant admits he has not done so, the defendant is liable for this sum of Rs. 59-1, with costs and interest. In respect of the kists of Cheyt, amounting to Rs. 107-2-10, the Judge held that the ryots' kists for a month are generally payable early the following month, but for farms, talooks, and estates paying revenue to Government, the kists are payable in the month noted in the agreement. The Judge, therefore, decreed these Rs. 107-2-10 with the other item, with costs and interest.

On special appeal, we have considered the points raised by the pleader for the appellant, and are of opinion that the defendant is entitled to claim a set-off for the sum of Rs. 216 deposited by him in the Serajgunge Sub-division. It is not denied that the mâl-cutcherry of the plaintiff is in that Sub-division, nor is it denied that notice of the deposit was given to the plaintiff under Section 5 of the Act.

With reference to the item covered by the assignment, it is not disputed that the money was paid to the zemindar, and the receipts have been filed with the record. We, therefore, think that the Judge was wrong in decreeing this item, and particularly in saddling the defendant with costs and interest thereon.

With reference to the amount due on account of the kist of Cheyt, whether that sum was due at the time that the suit was instituted will depend on the custom of the district, respecting which no evidence has been given; but there can be no doubt as to its being due at the time that the decision was passed. We think that the plaintiff is entitled to recover that kist, namely, Rs. 107-2-10, without interest or costs.

The decision of the Judge is, therefore, modified to this extent. The plaintiff will recover only Rs. 107-2-10 without costs or interest; the excess of costs over Rs. 107-2-10 to be borne by the plaintiff, together with the costs of this appeal.

The 23rd December 1868.

Present:

The Hon'ble H. V. Bayley and A. G. Macpherson, *Judges.*

Suit for rent—Ejectment.

Case No. 373 of 1868.

*Application for review of judgment passed by the Hon'ble Justices H. V. Bayley and A. G. Macpherson, on the 25th August 1868, in Special Appeal No. 2550 of 1867.**

Prosunno Moyee Dossee (Plaintiff), *Petitioner,*

versus

Bhubo Tarinee Dossee (Defendant), *Opposite Party.*

Baboo Mohendro Lall Seal for Petitioner.

Baboo Annund Chunder Ghossal for Opposite Party.

A talookdar, in executing a decree for rent, sold his ryot's right and interest in the tenure. He afterwards instituted a suit against the same ryot for arrears and ejectment.

HELD that the execution-purchaser should have been made a party to the latter suit.

Macpherson, J.—WE think we ought to grant a review of our judgment in this case, as one of the most important points in it seems to have been overlooked by ourselves as well as by the parties.

The defendant Koylashnath was the talookdar, and Chundee Churn was his ryot.

Koylashnath, having on the 19th Falgoon 1268 (March 1868) got a decree (in a suit brought under Act X. of 1859) for rent against Chundee Churn, issued execution, and put up for sale the right and interest of Chundee Churn in the tenure. At the sale, which took place on the 7th Assar 127[illegible] (20th June 1863), the plaintiff was declared the purchaser.

On the 23rd Joisto 1270 (5th June 1863), Koylashnath had instituted another suit against Chundee Churn for arrears of rent and ejectment (under Section 78 of Act X. of 1859); and in that suit he got a decree on the 2nd of Srabun 1270 (17th July 1863). In execution of this decree, ejectment was ordered, and on the 10th of Bhadro 127[illegible] (25th August 1863) Chundee Churn was ejected. Thereupon Koylashnath put the present appellant in possession under a new arrangement.

The plaintiff sues to have his rights as purchaser declared, and for possession.

It appears to us that he is entitled to a decree; for, at the time that the decree of the 17th July 1863 was obtained against Chundee Churn, he had ceased to have any interest in the tenure, and all his interest in it had passed to the plaintiff. That it had so passed, Koylashnath must be deemed to have known, inasmuch as it was he that caused the sale at which the plaintiff purchased. If, therefore, he wished a decree for ejectment to be binding upon the plaintiff, he ought to have made her a party to that suit.

Under the circumstances, it appears that no question as to registration really arises (although this was the point chiefly relied on and argued at the hearing of the appeal) —especially as the talookdar himself treated the tenure as transferable and caused it to be sold to the plaintiff.

It is more than doubtful whether the second suit, which was instituted under Section 78, ought to have been entertained at all, when the tenure was one which the talookdar had himself treated as transferable.

We reverse our former decree, and affirm that of the Lower Appellate Court, declaring that the plaintiff, as purchaser at the sale of the 20th June 1863, is entitled to possession of the tenure as against the defendants.

We make no order as to costs, either of the appeal to this Court, or of this application for review, the case not having been put properly before us at the hearing of the appeal.

---

* See *supra*, p. 304.

The 23rd December 1868.

Present:

The Hon'ble F. B. Kemp and E. Jackson, *Judges.*

Landlord and tenant.

Case No. 1817 of 1868 under Act X. of 1859.

Special Appeal from a decision passed by the Additional Judge of Hooghly, dated the 7th April 1868, reversing a decision of the Deputy Collector of that District, dated the 11th January 1868.

Krishto Dhun Pundit (Defendant), *Appellant,*

versus

Mahomed Nukee Kotwal (Plaintiff). *Respondent.*

Baboo Bhowanee Churn Dutt for Appellant.

Baboo Poorno Chunder Shome for Respondent.

In a suit to enhance rent, it was held that the payment of rent by defendant to a third party did not prove that the relation of tenant and landlord did not exist between defendant and plaintiff, where such payment had been made to that party, not as landlord, but under a deed of assignment from plaintiff's father.

Jackson, J.—This was a suit for enhanced rent. The first ground taken on special appeal is that the parties did not stand in the position of landlord and tenant. We are not satisfied, however, that the Judge was in any way in error in deciding that the relation did exist, and that the plaintiff was the landlord of the defendant, although he may have paid rent to the plaintiff's sister, inasmuch as he paid such rent to the sister, not as landlord, but under a deed of assignment from the plaintiff's father.

* * * * * * *

* * * * * * *

The 23rd December 1868.

Present:

The Hon'ble H. V. Bayley and A. G. Macpherson, *Judges.*

Right of suit—Joint landlords—Section 24, Act X., 1859.

Case No. 366 of 1867 under Act X. of 1859.

Regular Appeal from a decision passed by the Deputy Collector of Jessore, dated the 21st September 1867.

Puddo Monee Dossee (Plaintiff), *Appellant,*

versus

Bistno Chunder Biswas and others (Defendants), *Respondents.*

Mr. R. T. Allan for Appellant.

Baboo Boykuntnath Paul for Respondents.

When two landholders jointly appoint an agent for the collection of rents of their joint property, they can sue him separately under Section 24, Act X. of 1859, provided the one who does not sue is made a defendant.

Macpherson, J.—This is an appeal from a decree passed by a Deputy Collector in a suit instituted under Section 24 of Act X. of 1859.

The plaint states that the plaintiff and the defendant Juggodumba were joint owners of a zemindary and other property, each having an 8-annas share; that in Aghran 1271, they jointly appointed the defendant Bistno Chunder Biswas to be their naib for the collection of rents and general management of their estates and property; that quarrels having arisen between Juggodumba and the plaintiff, the latter re-called her appointment of Bistno Chunder as her naib; that Bistno Chunder collected the plaintiff's 8-annas share from Pous 1271 to Aghran 1273, but never has accounted for it to the plaintiff. The plaint prays that Bistno Chunder may be ordered to render accounts and pay a sum of nearly 50,000 rupees which the plaintiff alleges is the balance due. It also prays that he may be ordered to deliver up zemindary-papers.

The Lower Court, after having gone into the evidence, dismissed the suit on the ground that such a suit will not lie, *i. e.*, that, when two landholders jointly appoint one agent for the collection of rents of their joint property, they cannot sue separately under Section 24 of Act X. of 1859.

In appeal, it was contended that such a suit will lie, so long as the other joint landholder is made a party (defendant) to the suit, so as to ensure his interests being protected; and the case of Puddo Monee Dossee *versus* Banee Kant Ghose, 9th Weekly Reporter 344, was relied on. Being of opinion that this decision is right, we held that the suit would lie; and thereupon, believing that the evidence upon the record of the Lower Court was sufficient to enable us to pronounce a satisfactory judgment, we proceeded to hear the appeal upon the merits (under Section 353 of the Civil Procedure Code). The Deputy Collector, although he fixed issues raising various questions of law and fact, did not try or determine any of them, save the one as to whether the suit would lie.

[The Court then entered into a consideration of the evidence in the case.]

The 8th June 1868.

Present:

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble L. S. Jackson, J. B. Phear, A. G. Macpherson, and Dwarkanath Mitter, *Judges.*

Practice—Appeal to Privy Council—Review of judgment—Section 39 of High Court's Charter —Proceedings to be transmitted to England.

Privy Council Appeal No. 21 of 1866.

Rajah Enaet Hossein (Defendant), *Appellant to England,*

versus

Ranee Rowshun Jahan (Plaintiff), *Respondent to England.*

Messrs. R. T. Allan and *R. E. Twidale* and *Baboo Kishen Kishore Ghose* for Appellant.

Messrs. R. V. Doyne and *C. Gregory* for Respondent.

HELD (Jackson, J., *dubitante*) that an order made by the High Court on an application to review its judgment in a case of appeal to the Privy Council previously heard is not an order made on appeal within the terms of Clause 39 of the Court's Charter, so as to enable the Court to admit an appeal against such order to Her Majesty in Council.

HELD, *nem. con.*, that, in a case where an appeal to the Privy Council has been admitted against a regular decree made in appeal, such proceedings as applications for review of the judgment and the order of the Court thereon ought not to form part of the records to be transmitted to England.

This case was referred to the Full Bench on the 17th March 1868, under the following remarks recorded by the Hon'ble L. S. Jackson :—

THE point involved in this reference is a very short one. It is whether an order made by this Court on an application to review its judgment in a case of appeal previously heard is an "order made on appeal" within the terms of Clause 39 of the Court's Charter, so as to enable the Court to admit an appeal against such order to Her Majesty in Council.

To this I may add another question, *viz.* whether in cases where an appeal has been lodged and admitted against a regular decree made in appeal, the Court ought not, generally speaking, when it transmits the proceedings connected therewith, also to send such proceedings as applications for review of the judgment and the order of the Court thereon.

This latter point I should probably decide for myself, if it were not so immediately linked with the former as to make it proper to submit it also for the judgment of the Full Bench.

Upon the first point, I feel much difficulty in making the reference, because it certainly does seem to be most expressly decided by the judgment of the Chief Justice in the Full Bench case of Soudamini Dossee, reported at 6 Weekly Reporter, Miscellaneous Rulings, page 102, and I was myself one of the Judges who decided that case, and assented to the judgment delivered.

But I entertained at the time, though I unfortunately did not express them, serious misgivings as to the correctness of the ruling; and as far as my recollection serves, the argument (as well as the referring order) in that case turned chiefly on other reasons.

The question having arisen before me again in a definite shape, I venture to ask for a fuller consideration of it.

The two cases, I may observe, are quite distinct. In the case cited from 6 Weekly Reporter, the petitioner had suffered an adverse judgment of this Court to remain more

than six months unappealed. He had, however, applied for review; and within six months of the failure of that application, he asked for leave to appeal.

In the present case, the petitioner has made his appeal to England in due time against the decision on appeal; but having simultaneously applied for review of judgment, with documents, he now seeks to appeal also against the order refusing him a review.

Cases may be easily conceived in which a party may desire to appeal against an order passed on application to review, without appealing against the original judgment, or in addition to such appeal.

It is said they may go to the Privy Council direct. No doubt, they may; but such a proceeding, through the medium of advisers and Counsel whom the petitioner has never seen, is a plunge into cold water, which native suitors are not always prepared to take, and, at any rate, it is our duty to admit the appeal here, if it be in conformity with the Letters Patent.

It seems to me, after much and repeated consideration, that the words "made on appeal" in the 39th Clause must be taken to mean "made in the exercise of appellate jurisdiction" as distinguished from "made in the exercise of original jurisdiction;" those two heads being taken to include all jurisdictions of the Court other than criminal.

Looking to the wide permission granted by the 46th Clause to admit appeals against interlocutory orders, it seems to me impossible to suppose that orders in review would have been omitted if they had not been considered to be provided for in the previous Clause.

In short, I believe that, by the operation of the 39th and 40th Clauses, the widest discretion to admit appeals against all judgments, decrees, or orders (in matters not being of criminal jurisdiction), whether final, preliminary, or interlocutory, whether on appeal or otherwise, whether within or without the money-limit stated, has been allowed.

I am also of opinion that, when a party has appealed to Her Majesty in Council, he or the respondent is at liberty to ask that subsequent proceedings in review or otherwise may be transmitted to England, and that the Court ought to grant the application.

The judgments of the Full Bench were delivered as follow:—

Peacock, C. J., (Phear, Macpherson, and Dwarkanath Mitter, JJ., concurring).—The first question is whether an order made by this Court on an application to review its judgment in a case of appeal is an "order made on appeal" within Clause 39 of the Court's Charter, so as to enable the Court to admit an appeal against such order to Her Majesty in Council.

The question whether an order of this kind would fall within the words of the second part of Section 39 of the Charter as an order made on appeal or otherwise is not raised.

The question raised is a very important one, inasmuch as, if an order of this nature is an appealable order, the time for appealing against it to Her Majesty in Council would be reckoned from the time of the order, and not from the time of the original decree; and thus a party, by making a fruitless application for review, and getting that application refused, might by a side-wind appeal against a decree long after the time for appealing against it had expired.

It would be impossible for the Privy Council upon appeal against an order rejecting a review to decide whether that order was right or wrong without themselves reviewing the judgment. In the 7th Volume of Moore's Indian Appeals, page 304,* it was said by the Privy Council: "It must "be borne in mind that a review is per-"fectly distinct from an appeal. It is "quite clear from the regulations that the "primary intention of granting a review "was a re-consideration of the same subject "by the same Judge as contradistinguished "from an appeal which is a hearing before "another tribunal."

But it is contended that an order rejecting a review, though not an order made on appeal against the judgment to be reviewed, is an order made on appeal, inasmuch as it is an order in the appeal in which the judgment sought to be reviewed was given; and that the words "made on appeal" in the 1st part of Section 39 of the Charter must be read as if they had been "made in the exercise of appellate jurisdiction."

* *See* 3 W. R., P. C. Cases, p. 45.

It appears to me, however, that that was not the intention of the Letters Patent. If it had been so, the natural and more easy mode of expressing that intention would have been to use the words "from any final judgment, "decree, or order of the said High Court "made in the exercise of appellate jurisdic-"tion." I think that, by using the words "made on appeal," the framers of the Letters Patent did not intend that the words used should have that effect.

If the words "made on appeal" had been intended to mean "made in the exercise of its appellate jurisdiction" as contradistinguished from the exercise of its original jurisdiction, any order made by the Court in a matter which came before it, otherwise than in its original jurisdiction, would be the subject of an appeal to Her Majesty in Council. It is just as discretionary with the Court to reject an application for a review of its judgment as it would be to reject an application for liberty to appeal to Her Majesty in Council against a decree in which the amount involved is less than 10,000 rupees. If the one is an order on appeal, it appears to me that the other would be so; and if an appeal would lie to Her Majesty in Council against the one, it would also lie against the other.

Suppose an order rejecting an application for review is appealable, could the Privy Council direct the Judges of the High Court who formed the Division Bench, which pronounced the judgment to review their judgment, notwithstanding Section 378 of the Code of Civil Procedure, which says that, if the Court shall be of opinion that there are not any sufficient grounds for a review, it shall reject the application, and its order shall be final? The Judicial Committee are as much bound by that enactment as they are by an Act of the Imperial Parliament.

It is contended that inconvenience may arise if an appeal will not lie to Her Majesty in Council from such an order; but it appears to me that this is not the case. If the application for review is upon a matter of law, the Privy Council can do all that is necessary upon an appeal against the judgment, either by reversing or modifying the decree, or by remanding the case to the Court which passed the decree for further adjudication.

If the ground for review is the discovery of new matter of evidence which was not within the knowledge of the parties when the decree was passed, an application can be made to the Privy Council, upon the hearing of an appeal against the decree, either to take fresh evidence itself, or to remit the case to this Court with directions to take the fresh evidence.

In the case reported in the 3rd Moore's Indian Appeals 324, where the Judge of a Lower Court had suppressed certain important documents (which had been proved before him), so that the Sudder Court never had an opportunity of exercising its judgment upon them, but the documents were afterwards obtained and laid before the Judicial Committee, that tribunal ordered that the case should be remitted to the Sudder Court with a direction that it should take those documents into consideration, and investigate the matters therein alleged, as to it might seem best. (Macpherson, Privy Council, 124.) So that the Privy Council has all the powers upon appeal against the original decree that are necessary to do complete justice.

For these reasons, in addition to those which I expressed in the Full Bench case reported in the 6th Weekly Reporter, page 103, I am of opinion, after re-consideration, that the judgment which I then expressed is correct, and that an order rejecting a review of judgment is not an order made on appeal within the meaning of the 39th

Section of the Letters Patent, and I think that we should entirely frustrate the object of the rule which requires an appeal to be preferred within a limited time, if we held that the same object might be obtained by appealing against an order rejecting an application for review, however long after the decree had been made.

The second question is whether, in cases where an appeal has been lodged and admitted against a decree made in appeal, the Court ought not, generally speaking, when it transmits the proceedings connected therewith, also to send such proceedings as applications for review of the judgment and the order of the Court thereon.

It appears to me that those proceedings ought not to be sent. They are not proceedings in the case appealed to Her Majesty in Council. The judgment and decree are the matters appealed. The proceedings with reference to the application for review are matters which take place subsequently; and this is made perfectly clear by the 42nd Section of the Charter, to which Mr. Justice Louis Jackson has referred me, which directs that a copy of all evidence, proceedings, &c., are to be transmitted so far as the same have relation to the matters of appeal.

If it be important for the appellant to bring to the notice of the Privy Council that he made a fruitless application for a review, as suggested by Mr. Allan in the course of his argument, that matter can be brought before them by affidavit, if the appellant thinks proper to do so.

Jackson, J.—Upon the second of the two questions which I referred for the consideration of the Full Bench, I desire now to state unreservedly that my present opinion is that my first impression was erroneous, and that parties would not be entitled to have the subsequent proceedings transmitted to England.

Upon the first question, I feel bound to admit the force of the reasons by which the Chief Justice has supported his judgment, and, therefore, on this point, although my own mind is not yet free from doubt, I do not wish expressly to dissent from the conclusion in which my learned colleagues are agreed. I will only make this one observation that, in considering and referring this question, I own that I had mainly in view the case of an unsuccessful party, who made application for review of judgment upon the ground of a discovery of fresh evidence; and I wish to draw attention to the inconvenience, as it seems to me, which results from denoting by the one term "review" in Section 376 of the Code of Civil Procedure what appear to me to be two very distinct things, *viz.*, the re-consideration of a case as it originally stood, upon the ground of an alleged error upon a point of law or in respect of the weight of evidence; and, on the other hand, the re-hearing of a case on additional evidence on the application of one or other of the parties to the case, which is, in fact, the hearing of a new case. It appears to me that the inclusion of these two different things in the single term review of judgment tends very much to complicate questions connected with that kind of proceeding.

10th March 1868.

Present :

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice*, and the Hon'ble W. S. Seton-Karr, L. S. Jackson, J. B. Phear, and A. G. Macpherson, *Judges*.

Appeal—Execution—Postponement of sale—Section 243, Act VIII. of 1859.

Application under Section 35, Act XXIII. of 1861.

Hunooman Pershad, Judgment-debtor, *Petitioner*,

versus

Ajoodhia Pershad, Decree-holder, *Opposite Party*.

Baboo Tarucknath Sein for Petitioner.

Mr. R. T. Allan for the Opposite Party

HELD by the majority (*Jackson, J., dissenting*) that under Section 11 of Act XXIII. of 1861, an appeal lies from an order passed under Section 243 of Act VIII. of 1859, giving the judgment-debtor time to raise the amount of debt due under the decree against him.

This case was referred to the Full Bench by L. S. Jackson and Hobhouse, JJ., under the following remarks :—

Jackson, J.—IT seems to me that it will be convenient to refer the point raised in this motion for the decision of a Full Bench.

The question is, whether an appeal lies to the Zillah Judge from an order of the Principal Sudder Ameen, complying with an application of a judgment-debtor, and postponing the sale in order to enable the judgment-debtor to raise the amount of the decree against him.

A case lately came before us which is reported in the 8 Weekly Reporter, page 136, in which we held that an appeal in such case would not lie. We had on that occasion before us two conflicting decisions to be found in 1 Weekly Reporter, page 11, and 2 Weekly Reporter, page 49. Those decisions having been passed by the same Judges, we did not consider ourselves bound to refer the matter to the Full Bench at that time. But another decision upon the same point has now been brought to our notice, which is to be found in Marshall's Reports, page 261. In that case an appeal against the order under the same Section (243) of the Act was admitted, and the order in part reversed by two Judges of this Court. This appears to be such a conflict of decision, as obliges us to refer the matter for the opinion of the Full Bench.

In making this reference, however, I think it at the same time right to direct the Court below, that the effect of our prohibition to sell the property under attachment is not to extend beyond the period of three months originally allowed to the judgment-debtor.

Hobhouse, J.—I concur.

The following are the judgments of the Full Bench :—

Jackson, J.—In the present case, I am concerned to say, with the greatest deference for the opinion of the Chief Justice and of my learned brethren who are unanimous, that I feel compelled to adhere to the opinion I have long entertained, and which I expressed when referring the case for the determination of the Full Bench.

The single question before us is, whether in respect of an order made by a Court executing a decree under the authority of Section 243 of the Code of Civil Procedure, an appeal lies or does not lie to the superior Court; and the right of appeal in such a case is supposed to be given by Section 11, Act XXIII. of 1861.

My answer to the question shortly is, that the right of appeal conferred by Section 11 of Act XXIII. of 1861, is exactly co-extensive with the authority to determine particular questions conferred on Courts of original jurisdiction by the same Section.

If, therefore, I could suppose that the Principal Sudder Ameen in this case had at all derived his competency to make the order granting time to the judgment-debtor from Section 11 of Act XXIII., that is to say, that in making the order he was merely, under the general terms of that Section, determining a question arising between parties to the suit and relating to the execution of the decree, I should have no difficulty whatever in coming to the conclusion that an appeal was given; in fact, I should be constrained by the terms of the Section to hold that there must be an appeal.

But the order in the present case was made by the Principal Sudder Ameen, not by any means under Section 11, or by virtue of any authority conferred by that Section, but under the express provisions of Section 243 of the Procedure Code itself.

For the purpose of my argument, we may look on Section 11 as if it had been originally passed as a part of the Procedure Code, and it may fall into the place of the original Section 283, which it was intended to replace.

It appears to me that, in regard to the admissibility or otherwise of appeals from orders passed in execution of decrees, we must be guided by the distinct provision contained in Section 364 of the Procedure Code, which declares that "no appeal shall lie "from any order passed after decree, and re-"lating to the execution thereof, except as "is hereinbefore expressly provided;" that is to say, that where an order is made after decree by virtue of any provision of the Procedure Code antecedent to Section 364, we are merely to see whether the Section of the Act provides an appeal or not; and accordingly, several Sections relating to such orders do expressly authorize an appeal, and there are other Sections which are silent as to appeals. Where they are silent, of course, no appeal will lie.

It seems to me consequently that all that we have to do is to enquire whether the order made is made, under one of the Sections which provide an appeal or under one of the Sections which are silent or expressly exclude appeals.

Are we, then, to look for the present order in Section 283 of Act VIII. of 1859 (or in Section 11 of Act XXIII. of 1861) or elsewhere? If under Section 283 or under Section 11, there is clearly an appeal; but, if under Section 243, which gives no appeal, I fail to see how we can do otherwise than apply the provision of Section 364, which excludes an appeal.

Something was said as to the inconvenience which might arise if appeals were not allowed in cases of this description. That has always seemed to me an argument of very doubtful admissibility; but in point of fact, it would be impossible to admit appeals in all cases where inconvenience might arise if there was no appeal.

It has been said that, by an order under Section 283, the Principal Sudder Ameen might make an order deferring the payment of a debt for 20 years; but, in like manner, he might in any suit appoint a day for fixing the issues distant 20 years, and as great inconvenience would arise in the one case as in the other. There would be no appeal as to the order postponing the fixing of the issues, but the party would have to wait for the final decree, and might then object to the order. (Section 363, Code of Civil Procedure.) In like manner, the Principal Sudder Ameen might frame an issue which the parties would be obviously unable to support by proof, and he might then give to the plaintiff unlimited time to adduce his evidence. I only give these instances by way of illustration as bearing upon the argument that an appeal must lie; because, if no appeal be allowed, inconvenience would result. It may be added that an argument of this kind always proposes to sacrifice the maximum of convenience to the minimum of inconvenience; for surely it must be assumed that in the great majority of cases where a discretion is allowed, the Courts will give a proper and reasonable order; and it seems far better that such order should be undisturbed than to open a door for interference with all, by way of providing against a few orders which might possibly be made under unusual circumstances.

It is with very great regret that I differ from my learned brethren, but having considered the question very attentively, I feel I should not be doing right if I were to surrender the opinion I have deliberately formed to the opinions of my colleagues, however great my respect for them may be.

Peacock, C. J.—It appears to me that an appeal does lie in this case.

Section 243 of Act VIII. of 1859, speaking of executions, says that when the property attached shall consist of lands, if the judgment-debtor can satisfy the Court that there is reasonable ground to believe that the amount of the judgment may be raised by the mortgage of the land, or by letting it on lease, or by disposing by private sale of a portion of the land or of any other property belonging to the judgment-debtor, it shall be competent to the Court, on the application of the judgment-debtor, to postpone the sale for such period as it may think proper to enable the judgment-debtor to raise the amount.

The discretion which by this Section was vested in the Court executing the decree was a very wide one, and one in the exercise of which the Court might easily fall into error, and by which the execution-creditor might sustain very great damage.

Section 364 enacted that no appeal should lie from any order passed after decree and relating to the execution thereof, except as thereinbefore expressly provided.

An order made under Section 243, clearly fell within the provisions of Section 364, and was not appealable, no express provision having been made by that Act for giving an appeal.

Section 243 was silent as regards an appeal, and the words of Section 283 did not give an appeal. There was no other Section in Act VIII. by which an appeal was given in such a case.

Act XXIII. of 1861 was passed for the purpose of amending Act VIII. of 1859. It recited that it was expedient to amend the Act, but it did not state in what respects it was expedient to amend it. Section 283 of Act VIII. of 1859 was repealed. A new Section (11) was inserted, and it was declared that Act XXIII. of 1861 should be read and taken as part of Act VIII. of 1859.

Section 11, Act XXIII. of 1861, which was to be read as part of Act VIII., contained the following words: "And any other questions "arising between the parties to the suit in "which the decree was passed, and relating "to the execution of the decree," which were not in Section 283, Act VIII. of 1859; and by reason of the insertion of those words, the question referred to by them as well as the other questions which had been provided for by Section 283, were directed to be determined by order of the Court executing the decree and not by separate suit, and the order of the Court was expressly made subject to appeal.

The question whether the sale of land, attached in execution, shall be stayed under the provisions of Section 243 or not, clearly comes within the meaning of the words to which I have referred, and which were for the first time used in Section 11, Act XXIII. of 1861.

Such a question, when determined by the order of the Court executing the decree, comes within the words "and the order passed by the Court shall be open to appeal."

The importance of the question to be determined under Section 243 would be no ground for holding that an appeal lay from it, but it is an important matter to be considered when it is contended that the question, although falling within the words of Section 11, is to be excluded from its provisions.

There is considerable force in the argument of my Hon'ble colleague Mr. Justice Louis Jackson, for whose opinion we all entertain the greatest respect. His argument is that Section 11 is not a Section merely for the purpose of giving an appeal, but for the purpose of referring the determination of certain questions for the decision of the Court executing the decree with an appeal against the decision when passed.

But when we come to look narrowly to Section 283, which was repealed, and to Section 11, Act XXIII. of 1861, which was substituted for it, I cannot help thinking that the insertion of the new words in Section 11, which were not in Section 283, was quite as much for the purpose of giving an appeal in the case of all orders determining questions arising between the parties in the suit and relating to the execution of the decree as for the purpose of referring the determination of the questions to the Court of execution.

For instance, there was no necessity to enact that all questions regarding the amount of mesne-profits, which were reserved for adjustment in the execution of the decree, should be determined by order of the Court executing the decree; and many other questions of a similar nature might be put. I think one of the amendments intended by the insertion of those words was to give an appeal from decisions on all questions which were included in the words newly introduced.

If, instead of mixing the whole thing up together in one Section and in one sentence, the provisions had been separated, the point would have been very clear. If, instead of saying "and the order passed by the Court shall be open to appeal," the Section had said "and any order passed by the Court arising between the parties to the suit and relating to the execution of the decree shall be open to appeal," no question could have arisen as to the construction of the Section. If the Legislature had not intended to give an appeal in cases similar to that now under consideration, I think they would have said "and any other questions than those which "have by this Act or by Act VIII. of 1859 "been expressly referred for the decision of "the court of execution."

The case falls within the words of the Section. It is one amongst many other in which I think it is important that there should be an appeal, and in which I think that it was the intention of the Legislature to give an appeal by the insertion of the words in Section 11, although the Section is not very aptly worded, either as regards the direction that the questions mentioned in the Section should be determined by the Court executing the decree, or as regards the questions in respect to which it was intended to give an appeal.

The rule will be discharged with costs.

Seton-Karr, J.—I am of the same opinion as the learned Chief Justice.

Four cases have been quoted as bearing directly on the point referred to us—Marshall's Reports, page 261; 1 Weekly Reporter, page 11; 2 Weekly Reporter, page 49; 8 Weekly Reporter, page 136.

In the first of these cases, the opinion appears to have been arrived at without argument or discussion. In the next two cases I was one of the Division Bench which passed the orders which have made this reference necessary. In the first of these cases, the appeal was preferred against an act done by a manager, who had been appointed under Section 243, Act VIII. of 1859, and we held that Section 11, Act XXIII. of 1861, was not meant to apply to acts done by a person so appointed. In the second case, we certainly did hold that an appeal would lie under Section 11, but as between parties on the suit and to the execution.

The last case quoted is certainly in conflict with our opinion, but looking to the very broad and general terms of Section 11, Act XXIII. of 1861, and also to the hardship which might be caused if there were no redress against unjust or illegal orders passed under Section. 243, Act VIII. of 1859, I am of opinion that it was the intention of the Legislature that an appeal should lie.

Phear, J.—I agree in the decision of the Chief Justice and the arguments by which he has supported it.

Macpherson, J.—I also concur with the Chief Justice.

The 19th March 1868.

Present:

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice*, and the Hon'ble L. S. Jackson, J. B. Phear, A. G. Macpherson, and Dwarkanath Mitter, *Judges.*

Execution—Limitation—Bona fide application.

Case No. 436 of 1867.

Miscellaneous Appeal from an order passed by the Judge of East Burdwan, dated the 10th July 1867, reversing an order of the Principal Sudder Ameen of that District, dated the 6th April 1867.

Bisseshur Mullick (Judgment-debtor), *Appellant,*

versus

Maharajah Mahatab Chunder Bahadoor (Decree-holder), *Respondent.*

Baboos Romesh Chunder Mitter, Annund Chunder Ghossal, and *Lukhee Churn Bose* for Appellant.

Baboos Juggadanund Mookerjee and *Chunder Madhub Ghose* for Respondent.

A judgment-creditor obtained a decree on the 31st August 1859, and took out proceedings in the following order of time: *first*, on the 20th August 1861, when an effectual notice was served on the judgment-debtor: *secondly*, on the 13th September 1865, when a similar notice was served; and *thirdly*, on the 13th of August 1866, when application was made to arrest the person of the judgment-debtor.

HELD that as the execution of the decree was barred by limitation when the application of the 13th September 1865 was made, the last application on the 13th August 1866 was, within the terms of Section 20, Act XIV. of 1859, barred.

This case was referred to the Full Bench by Loch and Hobhouse, JJ., under the following remarks:—

Hobhouse, J.—The facts are these:—

The Maharajah of Burdwan, the judgment-creditor, got a decree on the 31st August 1859, and subsequently took out proceedings in execution in the following order of time:—

First, on the 20th August 1861, when, on the 24th of June 1862, an effectual notice was served on the judgment-debtor;

Secondly, on the 13th September 1865, when a similar notice was served;

Thirdly, on the 13th August 1866, when application was made to arrest the person of the judgment-debtor: And *lastly*, on this present occasion.

It is admitted that when the proceedings of the 13th September 1865 were instituted, execution was barred by the application of the Statute of Limitations (Section 20, Act XIV., 1859), and that all the proceedings taken were real, effectual, and in good faith, and that the judgment-debtor had notice of them, and on no occasion, until the present, sought to plead limitation in bar of them.

It is contended, however, by the judgment-debtor that when once proceedings were barred by lapse of time the decree was dead, so that no subsequent proceedings, even though the judgment-debtor had notice of them, and did not plead limitation in bar of them, could revive the decree; and in support of this contention he relies on various rulings of Division Benches of this Court, to be found at pages 20 and 21, Vol. V., and 17 and 18, Vol. VI., W. R., respectively.

On the other hand, the judgment-creditor contends that Section 20 of the Act is to be

construed literally; that the Court is only, in the terms of that Section, to ascertain whether any real and effectual proceeding has been taken to keep the decree in force "within three years next preceding the application for execution;" and that when, as in this case, a real effectual proceeding has admittedly been taken within such time, the application to execute is not barred by the fact that at some previous time the decree may have been dead, and he relies on two judgments of a Division Bench of this Court put up with the record.

There is no doubt that these latter judgments conflict with those relied upon by the judgment-creditor, and I think, therefore, that we should submit the matter for the decision of a Full Bench.

The facts are, that execution of the decree was at one time barred by the application of the Statute of Limitations, and that subsequently to this time the judgment-debtor suffered effectual proceedings to be taken in execution, so that, as the case now stands, such proceedings have been taken within three years next preceding this present application for execution.

Such being the facts, the question for the Full Bench is, whether or not the present application is barred by the terms of Section 20, Act XIV. of 1859.

The judgments of the Full Bench were delivered as follow:—

Peacock, C. J., (Phear, Macpherson, and Mitter, JJ., concurring).—I think that the case is a very clear one. On the 13th of September 1865, an application for execution was made; but at that time execution of the decree was barred by limitation. The proceedings under that execution were struck off on the 29th of March 1866. Subsequently, another application for execution was made within three years after the 13th of September 1865, and the question is whether the application which was made on the 13th of September 1865, or the issuing of the process thereon, was a proceeding taken to enforce the judgment within the meaning of Section 20 of Act XIV. of 1859.

It appears to me that the application was not a proceeding within the meaning of that Section. By the word "proceeding" in that Section, I understand the Legislature to have intended a proceeding not barred by limitation, and under which process of execution might have been lawfully issued, if the application had been opposed.

If this were not so, a person, after a decree was barred, might make an application to enforce its execution; but upon that application it is clear that no process of execution could arise unless some proceeding had been taken to enforce the judgment within three years prior to it. Such application for execution ought, therefore, under Section 20 to be refused. If the argument in the present case is correct, the applicant might in such case make a fresh application, and in support of it, avail himself of the one which had just been refused as an application which had been *bonâ fide* made within three years.

The application, then, of the 13th of September 1865, was not a proceeding within the meaning of the Section. If that application was not a proceeding within the meaning of the Section at the time when it was made, it could not subsequently become so, merely because the judgment-debtor did not come in and oppose it. The non-opposition by the judgment-debtor clearly was not a proceeding, nor was the issue of process by the Court in a case in which that process ought to have been refused a proceeding within the meaning of the Act. Under these circumstances, it appears that the application which was last made was barred by limitation.

The appeal must be allowed. The judgment of the Judge is reversed, and the judgment of the Principal Sudder Ameen affirmed with costs in all the Courts.

Jackson, J.—I entirely concur in the judgment which has just been delivered, and I have nothing whatever to add to the view of the law taken by the Chief Justice in the case before us; but it may be useful to advert to a class of cases, several of which have lately come before the 5th Bench on which I was lately sitting, and which, though distinguishable from the present case, might perhaps have been cited as bearing upon the question referred to us. I mean cases of this description, in which execution has been applied, a proceeding taken, the case then struck off, a fresh application made within three years from the date of the previous proceeding, fresh notice given, and, say, a process of attachment issued. Shortly after, that is within three years after that attachment took place, a fresh application to execute is made, and the judgment-debtor coming forward seeks to raise a question as to the *bona fides* and the sufficiency of the proceeding last taken before the preceding application.

In such cases, I have more than once felt obliged to hold that the question of the *bona-fides* of such proceedings, being a matter of fact which the judgment-debtor might have disputed on the occasion of the last notice, and he having, notwithstanding the service of notice, omitted to raise that question, and having submitted at that time to further proceedings in execution, he was thereafter barred from raising the question of limitation, and that the execution must go on. Cases of that description, I need hardly say, are clearly distinguishable from a case like the present, in which there was a manifest bar of limitation at the time of the last application.

The 19th March 1868.

Present:

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble L. S. Jackson, J. B. Phear, A. G. Macpherson, and Dwarkanath Mitter, *Judges.*

Execution—Limitation.

Case No. 507 of 1867.

Miscellaneous Appeal from an order passed by the Officiating Judge of Shahabad, dated the 26th of July 1867.

T. Leake (Decree-holder), *Appellant*,

versus

W. Daniel (Judgment-debtor), *Respondent.*

Baboo Otool Chunder Chowdhry for Appellant.

Baboos Mohinee Mohun Roy and *Onookool Chunder Mookerjee* for Respondent.

When a decree is, under Section 284 and the following Sections of Act VIII. of 1859, transmitted from one Court to another Court for execution, the Court to which the decree is transmitted has jurisdiction to determine whether or not execution of the decree is barred under Act XIV. of 1859.

This case was referred to the Full Bench by Loch and Hobhouse, JJ., under the following remarks:—

Hobhouse, J.—THE facts essential to the right understanding of this case are these:—

Appellant, the decree-holder, obtained a decree against the judgment-debtor, respondent, in the Court of the Judge of the district of Azimgurh, within the jurisdiction of the High Court of the North-Western Provinces.

Under Section 284, and the following Sections of the Code of Civil Procedure, the decree-holder applied to the Court of the Judge of Shahabad, to execute the decree of the Azimgurh Court, and the said Judge has refused to do so on the ground that execution is barred by the application of the Statute of Limitations (Section 20, Act XIV. of 1859).

In appeal before us, it is urged that this decision is erroneous in law, inasmuch as the Judge had no jurisdiction to make it: and it is said that, under Section 290 of the Act, the Judge should simply have stayed execution, pending orders of the Court of Azimgurh by which the original decree was passed.

On the other hand, it is pointed out to us that, under Section 288, the Judge of Shahabad has jurisdiction in a certain contingency to enquire into the validity of the decree of the Court of Azimgurh, and that, under rulings of Division Benches of this Court, marginally noted, such jurisdiction involves the minor jurisdiction of enquiring into and determining the fact as to whether or not execution of the same decree is barred by limitation.

5 W. R., 11, Misc.
6 „ 118, „
7 „ 19, „

I venture to dissent from the view of the law thus taken by the Division Benches in question.

I observe that the procedure under Section 284 and the Sections following is this:—

A copy of the decree and certificate of non-satisfaction and a copy of any order for execution are transmitted to the Court in which execution is desired. On arrival of these documents in the said Court, they are filed therein, and they become decrees and orders capable of execution by the Court to which they have been transmitted.

Then, when application is made to such Court for execution, the Court (Section 288) "shall proceed to execute the same according to its own rules in the like cases, "provided that such Court shall have no "power to enquire into the validity of the "decree, unless it appear upon the face of "the decree that the Court by which it was "made had no jurisdiction to make the "same."

Section 290: "Such Court may, upon "good and sufficient cause being shown, stay "the execution of the decree for a reasonable "time to enable the defendant to apply to "the Court by which the decree was passed, "or to any Court having appellate jurisdic-

"tion in respect of the decree or the execu-
"tion thereof, for an order to stay the
"execution, or for any other order relating
"to the decree or to execution thereof which
"such Court of first instance or of appeal
"might have made, if execution had been
"issued by such Court of first instance, or if
"application for execution had been made
"to such Court; and in case the person or
"property of the defendant shall have been
"seized under an execution, the Court which
"issued the execution may order the restitu-
"tion of the property or the discharge of the
"person of the defendant, pending the result
"of such application."

And again (Section 292): "Any order of the
"Court in which the decree was passed, or of
"such Court of appeal as aforesaid, shall be
"binding upon the Court in which the appli-
"cation for execution was made."

But, on the other hand (Section 294): "All
"orders of a Court for executing a decree of
"another Court shall be subject to the same
"rules in respect to appeal as if the decree
"had been originally passed by the Court
"making such order."

These seem to me to be the essential provisions of the law in respect of execution by one Court of the decree of another Court.

In the first place, then, I remark that the Court to which the decree is transmitted has not the whole record before it, but only three documents, *viz.*, copies of the decree and of any order for execution made by the transmitting Court, and certificate of non-satisfaction of the decree.

These documents are obviously not alone and without the record sufficient to enable the Court to enquire into the merits of the case; and it seems to me questionable whether the general provision of the Code, under which one Court may send for the records of another Court, is applicable.

But these documents are sufficient to enable the Court to comply with the proviso in Section 288, *viz.*, to see whether or not, on the face of the decree, the Court by which it was made had jurisdiction to make it, and, if it had not, then to enquire into the validity of the decree, and if it was invalid, then, I presume, to refuse to proceed to execute it.

I think, therefore, that the proviso in Section 288 gives one particular power, and that only, and upon the preceding words of that Section, and upon the general doctrine of the "*expressio unius*," I would hold that, unless the Court should consider that the decree had, on the face of it, been made without jurisdiction, then the Court was bound ("shall") to "proceed to execute the decree according to its own rules"

It is contended, however, that by these last words there is conveyed to the Court a power to enquire into the whole merits of the execution-case, and so, to apply the argument to this particular case, to enquire into the fact as to whether or not the decree is barred by the application of the Statute of Limitation.

But in the first place, as I remarked above, the Court has not, and I think cannot have, before it the materials for such an enquiry; nor, for public convenience, would it seem advisable that it should be able to procure such materials, nor again can I understand for what object the provisions of Section 290 were framed, if it was not that such an enquiry, as I have above mentioned, should be held by the Court "by which the decree was passed," or "by any Court having appellate jurisdiction" over such Court.

It seems to me that the Court to which a decree is transmitted for execution has a very limited and a very well-defined jurisdiction.

So far as the original decree is concerned, it may enquire into any want of jurisdiction to make it apparent on the face of it, and that is all.

And so far as execution of a decree is concerned, it may proceed to execute upon its own rules, *i. e.*, as Section 7, Act XXXII. of 1852 had it, "its rules and mode of procedure;" it may seize, for instance, the property or person of the defendant by its own officers under its own rules and its own peculiar procedure.

And its orders in execution are (Section 294) open to appeal.

But if any other order is wanted either to stay execution or relating to the decree or the execution thereof, and that order is one (as undoubtedly this is in this case) which the Court by which the decree was passed or its Appellate Court might have made if execution had been issued by such Court, then all that the Court to which the decree is transmitted can, in my judgment,

do, is to stay execution for a reasonable time to enable the defendant to apply to the transmitting Court for orders.

I think, then, as this was a decree of the Azimgurh Court, that that Court alone, and not the Court of Shahabad, had jurisdiction to pass an order as to whether or not the decree was barred by the application of the Statute of Limitation, and so that the order of the Judge of Shahabad must be set aside as made without jurisdiction.

The question for the decision of the Full Bench is this:—

When a decree is, under Section 284 and the following Sections of the Code of Civil Procedure, transmitted for execution to any Court, has that Court jurisdiction to determine whether or not execution of the decree is barred by the application of the Statute of Limitation, or does not the jurisdiction rather rest with the transmitting Court?

Loch, J.—The question raised by Mr. Justice Hobhouse is of so much importance that I think it should be submitted for the determination of a Full Bench.

The following are the judgments of the Full Bench:—

Peacock, C. J. (Phear, Macpherson, and Mitter, JJ., concurring).—In this case a decree of the Azimgurh Court was transmitted for execution to the Shahabad Court. There was no order for execution sent, but merely, as I understand, a copy of the decree and a certificate that satisfaction had not been obtained by execution.

It appears to me to be clear that when application for execution was made in the Shahabad Court, that Court was bound by Act XIV. of 1859, and had power to decide whether or not it was barred by that Statute from issuing process of execution.

A question was raised in argument as to what law of limitation would apply if the Court in which the decree was obtained and that to which it was transmitted were governed by different laws of limitation. It is unnecessary for us to determine what would be the law applicable to such a case; but speaking for myself only, I would say that it appears to have been the intention of the Legislature, under Section 287, that the law of limitation by which the Court to which the decree was transmitted was bound should be the law. It is a general rule that Statutes of Limitation affect the remedy, and not the law.

The case will be sent back to the Division Bench to be dealt with according to its merits.

Jackson, J.—I concur in this judgment, the question of diversity of law of limitation not arising in this case.

The 19th March 1868.

Present:

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice*, and the Hon'ble L. S. Jackson, J. B. Phear, A. G. Macpherson, and Dwarkanath Mitter, *Judges.*

Lease—Non-payment of rent—Section 78, Act X. of 1859.

Case No. 1534 of 1867.

Special Appeal from a decision passed by the Additional Judge of Chittagong, dated the 30th April 1867, affirming a decision of the Deputy Collector of that District, dated the 30th October 1865.

Jan Ali Chowdhry (Plaintiff), *Appellant,*

versus

Nittyenund Bose (Defendant), *Respondent.*

Mr. R. E. Twidale for Appellant.

Baboo Sreenath Banerjee for Respondent.

HELD that in a suit for the cancelment of a lease on account of a breach of its conditions, the breach complained of consisting in the non-payment of rent for a particular period specified in the lease, the lessee is entitled to avail himself of the proviso in Section 78, Act X. of 1859, that Section applying to *all* suits for the ejectment of a ryot or for cancelment of lease for non-payment of rent.

This case was referred to the Full Bench by Loch and Mitter, JJ., under the following remarks:—

Mitter, J.—THIS was a suit instituted by the special appellant for the cancelment of a lease on the ground that the respondent had violated a particular condition thereof by which it was liable to be cancelled. The breach in question amounts to the non-payment of rent for one entire year. The Lower Appellate Court has now found after remand that the breach complained of has been committed by the respondent, and a decree for the cancelment of the lease has been passed in the appellant's favor, subject however to the proviso in Section 78 of Act X. of 1859.

In special appeal it is contended before us that an unconditional decree for the cancelment of the lease ought to have been

passed, the proviso in question being inapplicable to a suit founded upon a breach of the conditions of a lease. We are of opinion that this contention is sound. We think that a suit for the cancelment of a lease for non-payment "of rent," as contemplated by Act X., is essentially distinct from a suit brought for the same purpose on the ground of a "breach of contract," even though the breach alleged amounts to nothing more than the non-payment of rent for a period specified therein. The distinction is clearly marked in Clause 5, Section 23 of the Act, and the two grounds of action, namely, "non-payment of rent" and "a breach of the conditions of the contract," are treated as quite distinct from one another. The first class of suits evidently arise out of the provisions made in Sections 21 and 22; the second from the conditions themselves voluntarily agreed to by the parties themselves. In the first, the landholder takes his stand upon a right created for him by the Legislature; in the second, he relies upon a right reserved to himself by the terms of the very engagement by which the tenure in question came into existence. It is to be observed in this place, that no suit for the cancelment of a lease on the mere ground of non-payment of rent can be maintained unless the lessee is a "ryot" or "a farmer, or other lease-holder not having a permanent or transferable interest in the soil." Where the lessee is the possessor of a permanent or transferable interest in the land, his lease can be cancelled on account of non-payment of rent only where such non-payment is made a ground of cancelment by the express terms of the contract under which he holds. Such being the distinction between the two classes of suits above referred to, it is now to be seen whether the proviso in Section 78 can be made applicable to a suit for the cancelment of a lease for non-payment of rent where such non-payment is expressly made a ground for cancelment by the conditions of the contract.

Section 78 runs as follows: "Any person desiring *to eject a ryot or to cancel a lease on account of non-payment of arrears of rent may* sue for "such ejectment or cancelment and for recovery of the arrear in the same action, "or may adduce any unexecuted decree for "arrears of rent as evidence of the existence of such arrear in a suit for such "ejectment or cancelment. *In all* cases "of suits for the ejectment of a ryot or the "cancelment of a lease, the decree shall "specify the amount of the arrear; and if "such amount, together with interest and "costs, be paid into Court within 15 days "from the date of the decree, execution shall "be stayed." We think that the proviso clearly refers to "*suits for cancelment of* "*leases on account of non-payment of rent*" referred to in the first sentence, and not to any other class of suits, such as suits founded upon breach of contract. The whole Section has reference to the provisions of Sections 21 and 22, and must be read in conjunction with them.

It cannot possibly be argued that the proviso in question can refer to a suit founded upon breach of contract when the breach does not consist of non-payment of rent, and we do not see any reason why it is to be applied to a suit of the same class merely because the breach in question happens to amount to non-payment of rent. The words "all cases" mean all cases of suits for cancelment on account of non-payment of rent as indicated by Clause 5, Section 23 of the Act, and the word "*all*" is used with reference to what precedes, *i. e.*, with reference to cases in which the arrear and the cancelment are sought for in the same suit, or cases in which the cancelment of the lease is alone sought for, an unexecuted decree for arrears of rent being filed in evidence. Where the landholder chooses to avail himself of a right created for him by the Legislature, he must take that right subject to all the limitations by which it has been circumscribed by the law; but where he relies upon the contract under which the tenant was permitted to enter upon the land, it is reasonable and just that the full benefit of that contract should be acceded to him, unless it can be shown that the extent of such benefit has been limited by express legislation.

It has been said that a Court of Equity in England would always allow a *locus penitentiæ* to the tenant to save himself from the penalty of forfeiture; but whether it is so or not we do not think that the Revenue Courts are competent to override the contracts of parties, unless there is any express legislation on the subject authorizing them to do so. No such *locus penitentiæ*, it is admitted, can be given to the tenant when the breach of contract committed by him is of any other description than non-payment of rent, and we do not see any reason why it is to be granted merely because the breach committed in a particular case accidentally happens to be non-payment of rent. Such a mode of

procedure would be particularly hard in the case of landholders seeking to cancel the lease of an under-tenant who possesses a permanent or transferable interest in the soil, for it has been shown already that the tenure of such under-tenants cannot be cancelled except under the express provisions of the contract under which they hold.

It is also to be remarked that under the provisions of Sections 21 and 22, the lease of a ryot or of a farmer or other lease-holder not possessing a permanent or transferable interest in the soil, can be cancelled on the ground of his failure to pay any one *kist* or instalment of rent. Such is not necessarily the case where non-payment of rent is made a ground of cancelment by the contract of the parties. In this particular instance before us the non-payment of rent for one entire year is the breach contemplated by the lease, and the period of default might be much larger in other cases. There can be no reason, it appears to us, why the tenant, after having failed in his resistance to the just claim of his landlord, should be allowed a further period of 15 days after the date of decree in direct opposition to the terms of the very contract under which he was allowed to enter upon the land.

We would have decreed this special appeal, but as some decisions of our Court have been pointed out to us in which a different view of the law appears to have been taken by some of our learned colleagues, we think that a reference to a Full Bench is necessary. The cases we refer to are the following: 6 W. R., page 65; 7 W. R., page 374; Hay's Reports, pp. 523 and 573.

We refer this case accordingly to a Full Bench for the determination of the following point—

Whether, in a suit for the cancelment of a lease on account of a breach of the conditions thereof, the lessee is entitled to avail himself of the proviso in Section 78, Act X. of 1859, the breach complained of consisting in the non-payment of rent for a particular period specified in the lease.

The judgment of the Full Bench was delivered as follows:—

Peacock, C. J.—I think that this is a clear case. Section 78 applies to all cases of suits for the ejectment of a ryot or for the cancelment of a lease for the non-payment of rent. It applies not only to cases in which it is sought to eject a ryot under Section 21 for non-payment of rent or for the cancelment of a lease for non-payment of rent under Section 22, but also to cases in which it is sought to cancel a lease or to eject a ryot for non-payment for rent under an express stipulation contained in the engagement between the parties that, in the event of non-payment, the lease shall be forfeited. The words are general "in all cases of suits," and not in all cases of suits brought for the purpose of enforcing the provisions of Section 22.

The appeal will be dismissed with costs.

The 19th March 1868.

Present:

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice,* and the Hon'ble L. S. Jackson, J. B. Phear, A. G. Macpherson, and Dwarkanath Mitter, *Judges.*

Suit for kubooleut—Plaint.

Cases Nos. 1175 to 1180 of 1867.

Special Appeals from a decision passed by the Judge of Backergunge, dated the 3rd of April 1867, affirming a decision of the Deputy Collector of that District, dated 1st December 1866.

Golam Mohamed and another (Defendants), *Appellants,*

versus

Asmut Alee Khan Chowdhry (Plaintiff), *Respondent.*

Baboos Shushee Bhooshun Bose and *Nilmonee Sen* for Appellants.

Baboo Romesh Chunder Mitter for Respondent.

When a landlord sues to obtain from his ryot a kubooleut at a given rate of rent, and the Court find that that rate exceeds the rate which, in the judgment of the Court upon the evidence before it, would be fair and equitable, the plaintiff is not entitled to a decree for a kubooleut at the lower rate, but his suit should be entirely dismissed.

If, in a similar case, the plaint mentions no date for the commencement of the kubooleut, the plaint does not disclose a sufficient cause of action and ought to be returned. The Court may, however, supply the omission by specifying in its decree the time from which the kubooleut ought to commence.

These cases were referred to the Full Bench by Bayley and Phear, JJ., under the following remarks:—

Phear, J.—These six suits are brought, the first four by Asmut Alee, a shareholder

in a zemindary, and the other two by Gunga Churn Chatterjee, the remaining shareholder in the same zemindary, against six different ryots, to obtain from them respectively kubooleuts at the rate of Rupees 20 per kanee.

In each case the Court of first instance framed one issue only, in the following terms: "At what jumma and rate, and for "what quantity of land, is the plaintiff en-"titled to get a kubooleut from the defend-"ants?" And upon this issue, it gave decrees in favor of the plaintiffs.

On appeal brought by the defendants the Judge decided all six cases by one judgment, the material part of which is couched in these words:—

"When there was a local inquiry in the "present instance, that inquiry showed that "the rate of Rupees 16 is that current in "the neighbourhood, and I think the decree "should issue for a kubooleut at that rate. "Suit decreed accordingly. Defendants' "appeal dismissed with costs. Order modi-"fied."

I have no hesitation in saying that this concise and imperfect judgment is in the highest degree unsatisfactory. The Judge omits all inquiry as to whether the plaintiff was entitled, apart from his co-sharer, to a kubooleut from each ryot. But perhaps this right was not disputed by the defendants. However this may be, in proceeding to determine at what rate the plaintiff was entitled in each case, if at all, to get a kubooleut from the defendant, the Lower Appellate Court was bound to be guided by considerations of fairness and equity, and whether the rent was fair and equitable would depend upon the circumstances of each defendant's holding. No doubt these circumstances might be pretty well the same in all the cases. But if they were so, the Judge ought to have stated that fact. Not only, however, is he quite silent on this point, but there is not a trace to be found in his judgment of his having paid the least heed to conditions of any sort under which the ryot was cultivating his land. Not a word is said as to whether or not in any one of the cases the plaintiff had shown that the ryot had contributed to the productive powers of the soil by his own exertions. No reference is made as to whether or not that soil is in all the six cases uniform with the soil in the neighbourhood, the current rent of which has been taken as a measure here. And further, although the Ameen, upon whose report alone the Judge based his decision, found that three different rates of rent were current in the neighbourhood corresponding with three qualities of land, the Judge has adopted the highest of those three, and has awarded it as the rent for *all* the lands in *all* the six different cases, without giving the least explanation of the reasons which induced him to do so.

In truth, as far as I can discover, the Judge has altogether omitted to apply judicial discretion to the determination of the main issue which he had to try, namely, what was the fair and equitable rent at which the plaintiff in each suit was entitled to obtain a kubooleut from the defendant? And were this the only matter of objection to the decision of the Court below, I should feel obliged to say that the cases ought to be remanded for re-trial on this issue.

But I am further of opinion, considering the evidence on the records, that in all the six suits the defendants are entitled to decrees in their favor, and therefore that the Lower Appellate Court was wrong in giving judgment for the plaintiffs. Taking any one of the suits by itself, I find that it is a suit to obtain a kubooleut at the rate of Rupees 20 per kanee from the defendant. In other words, it is a suit to compel the defendant to enter into a contract of tenancy, which is to cover some future time. It is not merely a suit to recover past rent, due after notice under Section 13 of Act X, 1859, or otherwise. It is not a suit for a money-debt. In cases such as these, no doubt the plaintiff's claim is divisible, and it is within the discretion of the Court to award him a less sum than that for which he asks. But when a plaintiff comes into Court to enforce specific performance of a contract, whether it be a contract of tenancy or of any other character, his cause of action stands or falls with his right to have the benefit of the particular contract which he sets out in the plaint. If he based his right to the benefit of the contract on the antecedent agreement of the defendant to execute it, then it is clear that he would fail in his suit unless he made out that this agreement extended to all the material terms of the contract, as he alleged it. He would not be allowed to fall back on such terms only as he succeeded in proving against the defendant, for the alteration or omission of any material term changes the contract. And it would be a great hardship that plaintiff, on the foundation of a suit to ob-

tain the execution of one contract, should obtain a decree against the defendant for the enforcement of another. There could be no assurance in such a case that the defendant would not have voluntarily executed this second contract, had it been proposed to him in the form in which it was decreed. I think that the same principle governs suits brought to obtain execution of a contract upon the title of fairness and equity. Whether the plaintiff claims the execution of the contract, because the defendant has previously agreed to execute it, or because it is on the facts of the case fair and equitable that the defendant should do so, it is equally incumbent on him (the plaintiff) to state distinctly the terms of the contract, and he ought to fail as much in the one case as the other, if he does not support those terms by evidence of the agreement on their behalf or of their fairness and equity, as the case may be.

This view is confirmed by the words of Act X. of 1859, which in effect direct that "a pottah should be prepared and tendered "to the ryot before the person to whom the "rent is payable becomes entitled to require "from him a kubooleut." This must mean a pottah couched in definite terms, and the enactment would not be satisfied by the tender of a pottah in which, for instance, the amount of rent was made contingent on the decision of the Collector in a suit about to be brought for the determination of the sum which would be fair and equitable in that respect. I do not think that the words "for the determination of the "rates of rent at which pottahs or kubooleuts "are to be delivered," in Sections 23 and 31 of Act X., refer to more than the determination of the issue between the parties as to the rate of rent, *viz.*, whether or not the rate relied on by the plaintiff is fair and equitable.

For all these reasons, then, I am of opinion that in suits like those which are now under our consideration, the subject of the plaintiff's claim is single and indivisible. He must be treated as being ready to deliver to the defendant a pottah corresponding in terms to the kubooleut which he sets out, and asks for, in his plaint; and if a pottah so drawn is not such as the defendant is entitled to receive, the plaintiff's suit must be dismissed. There is, as I think, no warrant in law for permitting the plaintiff to say: "If the pottah which I tender in accordance "with my plaint does not appear to the "Court fair and equitable, then I am ready "to tender such other pottah as the Court "may think fit, and I will alter my claim "for a kubooleut accordingly." In short, he must stand or fall by the justice of his claim of right to impose the contract which he specifies on the defendant, and cannot, after coming into Court, mend his specification to make it suit the evidence.

Now, every pottah and kubooleut must of necessity, either expressly or impliedly, contain three material terms relative, respectively, to the *commencement* of the lease, to the termination of it, and to the rate of rent. Of course, there may be many others at the option of the parties, but without these three the contract cannot be complete; and moreover, these three are so cardinal that an alteration in any one of them necessarily alters the whole contract. A lease to commence with the 1st Bysakh of a given year is quite distinct from a lease to commence with the 1st of Falgoon of the same year. A lease for five years involves a different contract from that exhibited in a lease from year to year as long as the parties shall choose. And a lease at a rent the rate of which is 20 rupees per kanee, is not the same thing as a lease which gives the rate at Rupees 16.

This leads me to observe that in none of the cases before us is the commencement of the kubooleut which is sued for, mentioned or ascertainable. The plaintiff's claim is, therefore, on this head indefinite, and for this reason alone the suit ought to be dismissed. Again, in all the cases the rate of rent at which the kubooleut is sought, is fixed by the plaintiff at Rupees 20; but there is no evidence of any kind on the record to show that more than Rupees 16 would be fair and equitable. It is obvious that the plaintiff has utterly failed in every single case to make out that it would be fair and equitable that the defendant should be compelled to receive a pottah, and deliver a kubooleut at the rate of Rupees 20 rent; consequently he has no right to the particular kubooleut which he seeks, and the Court cannot in these suits grant him any others.

In coming to this conclusion, I am fortified by the opinion of the Chief Justice, expressed in Special Appeal No. 2158 of 1866. The decrees of both the Lower Courts ought, in my judgment, to be reversed, and the six above numbered suits all dismissed with costs in all Courts.

Bayley, J.—In the opinion expressed in the 1st to the 5th para. (inclusive) of the

above judgment of Mr. Justice Phear, I fully concur.

I have, however, great doubts as to whether, in suits brought under Clause 1, Section 23, Act X of 1869, for a kubooleut at a certain definite rate, nothing except the kubooleut *at that exact rate* can be decreed, that is to say, that if plaintiff sues for the delivery of a kubooleut at Rupees 20, the Court cannot give 16 rupees, or any other sum which is fair and equitable, so long as it be not more than is prayed for in the plaint.

The decision cited (Weekly Reporter, Volume IX., p. 149) is not exactly in point, although, in some degree, supporting the view that, if plaintiff fails to prove a right to the exact contract he claims, he cannot have any other modified contract decreed.

I can see no practical difference ordinarily in a suit for a counterpart lease at certain rates to be enforced as a contract, and a suit for enhancement to those rates under the provisions of Sections 15 and 17 or other Sections of Act X. of 1859.

My main doubt is whether, in this class of cases under Section 23, Clause 1, that Clause and Section are not to be read together with Section 31, Act X. of 1859. The word *and* (not "*or*") is used, and the other terms are the same. Section 31 seems to me to contemplate that the suit for the kubooleut and the determination of the rates at which that kubooleut shall be given *are one and the same matter*, that is, that the kubooleut is only the resulting deed in which shall be recorded the rates determined whether these be the same as claimed by plaintiff or other lesser rates which ought fairly and equitably to be paid. Again, if the word "*and*" in Section 31 be read as "*or*," still a suit for determination of rates at which kubooleuts shall be delivered may be brought under Section 23, Clause 1. Thus, if (referring to Section 31) in a suit for determination of the rates at which a kubooleut or pottah is to be delivered the plaintiff (whether landlord or ryot) may state in his plaint his claim to have a lease or a particular rate, and *also* (as he may under Section 31) ask the Court to determine what ought to be the proper rate, why should not the same party obtain on a suit for a kubooleut such relief as he might be found entitled to, although not the full amount he may demand? I do not think it makes any difference in the case that the tender of a pottah is essential to effect being given to a decree for a kubooleut.

The two terms "pottah" and "kubooleut" do not necessarily indicate more than one contract. They are papers of one contract of which the rent payer holds one, *viz.*, the lease, the rent-receiver the other, *viz.*, the counterpart.

If the view of Mr. Justice Phear prevail, there is this practical difficulty, *viz.*, that it is hardly possible for a party suing for a kubooleut at a particular rate to discover *exactly* in each case what a Court might consider would be fair and equitable; the meaning to be put on those words "*fair* and *equitable*" being so very vague and indefinite in each judicial mind. It might thus well be that a Court should think a plaintiff entitled to 19-15-11, and yet the suit be dismissed because the plaintiff claimed a kubooleut for ¼-pie more. I must add, there are the cases No. 2158 of 1866 unreported, 12th January 1867, Chief Justice and L. Jackson, J., and also 17th and 19th February 1868, Chief Justice and Mitter, J., supporting Mr. Justice Phear's view; and, on the other side, the case in Volume 9, page 81, supporting my view. On the whole, then, I must with deference differ from Mr. Justice Phear in this case, and I presume a reference to the Full Bench should be made.

On the other point, I observe that it is true that the date of the commencement of the kubooleut is not indicated in the plaint. But the Full Bench decision, Vol. 3, page 29, Thakooranee's case, lays down that such suits for a kubooleut, if decreed, will take effect from the commencement of the year following that of the decree, and this, I think, would suffice.

Refer to Full Bench to ask whether, in a suit for a kubooleut at enhanced rates, no kubooleut on lesser rates can be decreed.

Phear, J.—Having read Mr. Justice Bayley's judgment, I would suggest that the reference to the Full Bench should be made in the following shape:—

When a landlord sues to obtain from his ryot a kubooleut at a given rate of rent, supposing the Court should arrive at the conclusion that that rate exceeds the rate which, in the judgment of the Court upon the evidence before it, would be fair and equitable, ought the suit to be dismissed?

Also, if in a similar case the plaint mentioned no date for the commencement of the kubooleut, would it disclose a sufficient cause of action?

The judgments of the Full Bench were delivered as follows:—

Peacock, C. J.—The first question is whether, when a landlord sues to obtain from his ryot a kubooleut at a given rate of rent, which, in the judgment of the Court upon the evidence before it, exceeds the amount which would be fair and equitable, ought the suit to be dismissed?

It appears to me that that question ought to be answered in the affirmative, and that, where the plaintiff seeks to compel a tenant to execute a kubooleut of a particular description, and fails to make out a right to a kubooleut of that description, he is not entitled to have a decree ordering the ryot to execute a kubooleut of the description to which he is entitled.

This opinion is not founded upon a mere technicality, but upon principles of justice. A man ought not to have a decree to compel a ryot to execute a kubooleut, unless, at the time when he commences the suit, he is willing to execute a corresponding pottah.

Section 9 of Act X. of 1859 enacts that the tender of a pottah, such as the ryot is entitled to receive, shall be held to entitle the person to whom the rent is payable to receive a kubooleut from such ryot. The Court went to a great extent when it held that a tender was not actually necessary; and I think that we ought not to extend the rule, and to hold that a landlord is entitled to obtain a decree against a ryot to compel him to execute a kubooleut, when from the plaint it is clear that the landlord was not ready or willing to execute a corresponding pottah.

If, instead of suing for a kubooleut, the landlord had by himself or his agent gone to the ryot, and endeavoured to agree upon the amount of rent which would be fair and equitable, the ryot would possibly have been willing to execute a kubooleut at the amount which the Court, upon the evidence, has considered reasonable. But apparently, without any notice whatever to the ryot, without any notice of enhancement in accordance with the provisions of Section 13 of the Act, the landowner commences a suit against the ryot, and asks that he may be compelled to execute a kubooleut at a rent much higher than the ryot was then paying, and much higher than that which the Court has considered that the landowner was entitled to demand. When a suit for a kubooleut at a given rent is brought, a ryot has no opportunity of avoiding litigation, unless he complies with the landowner's demand: and when the decree of the Court shows that the amount of rent demanded was more than that which, under the circumstances, the ryot ought to pay, the suit ought to be dismissed.

The facts of the present case afford a good illustration. The landlord demanded the rate of 20 rupees a kanee. The first Court awarded a kubooleut at the rate of 12 rupees. The landowner appealed to the higher Court, which shows that he was not willing to execute a pottah at 12 rupees, and to accept a kubooleut at that rate. The Judge increased the rate to 16 rupees, and the plaintiff says that he ought to have had a kubooleut awarded to him at the rate of 16 rupees. It does not appear that even then the landlord was willing to execute a pottah at 16.

But it is contended that that is immaterial, because he would not have obtained execution against the ryot to compel him to execute a kubooleut at 16 rupees until he had offered to give a pottah at that rate. This is the first time in which I ever heard it contended that a decree ought to be given against a ryot to compel him to execute a kubooleut at a given rate of rent, leaving it optional with the landlord to give a pottah at that rate or not; or that a decree ought to be given against a ryot which would not be executed except upon the contingency of the landlord's doing something which the Court had no power to compel him to do. Such a decree would be a one-sided decree, binding the ryot, but leaving the landowner free.

These are my reasons with reference to the general question which has been propounded; but I think that there is a still stronger reason why, in the present case, the landowner ought not to have a decree against the ryot, ordering him to execute a kubooleut, at the rate of rent found by the Court to be reasonable.

Section 13 of Act X. of 1859 says that a ryot shall not be liable to pay any higher rent than the rent payable for the previous year, unless a notice of enhancement shall be served in or before the month of Cheyt. That Section applies to all ryots, whether they have rights of occupancy or not. Section 17 lays down the ground upon which alone ryots having a right of occupancy are liable to enhancement.

It has been held by a majority of Judges in a Full Bench (see 3rd Weekly Reporter, Act X. Rulings, p. 29) that a suit for a kubooleut at an enhanced rate may be brought without notice of enhancement, but that in such a suit brought without notice, the kubooleut cannot be decreed except from the year following that in which the decree is given.

In this case, the plaintiff, it is said, relying upon that ruling, brought his suit for a kubooleut at an enhanced rent without giving notice of enhancement. The suit was commenced on the 29th of August 1866.

The suit was decided on 3rd April 1867. Assuming the commencement of the suit to be tantamount to notice of enhancement according to the Full Bench ruling, a decree could not, according to that ruling, be given for a kubooleut at an enhanced rate to commence before the year 1868. But upon what evidence could the Judge, on the 3rd April 1867, hold that in consequence of the increase of produce the rent commencing from 1868 ought to be enhanced beyond that which the tenant was then paying? Could the Judge, by anticipation upon the evidence given in 1867, decree that the rent for 1868 should be at the rate of 16 rupees?

Suppose, after April 1867, circumstances had arisen, such as one unfortunately saw in Orissa two years ago—suppose from drought at the end of 1867, or from other causes, a prospect existed of a total failure of crops in 1868, would the tenant be bound to execute a kubooleut at that rate for 1868?

It is said that the tenant might bring a fresh suit under Section 18 for the purpose of showing that the produce had been reduced in 1868, by causes beyond his power. But was the Judge entitled, on the 3rd of April 1867, to pronounce a speculative decree as to 1868, which the tenant would have to get rid of by a fresh suit in 1868 when the circumstances of 1868 became known? It appears to me that the plaintiff was no more entitled in 1867 to obtain a decree in 1867, declaring that he was entitled to a kubooleut for 1868 binding the tenant to pay 16 rupees a kanee, than he would have been to file a suit in 1867, without notice of enhancement, to declare that the fair rate of rent in 1868 would be 16 rupees a kanee. I apprehend that such a suit could not be maintained, upon the ground that the Courts could not speculate in 1866 or 1867 as to what would be the value of the land in 1868; nor would they allow a ryot to be harassed in 1866 by a suit for determining what would be a fair rent for 1868, when the tenant had a right under Section 19 to give up possession at the end of either 1866 or 1867, and might never become liable to pay rent at all for 1868.

I do not understand the majority of the Judges to have held that if a man sues for a kubooleut at a specific rent, and fails to prove that he is entitled to that rent, the Court will speculate as to what may or may not be the value of the land at the commencement of the year following their decree, in order that the landlord may have a decree for a kubooleut at a less rate of rent than he demanded.

I am of opinion that the plaintiff, having asked for a kubooleut at a specific rate of rent, and having failed to show that he was entitled to that rate at the time of the decree, was not entitled to a decree for a kubooleut at a less rate. It appears to me that he was entitled to a decree only upon proof that he was entitled to a kubooleut at the rate which he demanded.

As to the 2nd point, it appears to me that the plaint not specifying the date for the commencement of the kubooleut sought for, was not sufficiently specific, and that the Court in which it was presented ought to have returned it; but that the plaint having been admitted and the case heard, the Judge might have supplied the omission by the decree by specifying the time from which the kubooleut ought to commence. In this very decree the Judge has ordered a kubooleut at enhanced rate, without specifying the date from which it was to commence. If the ryot were compelled to execute such a kubooleut from the date of the decree, he would in fact be compelled to pay an enhanced rent from a period earlier than that from which in point of law he was found to pay it.

It is said that landowners will be placed in difficulties. But there will be no difficulty at all, if they will only follow the course which Act X. points out. If they wish to enhance the rent of a ryot, they should give notice under Section 13; and if, after that notice takes effect, the tenant fail to pay the enhanced rent demanded, the landowner may sue for rent at the rate demanded by the notice. The Court will then determine whether the plaintiff is entitled to enhance, and whether he has served the necessary notice, and then will decree payment to him either at the old rate or at the

enhanced rate demanded, or at the rate to which the Court may consider the landlord to be entitled to enhance the rent.

It is by suits for kubooleuts at enhanced rates without notice, suits for declarations of rights where relief is not necessary, and other proceedings of that nature, that ryots are constantly harassed. In my opinion, suits of the nature which I have described, ought to be discouraged.

Section 23, Clause 1, Act X. of 1859, has been referred to. But that Section was intended to point out the tribunals which were to have cognizance of suits of this nature, not to point out the cases in which such suits ought to be brought.

The decision of both the Lower Courts is reversed, and the suit of the plaintiff is dismissed with costs in all the Courts.

Jackson, J.—I am of the same opinion.

Phear, J.—I am of opinion that the first question must be answered in the affirmative; but as I have given my views at length in the judgment which I delivered in the Division Bench, I do not think it necessary to repeat them now.

I also think that the second question should be answered in the negative, for it appears to me that a plaintiff suing to obtain a kubooleut, without specifying the time at which that kubooleut is to commence, fails to state a definite cause of action. I quite agree, therefore, with the Chief Justice in thinking that in the Court of first instance, when a plaint of that character is presented, it would be the duty of the Court to reject it. But I do not at present feel myself justified in going so far as to say that that deficiency (supposing the plaint had been admitted and the case tried) could be supplied by the Court from the materials before it. At the same time, I have not that confidence in my own view on this point as would induce me to give a judicial opinion in opposition to that of the Chief Justice which he has just expressed in regard to it.

Macpherson, J.—I concur in the answers which the Chief Justice proposes to give to the questions which have been referred to us.

Miller, J.—I concur generally in the judgment delivered by the learned Chief Justice. I think that a suit for a kubooleut at enhanced rates cannot be maintained without a previous notice of enhancement under Section 13, Act X. of 1859. The unfairness of such a course on the part of the landlord towards the tenant has been already pointed out by the Chief Justice, and I do not wish to add anything to the remarks that have already been made by him upon that point. As, however, it has been previously determined by a majority of the Judges of this Court that a notice of enhancement is not necessary, I am bound to submit to that decision. But whilst submitting to it, I am not prepared to give to the landlord anything more than what he is strictly entitled to get under that decision. If the landlord chooses to avoid the ordinary process which is presented for him by the law, and thereby attempts to take an unfair advantage over his antagonist, he cannot in justice complain if he is held strictly to the terms of the contract he wishes to impose upon the latter. Upon this ground I hold that the first question referred to us ought to be answered in the affirmative.

With reference to the second point, I am also of the same opinion as the learned Chief Justice. I wish to add, however, that it is a point of little or no importance. According to the Full Bench case referred to by the learned Chief Justice, it has been decided that the kubooleut is to come into operation from the commencement of the year following that in which it is finally decreed by the Court. The landlord could not have possibly anticipated at the time when he filed his plaint as to when this decree would be passed in his favor. The utmost that he could have done was to state therein that the kubooleut he sues for is to come into operation on some date unknown to himself, but depending upon the date when his suit will be finally disposed of. I think that the omission of such a statement is not of much consequence; and that if any stress be laid upon the point upon purely technical grounds, the defect might be permitted to be rectified without dismissing the suit.

d

The 6th August 1868.

Present :

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice,* and the Hon'ble H. V. Bayley, L. S. Jackson, A. G. Macpherson, and Dwarkanath Mitter, *Judges.*

Purda-nusheen ladies—Execution—Arrest.

Case No. 450 of 1867.

Miscellaneous Appeal from a decision of the Principal Sudder Ameen of Hooghly, dated the 31st May 1867.

Maharanee Udhee Ranee Narain Coomaree, Raj Ranee of Burdwan (Decree-holder), *Appellant,*

versus

Sreemuttee Burroda Soon luree Dabee (Judgment-debtor), *Respondent.*

Mr. J. W. B. Money and *Baboos Juggadanund Mookerjee* and *Chunder Madhub Ghose* for Appellant.

Mr. G. C. Paul and *Baboo Umbica Churn Banerjee* for Respondent.

Purda-nusheen women, or women who, according to the usage of the country, ought not ordinarily to be compelled to appear in public, are not exempt from arrest and imprisonment in execution of decrees either by Section 21, Act VIII. of 1859, or under any other rule of law.

This case was referred to the Full Bench by L. S. Jackson and Hobhouse, JJ., under the following remarks :—

Jackson, J.—In my opinion a *purda-nusheen* woman who is a judgment-debtor is not protected from arrest and imprisonment in execution of the decree against her.

The protection has been supposed to be conferred by Section 21 of the Code of Civil Procedure, which provides that "women "who, according to the custom and manners "of the country, ought not to be compelled "to appear in public, shall be exempt from "personal appearance in Court."

This exemption, it seems to me, relates to altogether a different subject from arrest and imprisonment in execution of a decree.

In that portion of the Code in which the Section cited occurs, the Legislature was providing for the appearance of parties to suits, the mode in which they might prosecute or defend their suits, as the case might be, and the persons by whom they might be represented for that purpose. And in cases where other persons might be compelled, or would be bound, to appear in person, the Legislature out of tenderness for the custom and manners of the country exempted women of certain rank from personal appearance.

The word "appearance" I understand to be here used in its technical sense, meaning that kind of presence in Court which enables the party to do acts in connection with the suit, and which brings him, so to say, face to face with the Court.

If "attendance" in Court (spoken of in Sections 127 and 162) be the same thing as appearance, then doubtless a native lady of rank, who was exempted under the 21st Section, might, if required to attend, plead such exemption as a "lawful excuse" under Sections 127 and 170; and her failure to attend would not then be visited with the penalties authorized by those Sections.

When the attendance of a party is ordered by the Court of its own motion, or at the instance of the opposite party, it is for the purpose of examination in reference to the matters in suit But that object may be attained with almost (though not quite) equal efficiency by examining the party under a commission. And when it is brought to examine a person of this class as a witness, Section 175 expressly authorizes an examination in that way, and Section 179 enables the deposition so taken to be read.

By such indulgence the opposite party, or the party affected by the evidence, is not materially prejudiced; and inasmuch as, if the exemption were not allowed, the power of compelling the attendance of opponents might often be oppressively used in cases where such women are concerned, the balance of convenience, I think, is in favor of the indulgence.

The 200th Section of the Code provides that, "If the decree be for any specific "moveable, or for the specific perform-"ance of any contract, or for the perform-"ance of any other particular act, it shall be "enforced by the seizure, if practicable, of "the specific moveable and the delivery "thereof to the party to whom it shall have "been adjudged, or by imprisonment of the "party against whom the decree is made, or "by attaching his property and keeping the "same under attachment until further order "of the Court, or by both imprisonment and "attachment, if necessary;" and the 201st Section provides—"If the decree be for

"money, it shall be enforced by the imprisonment of the party against whom the "decree is made, or by the attachment "and sale of his property, or by both, if "necessary."

In neither Section does any reservation occur, and I cannot believe that any reservation was intended. The imprisonment of the judgment-debtor is one of the means which the law has provided to enable the execution-creditor to recover what is due to him. In many cases it would be among the most efficacious, and, occasionally, it would be the only effectual means of recovering any thing; and can it be supposed that the Legislature meant to take it away just in the cases where it would be most useful?

For if the immunity exists in the case of *purda-nusheen* ladies, it also exists, for precisely the same reasons, in the case of persons exempted under the 22nd Section; and if this be the law, any gentleman who happens to have been a Member of the Bengal Council during the last few years, and who can arrange to keep his property from attachment and sale, may defy his creditors if he has any.

But there is nothing whatever in the language of either Section 200 or 201 to lead me to suppose that it was intended to exempt any one as a member of a class from the consequences of a decree against him or her: that, in fact, it was intended in this respect to make one law for the rich and another for the poor.

It was said that under Section 273 a person arrested in execution of a decree for money is to be brought before the Court, and that when so brought he must "appear"; and that to compel a Native lady of rank so to appear in Court would be to take away the privilege of exemption which Section 21 confers.

It seems to me that the coming before the Court in custody under a warrant of arrest is not an "appearance" within the meaning of Section 21; and that the appearance there spoken of is an appearance for the purpose of prosecuting or defending the suit. Whether the appearance or attendance for the purpose of giving testimony is also included, I am not called upon to decide.

Something was said too, in the course of the argument, of the common law of the country. We are not shown any authority for the exemption of *purda-nusheen* ladies from arrest under any unwritten law, and I apprehend that the whole absolute law on this subject for the Mofussil Courts is now to be found in the Code of Civil Procedure.

For the reasons above stated, I think there is no exemption for Native ladies of rank, but that after the taking of any preliminary measures the warrant for execution by imprisonment must issue in their case as well as in others.—(Section 221.)

But a Division Bench of this Court, following a Full Bench ruling, which has not been reported and of which no trace is to be found, has held (II. W. R., p. 33) that "women of rank are exempted from arrest in execution of decrees," and an expression in the judgment in Davis *versus* Middleton (VIII. W. R., p. 282) seems to accept this ruling as law.

Under these circumstances, I conceive that the point must be referred for an authoritative ruling by a Full Bench.

I have not considered the observation thrown out during the argument by Mr. Peterson, namely, that the Court in such cases has at least a discretion to allow the warrant to issue or not, because the decision of the Court below has proceeded on the principle of absolute exemption; and, if there is to be a discretion, it must be exercised with reference to the circumstances of the particular case, of which in this instance we know nothing.

The question to be referred is whether under Section 21, Act VIII. of 1859, or under any other rule of law applicable to the Mofussil Courts, women who, according to the usage of the country, ought not to be compelled to appear in public, are exempt from arrest and imprisonment in execution of decrees.

Hobhouse, J.—I agree with my learned colleague that the question he has put must be submitted for the judgment of a Full Bench, and I agree also in the opinion he has given upon that question.

The decree in this instance was a decree for money, and so under Section 201 it might ordinarily be "enforced by the imprisonment of the party against whom it was made."

Then by Section 212 the decree-holder would state that the mode in which the assistance of the Court was required was "by arrest and imprisonment of the person named;" and if on comparison with the decree all were found to be correct, the Court would, under the provisions of Section 15,

Act XXIII. of 1861, "order execution of the decree according to the nature of the application," *i. e.*, by arrest and imprisonment of the person.

And then, under Section 221, the Court would issue "the proper warrant for the decree," *i. e.*, the warrant for the arrest and imprisonment of the person; and under Section 222, the officer of the Court would either execute that warrant, *i. e.*, would arrest the person, or would show cause why it had not been executed.

Ordinarily, therefore, if a judgment-creditor in execution of his decree for money applied for the arrest and imprisonment of the person of his judgment-debtor, the Court would be compelled, if all were regular, to cause such arrest and imprisonment.

The burden, therefore, in this case is upon the judgment-debtor to show why she should be exempted from this ordinary rule.

Mr. Peterson for the judgment-debtor in this case relies on Section 21 read with Section 273 of Act VIII. of 1859 and by the light of Regulation IV., 1793, and of various precedents of Division Benches of this Court.

The first precedent quoted is that which will be found in II. W. R., p. 33. Miscellaneous Rulings.

In this case the learned Judges distinctly ruled that "women of rank are exempted from arrest in execution of decrees." This decision was based professedly on some previous ruling of a Full Bench; but as this ruling cannot be traced, we have no clue to the reasoning on which the decision was based; and it is certain, that looking to the express terms of Section 21 of the Act, the wording of the decision, as noticed elsewhere by a subsequent decision of another Bench of this Court, is not altogether accurate. For these reasons, the decision in II. W. R. is no guide to us.

The next precedent relied upon is that to be found in VIII. W. R., p. 282.

The question there arose, upon a Small Cause Court reference, and it was this, *viz*, whether a European lady, the widow of an Officer of the Army, was protected from arrest in execution of decree by the provisions of Section 21.

The answer was in the negative, and, in the course of giving it, the learned Judges remarked "that exemption from arrest on "process of execution" was "limited to "the woman described in Section 21, Act "VIII., 1859," *i. e.*, "not" to women "of "rank," but to "women who according to "the custom and manners of the country "ought not to be compelled to appear in "public."

This *dictum* is clearly in point in this case, but I think that we cannot give to it its full force, because it was not a *dictum* upon the question before the Court which gave expression to it, neither can we be guided by it, for we do not know the reasoning on which it was based.

I turn then to Section 21 of the Act, and I find that it occurs in Chapter II., under the heading "Preliminary Rules."

Mr. Doyne for the appellant points out that these "Rules," antecedent to Section 21, refer solely to applications to the Court and appearances of parties in Court, and he contends, therefore, that the words "personal appearance" in Section 21, apply solely to appearance of parties to the suit, and not to "personal appearance" generally.

If the Chapter of "Preliminary Rules" stopped at Sections 21, 22, or if there were no mention in the Code of this "personal appearance" otherwise than in these Sections, there would be force in this contention, but Sections 23 and 24 treat of matters other than the appearance of parties, and exemption from personal appearance is treated of again in Section 175, not as an appearance as of a party only, and I, therefore, think that the provisions of Sections 21 and 22 must be treated as giving expression to two certain "Preliminary Rules" of a general nature, and not as rules to be read in connection with Sections 16 to 20 immediately preceding.

Section 21 then is, in my judgment, a general rule, and it runs thus:—

"Women who according to the custom and "manners of the country ought not to be "compelled to appear in public, shall be ex-"empt from personal appearance in Court."

That this rule gives exemption to such women from personal appearance as parties is admitted, and that it also gives exemption from personal appearance as witnesses, the provisions of Section 175 seem to me (though the point is not before us) pretty conclusively to determine.

But does the rule go further? Does it also give exemption from arrest in execution of decree?

Mr. Peterson for respondent has referred us to the provisions of Section 13, Regulation IV., 1793, as showing the foundation of the provisions of Section 21 of the Code, and contends that Section 21 gives a more definite and more extensive exemption than the Regulation it repealed.

This contention is not in my judgment sound, and on the contrary I think that if Section 21 is to be read by the light of Regulation IV., then its provisions must be held to apply exclusively to exemption from the personal appearance as parties and as witnesses only.

The Regulation in question had for its object the enactment of rules for receiving, trying, and deciding complaints. Section II. treated of parties, Sections III. to V. of the complaint and answers, Sections VI. and XIII. of parties and witnesses, Sections VII. and VIII. of execution of decrees.

By Sections VI. and XIII. it was expressly declared that if the party or the witnesses were "a Hindoo or Mahomedan woman of "a rank or quality which, according to the "customs and manners of the country, "would render it improper to compel her "to appear in a Court of Justice," she was not to be summoned so to appear by any compulsory process, but was to be examined by commission.

But by Section VII it was enacted that when the parties have been heard and the witnesses examined, the Court shall give judgment and decree, and if the decree be for money, shall execute it either by attachment of the person or property or by both.

So that, under the old law, the provisions of which have, I think, been simply transferred to the present Code, although the women in question were exempted from personal appearance either as parties or witnesses, they were not exempted from arrest of the person in execution of decree.

It is, however, further contended by Mr. Peterson that the policy of the law is, in accordance with the exact wording of it, to exempt from personal appearance in Court those who ought not to be compelled to appear in public; that an appearance in Court is an appearance in public; and that a person arrested under a warrant in execution of a decree must, under the provisions of Section 273, "be brought into Court," and so must appear personally in public.

I remark that the form of Warrant of arrest—a form, I would note, in use under the old Procedure as by a Circular Order of the Sudder Court of 1st March 1841—provides that the person arrested be "produced before the Court," but I doubt if such production is actually required by any provision in Section 273 or elsewhere in the Code, and I think it very possible that if a lady, exempted from personal appearance under Section 21, were to plead this exemption against production before the Court under Section 273, the plea would be good in law; but whether it be so or not, I think that an arrest does not necessarily involve a personal appearance in public (for the debtor might pay up and avoid production in Court) and cannot, therefore, in my judgment, be construed into such appearance.

I think, too, that if ladies exempted under Section 21 are to be held protected from arrest in execution of decree, there might be, as suggested by my colleague Mr. Justice Jackson, many decrees which would become altogether infructuous, and I agree with my colleague that we should not be able to confine this exemption to the case of Native ladies provided for in that Section but should have to extend it to the cases of all persons exempted by the Local Government under Section 22, and so should be holding that Government to be invested with an authority of the extent and nature of which they were probably not in the least aware when they created the exemptions to which my colleague refers.

The judgments of the Full Bench were delivered as follow:—

Peacock, C. J.—The question which has been submitted for the opinion of a Full Bench is whether, under Section 21, Act VIII. of 1859, or under any other rule of law applicable to the Mofussil Courts, women who, according to the usage of the country ought not to be compelled to appear in public, are exempt from arrest and imprisonment in execution of decrees?

It appears to me to be clear that they are not exempt under any rule of law unless they are exempt under Section 21. The only question then is whether they are exempt under the provisions of that Section.

Looking at the whole of Act VIII. of 1859, it appears to me that Mr. Justice Louis Jackson expressed a correct opinion when he stated that "a *purda-nusheen* woman

"who is a judgment-debtor is not protected "from arrest and imprisonment in execution "of a decree against her."

Section 17, paragraph 5, enacts: "That "whenever the personal appearance of a par- "ty to a suit is required by this Act, such "appearance may be made by his recognized "agent unless the Court shall otherwise "direct."

Sections 19 and 20 point out what may be done when an officer or soldier is a party to a suit, and then Section 21, upon which the question turns, enacts "that women, "who, according to the custom and manners "of the country, ought not to be compelled "to appear in public, shall be exempt from "personal appearance in Court."

The Section points out, *first*, the persons who are entitled to the exemptions; and, *secondly*, the exemption to which they are entitled. The persons are women who, according to the custom and manners of the country, ought not to be compelled to appear in public. The exemption to which they are entitled is from personal appearance in Court.

Section 22 exempts from personal appearance in Court any one whose rank, in the opinion of Government, entitles him to have that exemption conferred upon him.

The exemption is the same in both cases; the only difference is that women, who, according to the custom and manners of the country, ought not to be compelled to appear in public, have the exemption by virtue of the Act, whilst men of rank cannot claim the exemption unless the Government confers it upon them.

I can scarcely imagine that the Legislature would have vested the Local Government with power to exempt any class of men, however high their rank, from arrest in execution of decrees, so long as it considered it necessary that arrest should be one of the means which ought ordinarily to be allowed for the enforcement of decrees; nor do I believe that the Legislature, much as it desired to regard the usages of the country, ever intended to exempt *purda-nusheen* women from arrest in execution of decrees to which all other women are subject.

There are many cases in which it would be impossible to enforce a decree against a Native lady, if she were exempt from arrest in execution. She may be a widow or a married woman; she may have no separate property; or she may have only a small allowance for her maintenance and religious duties. Our experience teaches us that Native ladies, especially widows unacquainted with the world, are not unfrequently induced to allow speculative suits to be instituted in their names by persons who hope to derive profit, if the suit succeeds, and agree to indemnity the women in whose names the suits are brought. In such cases, if the person in whose name the suit is instituted has no property and no just cause of suit, her opponent may be harassed by perilous and vexatious litigation if, when she fails in her suits, he cannot enforce a decree for costs against her by arrest in execution.

In the Chapter of Act VIII. of 1859, which relates to execution of decrees, it is enacted by Section 201 that, if the decree be for money, it shall be enforced by the imprisonment of the party against whom the decree is made, or by the attachment and sale of his property, or by both, if necessary.

By Section 221 it is enacted that, "where all necessary preliminary measures have been taken, where any such are required, the Court, unless it sees cause to the contrary, shall issue the proper warrants for the execution of the decree."

I am not called upon at present to express an opinion whether a Court would be bound to issue a warrant of arrest in execution of a decree against a woman who ought not to appear in public, unless it be shown that there are no other means available for obtaining satisfaction. The question now before us is, not whether a Judge has a discretion in the matter, but whether an absolute exemption from arrest exists by law.

Mr. Justice Louis Jackson says: "I have "not considered the observation thrown out "during the argument by Mr. Peterson, name- "ly, that the Court in such cases has at least a "discretion to allow the warrant to issue or "not, because the decision of the Court below "has proceeded on the principle of absolute "exemption, and if there is to be a discretion, "it must be exercised with reference to the "circumstances of the particular case, of "which, in this instance, we know nothing."

Section 201 contains no express exemption of women who ought not to appear in public, and Section 21, to which the reference relates, as in a part of the Act which has relation to an entirely different subject. It is contended, however, that the exemption must necessarily exist by virtue of Section 273, which enacts that the person arrested may, on being brought before the Court, ap-

ply for his discharge, and that Native ladies would not have the exemption intended to be conferred upon them by Section 21, if they could be brought into Court upon arrest in execution. Probably they would be entitled to waive that which is intended merely as a privilege, but that point does not arise at present.

It appears to me that, reading Section 21 together with Sections 22 and 273, it was not the intention of the Legislature to exempt from arrest in execution either *purdanusheen* women absolutely under Section 21 or men of rank, if the Government should, under Section 22, grant them exemption from personal appearance in Court. It was urged that it has never been the practice in this country to issue warrants of arrest in execution of decrees against Native ladies who ought not to appear in public. I must admit that no such arrest has been made within my recollection. This probably has arisen from good feeling and a general desire not to cause that annoyance and disgrace, which, looking to the usages of the country, would necessarily be occasioned by an arrest. I trust that the same good feeling which has hitherto prevailed will continue to exist, and that the arrest of any woman in execution of a decree, if ever such an arrest be made, will be a very exceptional case.

I know nothing of the merits of this particular case, but I consider it exceedingly unfortunate that the first case in which it has been necessary to have the law authoritatively settled by a Full Bench is one in which the application to arrest a Native lady in execution of a decree has been made in behalf of one of her own sex—a Hindoo lady who holds a high rank and position. It is to be regretted that, if ever a precedent for such a proceeding shall become necessary, the case of the Maharanee of Burdwan against Burrodasoonduree Dabee now before us is the one which must be cited as the case in which the point was determined.

The Principal Sudder Ameen decided the case on a mere point of law. He says: "As "the judgment-debtor belongs to a respect-"able family, no suit for her apprehension can "be issued under the law, and as the record "does not show that any other steps have "been taken for the recovery of the amount "due under the decree, the application of the "decree-holder for the issue of a warrant of "arrest against the judgment-debtor must be "disallowed, and the case struck off the "file." The case must go back to the Principal Sudder Ameen, but he must not understand us as deciding that it will be compulsory upon him to issue a warrant of arrest unless it be shown that the plaintiff has no other means by which she can obtain satisfaction of her decree against the defendant.*

* The 15th August 1868.

Present:

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice*, and the Hon'ble Dwarkanath Mitter, *Judge*.

Peacock, C. J.—MR. MONEY moved on behalf of the Maharanee of Burdwan in the case of the miscellaneous appeal No. 450 of 1867, which was decided by the Full Bench on the 6th instant, that the case might be sent back to the Division Bench which referred it, in order that the merits might be gone into. He moved upon an affidavit which stated that the suit of the Maharanee of Burdwan was originally brought against the defendant and her husband who had taken a putnee in her name; that the putnee having been taken in the name of the wife, the husband had been exonerated from liability, but that the debt was really the husband's, and that all the separate property of the wife had been seized and sold in execution; and that it was under those circumstances that the warrant for arrest of the lady in execution of the decree had been applied for; that the case was going to be appealed to Her Majesty in Council, and that his client was desirous that all the facts might appear on the record. He also wished to bring the facts before the Court in consequence of the remarks which had been made by the Chief Justice.

The Chief Justice stated that, when the case was before the Full Bench, he understood that the question turned entirely upon a point of law; that the Principal Sudder Ameen had refused to issue a warrant of arrest solely upon the ground that the law did not allow a woman, who, according to the customs of the country, ought not to be compelled to appear in public, to be arrested in execution of a decree; that this Bench, consisting of only two Judges, had no power to alter the decision of the Full Bench, and to send the case back to the Division Bench which referred the question: that the case had been sent back to the Principal Sudder Ameen to be determined upon the merits, and that he would have to enquire into the facts, if the application for a warrant of arrest should be renewed before him. Moreover, that the Division Bench, if the case were sent back to it, would have no power to determine the facts upon affidavit. He stated that the affidavit appeared to him to make the matter worse rather than better, and that, in his opinion, it would be cruel, after all the lady's separate property had been sold in execution, to arrest her in satisfaction of the decree when the debt was really not her own, but her husband's, and she had no means of obtaining her discharge by paying the debt. Mr. Money then stated that it was not really intended to arrest the lady. The Chief Justice said that a warrant of arrest against the wife ought not to be issued merely to be held *in terrorem* over the husband. He further stated that, in making the remarks respecting the case when it was before the Full Bench, he expressly said that he knew nothing of the merits of the case: that he did not intend to cast a reflection upon any one, but that he considered it unfortunate that the first case in which a purdah lady should be arrested in execution of a decree should be one at the suit of a Native lady of high rank and position. It was very probable that the application for the arrest of the defendant had been made by the agents of the Maharanee without due consideration and without her express instructions or actual knowledge, and he thought that it would be very advisable that the matter should be brought under the personal notice of the Maharanee, in order that she might determine for herself whether she would desire a purdah lady of her own country and religion to be arrested in execution of a decree at her suit.

Bayley, J.—I concur in the answers proposed to be given to the questions put to the Full Bench.

Jackson, J.—I have so fully and so lately expressed my opinion upon the question raised in this case that it is scarcely necessary that I should add anything to what has fallen from the Chief Justice. After hearing the further argument which has been addressed to us to-day, I adhere to the opinion which I before expressed—an opinion which, I am extremely happy to find, has the concurrence of my learned brethren on this Bench.

I confess that, on the further argument, I had hoped to hear something more made of the exception supposed to be enjoyed by Hindoo ladies of rank under what may be called the "common law of the country," to which reference was made by Mr. Peterson on the previous argument. I must say that I am very little pressed by what Mr. Paul has called the practice of the Courts. Very little importance can be attached to an alleged practice where that practice is based on an entire absence of precedent. It is impossible to say how many or how few ladies of rank may have been taken in execution of decrees, or how many applications for their arrest may have been made without any question being raised as to their exemption. The experience of the vakeels of this Court has been referred to, but it happens that the learned gentlemen who practise in this Court have very little to do with questions relating to the execution of decrees, but their practice is almost confined to arguments on points raised in appeal.

Moreover, it is notorious that in the Mofussil it is almost a rare thing to find that execution of a decree is taken out by means of a warrant for confining the debtor in jail. I myself have seen a Civil Jail for months free of prisoners, male or female.

I quite concur in the hope which has been expressed by the Chief Justice that this decision of the Court will not be followed by many applications of this sort. I am induced to think from the judgment of the Lower Court and the language used in the appeal that the application in the present case may have been made simply with the object of raising the question, and it is not at all certain to my mind that it was a *bonâ-fide* application with a view to the imprisonment of the judgment-debtor.

Macpherson, J.—I concur in the proposed answers. I may add that I think it is perfectly clear, as shown by Mr. Justice Hobhouse in the observations which he made when he referred this case to the Full Bench that there was nothing under the old law which exempted *purda-nusheen* women from arrest in execution of decree, and that, in deciding as we now do, we are in no degree altering the practice or declaring the law to be different from what it has always been.

Mitter, J.—I concur with the learned Chief Justice. I wish, however, to add that, in exercising the discretion which is always vested in the Civil Courts in the country of issuing a warrant of arrest under the provisions of Act VIII. of 1859, the customs, habits, and the feelings of the Native community ought not to be altogether overlooked when the debtor happens to be a Native lady of rank Such was the practice adopted by the late Supreme Court, and that practice ought not to be, in my opinion, departed from, unless the Court is satisfied that the ends of justice absolutely require that such a warrant should be issued.

The 6th August 1868.

Present:

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble H. V. Bayley, L. S. Jackson, A. G. Macpherson, and Dwarkanath Mitter, *Judges*.

Mortgage—Foreclosure.

Case No. 1977 of 1867.

Special Appeal from a decision of the Principal Sudder Ameen of Chittagong, dated the 22nd July 1867, reversing a decision of the Moonsiff of Rungunia, dated the 19th January 1867.

Mohesh Chunder Sein (Plaintiff), *Appellant*,

versus

Mussamut Tarinee (Defendant), *Respondent*.

Mr. R. E. Twidale and *Baboo Sreenath Banerjee* for Appellant.

Baboos Romesh Chunder Mitter and *Greeja Sunker Mojoomdar* for Respondent.

The period of one year allowed by Section 8, Regulation XVII. of 1806, to a mortgagor to deposit the amount of the mortgage-debt before the mortgage can be finally foreclosed, is to be reckoned from the date of the service upon him of the notice to redeem, and not from the date of the issue of such notice.

This case was referred to the Full Bench by Peacock, C. J., and Mitter, J., under the following remarks :—

Peacock, C. J.—We think that the decision of the Principal Sudder Ameen, that the proceedings in connection with the service of notice were fraudulent, must be set aside. The only evidence in support of that fraud was the entry in the Nazir's book, which shows that the *tullubana* was not lodged till the 6th of January 1865.

The Principal Sudder Ameen says that this evidence is inconsistent with the fact that the notice was served on the 9th of December 1864. We think that the entry was not evidence of fraud as against the plaintiff.

The Principal Sudder Ameen also says that it is not satisfactorily established that the notice of foreclosure was served on the defendant, and he relies on a discrepancy in the evidence of three witnesses who were called to prove the service ; whereas, upon close examination of the evidence of those three witnesses, it appears that the discrepancy upon which the Principal Sudder Ameen relies did not, in reality, exist.

We think that it is unnecessary to send this case back for a re-trial upon the question of fraud or as to the non-service of the notice, inasmuch as, rejecting the evidence altogether, which was not admissible, in support of the fraud, there is no evidence to show that the plaintiff did fraudulently induce the Nazir or the peon not to serve the notice ; and the discrepancy on which the Principal Sudder Ameen relies in support of the finding that the notice was not served does not exist.

But, according to the plaintiff's own showing, the notice was not served until the 9th of December 1864, and the mortgage-money was deposited on the 9th of December 1865. Excluding the alleged day of service, which, according to the authorities, must be excluded, the money was deposited within one year from the date of the service. The perwannah of the Judge was dated the 24th of November 1864, and if the year for the deposit of the mortgage-debt is to be calculated from the date of the perwannah, and not from the date of service, the deposit was not made in time.

According to the decisions of the late Sudder Court, the year within which the mortgage-money is to be deposited is to be reckoned from the date of the issue of the perwannah ; and by a Circular Order of that Court, it was ordered that the perwannah should bear the date on which it should be actually issued, instead of that on which the order was made, and that the time of one year allowed for redeeming the mortgage should be calculated from the date so inserted. (Circular Order of the 9th of April 1817.)

There was also a recital in that Circular Order that the year allowed for redemption must necessarily be calculated, as prescribed by the Regulation, from the date of the notification.

The Circular Order runs as follows: "It having come to the knowledge of the "Court that the written notification to the "mortgagor directed in that Section (that is, "Section 8, Regulation XVII. of 1806) instead "of being immediately issued, as evidently "intended by the express terms of the Regu-"lation, is sometimes delayed for a month "and upwards, whereby the mortgagee's "application for foreclosure is not made "known to the mortgagor as early as it "ought to be, whilst, at the same time, the "year allowed for redemption must necessari-"ly be calculated as prescribed from the "date of the notification."

If this question were a new one upon which no decisions had been pronounced, I should have had no doubt whatever that the words "within one year from the date of the notification" used in Section 8, Regulation XVII. of 1806, meant within one year from the time of the service upon the mortgagor of the perwannah containing the notification, and not from the date of the perwannah or notification.

It is clear that the Legislature intended that the mortgagor should not be foreclosed, unless he should fail in redeeming the mortgage within one year from the time of his having notice of the application made by the mortgagee under Section 8 of the Regulation, and of its being notified to him that the mortgage would be finally foreclosed if he should fail to redeem within one year from the time of his receiving the notice.

Section 8 directs that the Judge, on receiving such written application from the mortgagee as specified in that Section, shall cause the mortgagor or his legal representative to be furnished, *as soon as possible*, with a copy of it, *and shall, at the same time*, that is, at the time of the mortgagor's being furnished with a copy of the application, notify to him by a perwannah under his seal and official signature that, if he shall

not redeem the property mortgaged in the manner provided for by the preceding Section within one year from the date of the notification, the mortgage will be finally foreclosed. The Judge is required, at the time of furnishing the mortgagor with a copy of the application, to notify by a perwannah, that if the mortgage shall not be redeemed within one year from the date of the notification, the mortgage will be foreclosed. The year is to be calculated from the date of the notification, not from the date of the perwannah; and, in order to notify by a perwannah, I apprehend it is necessary that the perwannah should be made known, or served upon the person who is to have the notice.

The Judge cannot be said to notify by a perwannah so long as the perwannah remains in the Judge's Court or with the Nazir. It was evidently intended that the perwannah should be served at the time at which a copy of the application is furnished.

The Regulation contains a preamble reciting the grounds upon which it was enacted. The recital application to this part of the Regulation is as follows: "It is further requisite for the purpose of preventing improper and injurious transfers of landed property at an inadequate price by the forfeiture of mortgages accompanied with a condition of sale to the mortgagee, if the amount advanced be not repaid within a stated period, that an equitable provision should be made for allowing a redemption of the estate within a reasonable and limited period, on payment of the principal sum lent, with interest thereupon.

But there would be little equity in allowing a mortgagor to redeem his estate within one year from the date of a perwannah not served upon him, or of which he should have no notice at all, or no notice until the period of one year from the date of the perwannah should have actually expired or be upon the eve of expiration. I apprehend that the Legislature intended that the mortgagor should have one year to redeem from the time at which it should be made known to him that the mortgagee had applied to foreclose.

I cannot consider myself bound by any Circular Order issued by the late Sudder Court.

There are several decisions of that Court to the effect that the year allowed for redemption in Section 8 is to be calculated from the issue of the perwannah, and that the date of it is to be taken as the period of issue.

In the Sudder Decisions for 1846, page 282, the Court say: "The Court on this head observes that it has been repeatedly held that the date from which the period is to be counted is the date of the *notice* issued, and the defendant is in error in supposing that it should be counted from the date of service of the notice. This rule has been adopted not only with reference to the terms of the Regulation XVII. of 1806, but also to the principle of the enactment. The one year's grace allowed by law to the borrower, after the period mentioned in his own engagement has expired, being clearly matter of favor, there can be no reason for allowing any further indulgence, and the Act must be construed strictly and to the letter."

But what favor or indulgence is there in allowing a man a year to redeem from the date of a notice which may not have been served upon him until after that year has expired, or until the day before it expires, for that is the effect of holding the date of the notice of perwannah to be the period from which the year is to be calculated.

A reference was made to Mr. Justice Macpherson's book on Mortgages, in which it is said: "So, if the notice of foreclosure is not served on the mortgagor until the last day of the year of grace, he will have no time left him for redemption." If the construction contended for is correct, it may be added that if it is not served on the mortgagor until after the last day of the year of grace, the mortgage may be actually foreclosed before the mortgagor is aware that any proceedings of foreclosure have been taken.

There was another case of the late Sudder Court of the 19th of June 1847, No. 152 of 1840, in which that Court held that the year was to be reckoned from the date of the notice, and not from the time of service; and they reversed the decision of the Judge, who found that it was the custom in his district to calculate the period from the date of service of notice; and they said: "We are of opinion that a local custom cannot be pleaded against the law as established by Regulation, Circular Order, and precedents."

I have already stated that, in my opinion, the law that the period was to be reckoned from the date of the notice, and not from the date of service, was not established by Regulation. It could not be established by

Circular Order: and I believe that up to that date, it had not been established by precedent.

In reversing the decision of the Judge, Mr. Tucker, in admitting the special appeal, said: "The Judge has quoted as a precedent the case of Hossein Ali Khan and others *versus* Mussamut Phoolbas Koonwur (4 Sudder Dewanny Reports, page 5)." But it is evident that he could not have read the case in detail, and that he formed his opinion of the effect of the decision merely from the marginal note of the report. He said: "The Circular Order, dated the 9th of April 1817, was issued for the guidance of the Courts in this matter; and it seems to call for explanation why a custom opposed to that Circular is still allowed to prevail and to over-rule what has been declared to be law upon the subject."

Now, I have read in detail the case which was cited from the 4th Volume of the Sudder Dewanny Reports, and have formed my opinion of the effect of that decision not merely from the marginal note. In that case the Officiating Chief Judge, Mr. Harrington, held that as the borrower had been ordered by the notice to pay the principal sum within one year from the *receipt* of it, and as it was proved that he had done so, he had saved his right of redemption, although he had not redeemed within the period of one year from the date of the notice.

The 2nd Judge also held expressly that the year commenced from the date of notice. But he added that if the date from which the term of one year was to commence was held to be the date of the *issue* of the notice, it would appear that the full period of one year had not elapsed; for it might be presumed that the notice had not been given to the *peada* who was to serve it before the 19th of September 1814, the date on which notice was issued, and that the money was paid into the Treasury before the close of the 19th of September 1815. But the notice itself was dated the 28th of June 1814, and it was clear that the money had not been paid into Court within one year from that date. He held that the right of the borrower was reserved under the Section above quoted, even as contended by the Court's Circular Order of the 19th of April 1817. But he added that the Circular was not passed when the transaction to which the case referred occurred; and the borrower was then guided by a precedent laid down by Mr. James Stuart, former Third Judge of the Court, on the 24th of July 1813, in the case of Lutchput Rai, petitioner, *wherein it was laid down that the term of one year was to be reckoned from the day on which the notice was served on the borrower.*

This case shows that a period antecedent to the Circular Order of 1817, and much nearer to the time when the Regulation was passed than the year 1846, the date of the decision to which I have already referred, it was held by the late Sudder Court that the period of one year was to be reckoned from the time of the service, and not from the date of the notice. The Judges of that day must have had quite as good (if not better) means of knowing what was the intention of the Legislature as the Judge who issued the Circular Order in 1817, and those who seemed to consider that explanation was necessary why the Judges should act in opposition to that Circular.

There has, therefore, been no uniform course of decisions from the time when the Regulation was passed to the present, that the period is to be reckoned from the date of the notice.

Further, the case in the 4th Volume of the Sudder Decisions is important as showing that the perwannah at that time directed that the payment was to be made within one year from the receipt of it, and not from the date of the perwannah itself. That and the custom upon which the Judge acted in the case cited from the decisions of 1847, lead me to think that it is not improbable that in the perwannahs issued up to the date of the Circular of 1817, it was notified to the mortgagors that the estate would be foreclosed unless redeemed within one year from the receipt of the perwannah.

In the present case, the notification mentions the period of one year, without expressly stating from what period that year is to be reckoned. Not saying that it was to be reckoned from the date of the perwannah, the borrower would naturally and reasonably conclude that the time was to be reckoned from the time at which he received the perwannah, and not from the date of it: and he did redeem within that period. If that be the true construction of the perwannah, the case falls expressly within the authority to which I have referred from the 4th Volume of the Sudder Dewanny Reports.

But as the decisions of 1846 and 1847 were followed in the decision of the 4th of September 1858, page 1477, Case 149 of 1858, and two of the Judges of the High Court have held that they considered themselves bound by the decisions in

which they had reluctantly acquiesced in a former case, I do not think it right to decide this case without a reference to a Full Bench.

The reasons given by the Judges of the Division Bench, to which I have referred, and which is reported at page 116 of the 9th Volume of the Weekly Reporter, Civil Rulings, are very strong to show that the time ought to be reckoned from the service, and not from the date of the perwannah.

I should remark that the decisions even from 1846 are not uniform. The Circular Order says that the year allowed for redemption must necessarily be calculated from the date of the notification, and therefore it directed that it should bear date on the day on which it was actually issued, and that the period of one year should be calculated from the date so inserted. The construction was that the time should be reckoned from the date of the notification. Their order consequent upon that construction of the law was, that the date of the notification was the day on which it was issued.

The decision of 1846 was, that the date from which the period was to be counted was the date of the notice. The decision of 1858 was, that it was to count from the date of the issue of the notice; and that decision was considered by the Division Bench of this Court in the case in the 9th Weekly Reporter to mean, not the date of the document itself, *viz.*. the date of its being signed, but the date of its issue by the Court. They say: "This ruling, it must be said, finds but little countenance in any thing which appears in Regulation XVII., and is not perhaps always capable of being applied. We understand it in effect to lay down that no time should be counted against the mortgagor during which the perwannah, although it may be complete in all respects, is lying idle in the serishta of the Court; and that, whatever may be the actual date when the Court put its hand to the document, still it is not to be treated as a notification within Section 8, until it had become an active order of Court. We are willing to concur in this view, considering, as we do, that the notification intended by the Legislature is not made until even a later period." Turning to the facts of the case, the Court was of opinion that the perwannah was not issued as long as the Nazir kept it in his desk, and that it was, in fact, first issued when, on the 23rd of August 1864, it was handed to the peon for delivery.

Why it was not an active order while lying in the desk of the Nazir, but would be an active order whilst kept by the peon in his pocket, I am at a loss to understand. I cannot feel myself bound by the decision of 1858, if it is capable of such a meaning. How the mortgagor, who is to steer his course according to the notification, is to ascertain how long the order may have been kept in the desk of the Nazir, or how long in the pocket of the peon, there is nothing to show. Whatever is to be the construction of the Regulation in question, I think it should be clearly defined, and it should be laid down in such a manner that the borrower may know within what period it is notified to him that he must redeem the mortgage in order to prevent a final foreclosure.

Seeing that the decisions are conflicting, and that there is no uniform course of decisions by which we can be guided, I think we ought to decide this case according to what we believe to have been the actual intention of the Legislature; and that is, that the year is to be counted from the date on which the borrower has notice of the application to foreclose, and has it notified to him by service of the perwannah that he is to come in and redeem, if he wish it.

The case, however, will be referred to a Full Bench for decision as to the period from which the year mentioned in the Regulation is to be reckoned. If it become necessary, we will hear the vakeels as to the question whether, having regard to the particular form of the notice which was served in this case, the mortgagor was at liberty to deposit the money within one year from the time when the notice was served upon him.

The judgment of the Full Bench was delivered as follows by—

Peacock, C. J.—The Court is of opinion that the year mentioned in the Regulation ought to be reckoned from the date of the service of the notice. I can add nothing to what I said when the case was referred by the Division Bench. It is unnecessary to determine what would be the case if the mortgagor should keep out of the way to avoid service.

The case will go back with this expression of opinion to the Division Bench which referred it.

The 6th August 1868.

Present:

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice*, and the Hon'ble H. V. Bayley, L. S. Jackson, A. G. Macpherson, and Dwarkanath Mitter, *Judges.*

Decree (Assignment of)—Cross-decree—Set-off.

Case No. 618 of 1868.

Miscellaneous Appeal from an order of the Officiating Judge of Jessore, dated the 6th September 1867, affirming an order of the Principal Sudder Ameen of that District, dated the 8th June 1867.

Kaim Ali Joardar (Objector), *Appellant,*

versus

Luckhy Kant Chuckerbutty (Decree-holder), *Respondent.*

Mr. R. T. Allan and *Baboo Bungsheedhur Sein* for Appellant.

Baboo Khetturmohun Mookerjee and *Lukhee Churn Bose* for Respondent.

A party taking by assignment a decree obtained by *A* against *B* takes it subject to a set-off on account of a cross-decree in the same Court obtained by *B* against *A*.

This case was referred to the Full Bench by L. S. Jackson and Hobhouse, JJ., under the following remarks:—

Jackson, J.—It seems to me that this case must be referred for the opinion of a Full Bench.

Kaim Ali and Ashruffunnissa had cross-decrees, one against the other, in the Court of the Principal Sudder Ameen.

Luckhy Kant Chuckerbutty sued Ashruffunnissa in the Court of the Sudder Ameen, and obtained a decree against her, in execution whereof he procured a sale of her rights and interests in her decree against Kaim Ali, and became himself the purchaser thereof. That sale took place on the 11th January 1867, at which time the cross-decree of Kaim Ali against Ashruffunnissa was before the High Court in appeal, and it was finally affirmed in the month of March following.

Luckhy Kant subsequently proceeded to execute the decree of Ashruffunnissa against Kaim Ali, and Kaim Ali claimed as set-off the amount of his own cross-decree against Ashruffunnissa. The Judge, however, held that Luckhy Kant is entitled to execute the decree which he has purchased without any such set-off, and Kaim Ali now appeals.

There is in support of the view taken by the Judge a decision of a Division Bench of this Court, which is to be found in 5 Weekly Reporter, page 22, Miscellaneous Rulings. I was one of the Judges and passed that decision, the soundness of which has since been questioned, and, upon further consideration, I am myself inclined to think that the decision was mistaken—at least upon the grounds on which we based it.

That decision, I think, was right upon the facts of the case, but the principle upon which we decided, I think, was erroneous.

The point was on a subsequent occasion referred for the opinion of the Full Bench, but was not decided, inasmuch as it was found that, for other reasons, the two decrees were not capable of being set-off one against the other. In this case, however, the point clearly arises, and it now appears to me that Luckhy Kant, purchasing the rights and interests of Ashruffunnissa, was entitled to execute her decree in like manner and to the same extent as she might have done, and not otherwise or further.

It is admitted that, when he made the purchase, there was outstanding against Ashruffunnissa the cross-decree of the same Court which was ultimately affirmed on appeal; consequently both at the time of his purchase and at the time when he made the application to execute, Ashruffunnissa's decree stood subject, within the meaning of Section 209, to set-off of the cross-decree.

I am, therefore, at present inclined to think that the appellant before us ought to such

ceed, but as the decision which I have referred to in 5 Weekly Reporter has not been overruled, I think the case must be referred for the opinion of the Full Bench. A decision to the opposite effect by Loch and Macpherson, JJ., will be found at page 73 of the 6th Weekly Reporter, Miscellaneous Rulings. The question for the decision of the Full Bench will be, whether a party taking by assignment a decree obtained by *A* against *B* does not take it subject to a set-off on account of a cross-decree in the same Court obtained by *B* against *A*.

The judgment of the Full Bench was delivered as follows by :—

Peacock, C. J.—The case is almost too clear for argument. I entirely agree with the view which was expressed by Mr. Justice Louis S. Jackson, when the case was referred for the opinion of a Full Bench, *viz.*, that the purchaser of the rights and interests of the decree-holder was entitled to execute the decree purchased, in like manner and to the same extent as the original decree-holder might have done, and not otherwise or further : and consequently that the purchaser took it subject to the rights of the judgment-debtor to set off his cross-decree.

The case will go back to the Division Bench which referred it for final determination.

The 6th August 1868.

Present :

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice*, and the Hon'ble H. V. Bayley, L. S. Jackson, A. G. Macpherson, and Dwarkanath Mitter, *Judges*.

Enhancement—Ryot not having right of occupancy—Notice — Section 13, Act X. of 1859.

Case No. 1911 of 1867.

Special Appeal from a decision passed by the Judge of Beerbhoom, dated the 17th May 1867, modifying a decision of the Deputy Collector of that District, dated the 19th September 1866.

Bokronath Mundul (Defendant), *Appellant*,

versus

Binodh Ram Sein (Plaintiff), *Respondent*.

Baboo Debendro Narain Bose for Appellant.

Baboos Khettur Nath Bose and *Rash Beharee Ghose* for Respondent.

A landlord cannot recover rent at an enhanced rate from a ryot who has not a right of occupancy, unless he proves the existence and the reasonableness of the grounds stated in his notice served under Section 13, Act X. of 1859.

Section 13 is applicable not merely to ryots having a right of occupancy, but to all under-tenants and ryots.

This case was referred to a Full Bench by L. S. Jackson and Mitter, JJ., under the following remarks :—

Jackson, J.—I THINK the point in this case must be submitted for the decision of a Full Bench of this Court. The Judge in his decision in this case, as well as in appeal No. 1935, which has been mentioned, clearly relies on the authority of a case reported in III. Weekly Reporter, page 126, Act X. Rulings (Koobir Sirdar *versus* Goluck Chunder Chuckerbutty). In that case the Judges say: "We think that in the case of a *tenant-at-will*, the grounds on which notice of "enhancement was given are mere superfluity; "the tenant must either go or stay Nor has "he any right to claim the prevailing rate."

In the other case which was cited by the respondent's vakeel, and which is to be found at page 40, IV. Weekly Reporter, Act X. Rulings (Rammonee Chuckerbutty *versus* Ali Buksh), the Judges observe: "We do not desire to say that in a case like the present, a "suit for *arrear of rent* on the footing of the "notice of enhancement might not be successful. A ryot not possessing a right of occupancy upon receiving such a notice, must be "aware that, if he will not agree to the landlord's terms, he has no alternative but to go "out. If under these circumstances he chooses "to remain without remark, in the use and "occupation of the land, he may well be taken "to have acquiesced in the terms of the notice, "even though these be couched in words which "refer rather to regular enhancement than to "a bare proposal for a new rent. And this "seems to have been the opinion of the Court "in the case of Koobir Sirdar *versus* Goluck "Chunder Chuckerbutty (3 Weekly Reporter, "Act X. Rulings)."

These latter observations really amount to no more than a mere *dictum*. The case then before the Court was a suit for a kubooleut at an enhanced rate, and in that suit an order for a remand was made. But the ruling in the first case to which I have referred is clear and unmistakeable.

It seems to me, now that the point has arisen again, quite unreasonable to hold that

when the Legislature has required a written notice to be served upon the tenant, stating the grounds upon which enhancement is sought, such is a mere "superfluity."

I am of opinion that when notice has been served upon a tenant (not being a ryot with a right of occupancy) under Section 13, and when that tenant does not agree to pay at the rate mentioned in such notice, the landlord has the option of removing him from the land or allowing him to remain, and I think, when the landlord has not given him notice, but has allowed him to remain in occupancy, which the ryot, for his part, retains, it must be considered that the parties have agreed to continue the relation of landlord and tenant, and to leave to the arbitrament of the Court whether the rent claimed is fair and equitable.

It cannot be said that what the Legislature directs to be essential to the notice of enhancement, is a mere superfluity. The difference between a ryot having a right of occupancy, and a ryot not having a right of occupancy, is, that in the case of the former, the landlord in his notice of enhancement is restricted to the grounds stated in Section 17, and in the case of a ryot not having a right of occupancy, he may state other grounds, and if those grounds are disputed it is for the Court to determine whether the grounds are just and reasonable.

A case which supports this view is brought to our notice by Baboo Gopal Lall Mitter. It is reported at page 41, Act X. Rulings, V. Weekly Reporter (Jeetun Lall Jha *versus* Kaleenath Jha), and the marginal note runs thus: "In a suit for enhance-"ment the rent demanded must be proved to "be fair and equitable, even if the tenant has "no right of occupancy."

As this opinion, however, is in conflict with the ruling cited above from the 3rd Volume of the Weekly Reporter, we think that this case must be referred for the opinion of a Full Bench.

Mitter, J.—I entirely concur in the judgment delivered by my learned colleague.

It appears to me that the special appellant in this case is clearly entitled to a notice under Section 13 of Act X. of 1859, before he can be called upon to pay a single pice more than what he paid in previous years.

It is admitted that he is an under-tenant, holding the land without a "written engagement or under a written engagement not specifying the period of such engagement," and, therefore, according to the very express wording of that Section, he is entitled to the notice as specified therein, or, in other words, to a notice which shall specify the particular ground upon which the enhancement is sought.

It has been said that the ryot has no right of occupancy. This circumstance is perfectly immaterial. All that the law says, Section 8, Act X. of 1859, is this, that ryots not having rights of occupancy are not entitled to pottahs except upon such terms as may be agreed upon between them and the persons to whom the rent is payable. But it does not say that when a non-occupant ryot is sued for enhancement, he is not entitled to call upon the landlord to prove the particular grounds on which the notice has been served. It is neither fair nor equitable to hold that, when he is sued for rent, he should be called upon to pay any thing more than what is fair and reasonable; and nothing is fair or reasonable that is inconsistent with the grounds of the notice that has been served upon him. The landlord might have asked the ryot to quit the land; but if he chooses to demand rent from him, he is only entitled to recover what is fair and equitable.

The provisions of the next Section (Section 14) very clearly lay down that "when a ryot has been served with notice by the landlord, he can sue the landlord for excessive demand of rent. Section 10 provides that "every under-tenant or ryot, from whom any sum is exacted in excess of the rent specified in his pottah, or payable under the provisions of this Act, whether as *abwab* or under any other pretext, and every under-tenant, ryot, or cultivator, from whom a receipt is withheld for any sum of money paid by him as rent, shall be entitled to recover from the person receiving such rent, damages not exceeding double the amount so exacted or paid," &c.

Now, unless the landlord is in a position to make out the grounds of enhancement assigned in the notice, the rent which he has asked for is rent which is not payable under Act X. of 1859; and if the grounds do not exist to the extent alleged by the landlord, the tenant is entitled to sue him for damages. Under these circumstances, I think that it is not desirable to depart from a rule clearly laid down by the Legislature, on a mere assumption that it is a mere superfluity in the largest number of cases to which it applies.

I agree in submitting this case to a Full Bench.

The judgments of the Full Bench were delivered as follow:—

Peacock, C.J.—I entertain no doubt whatever in this case. Section 13 is not applicable merely to ryots having rights of occupancy, but to all under-tenants and ryots. It enacts that no under-tenant or ryot who holds or cultivates land without a written engagement, or under a written engagement not specifying the period of such engagement, &c., shall be liable to pay any higher rent for such land than the rent payable for the previous year, unless a written notice shall have been served on such under-tenant or ryot on or before the month of Cheyt, specifying the rent to which he will be subject for the ensuing year, and the ground on which an enhancement of rent is claimed.

This Section is applicable to ryots who have not gained a right of occupancy, as well as to ryots who have a right of occupancy. Speaking for myself, I have no doubt that a ryot who has held, without any period for the duration of his tenancy having been fixed, although he may not have gained a right of occupancy, cannot have his holding determined without a reasonable notice to quit, and that a notice given in the last month of a current year would not be sufficient.

By Section 19, a ryot may relinquish possession by giving notice to his landlord in or before the month of Cheyt of the year preceding that in which the relinquishment is to have effect. If the landowner, instead of giving notice to quit, requires the ryot to pay a higher rent than that paid in the previous year, the ryot is not bound to continue to hold the land at such enhanced rent, but is at liberty to quit upon giving notice in or before the month of Cheyt. The landlord, however, cannot, by giving notice of enhancement, compel the tenant to pay more than a reasonable rent, and he cannot enhance without notice specifying the grounds of enhancement.

If, by giving notice of enhancement in or before the end of Cheyt to a ryot not having a right of occupancy, he could enhance the rent to any amount he pleased, the ryot might suffer great injustice. For the landlord might give him notice of enhancement to an exorbitant amount at the last moment of the month of Cheyt, when it would be too late for the ryot to quit without being liable to pay rent for the ensuing year under Section 19, Act X. of 1859. The notice might be sent on the last day of Cheyt from the landowner's cutcherry at a long distance, when it would be too late for the tenant to send notice to his landlord, under Section 19, of his intention to relinquish possession; and if the tenant should quit without such notice, he would be liable to pay rent.—(*See* Section 19.)

When Section 13 required that the notice of enhancement should specify the grounds on which the enhancement should be claimed, the Legislature could not have intended to compel the landowner to do that which they considered to be superfluous; still less could they have intended to compel him to do something worse than superfluous, *viz.*, to specify grounds of enhancement by which he was not to be bound.

Section 14 authorizes the tenant to contest his liability to pay the enhanced rent demanded of him either by complaint of excessive demand of rent or in answer to a suit preferred against him for recovery of arrears of the enhanced rent. I think it clear that the meaning of the Legislature was that the grounds specified for enhancement should be such as to justify the enhancement, and that their existence should be proved in the suit in which the tenant should contest his liability to enhancement.

It was contended in argument that the landlord may enhance the rent of a ryot not having a right of occupancy to any amount he pleases, and may specify any grounds that he pleases for such enhancement, and that he is not bound to prove that any of such grounds exist, and that it is for the ryot to prove that no such ground exists. If such an argument were tenable, a landlord might give notice that he intends to enhance to some exorbitant amount upon the ground that he is a grasping oppressive landlord, having no regard for justice or fair dealing or for the interests of any one except himself. It might be difficult, if not impossible, in many cases for a ryot to disprove the grounds alleged, by showing that the landlord was not a person of that description. This shows that the grounds must be reasonable, and such as to justify the enhancement claimed. The *onus* of proving the existence of the grounds alleged is upon the landowner. It appears to me that the Judges who referred this case came to a

right conclusion that a landlord cannot enhance the rent unless he states the grounds on which he seeks to enhance, and that, if those grounds are disputed, it will be for the Court to determine whether they exist, and whether they are such as to justify the enhancement.

Section 8 has been referred to, but it appears to me to have nothing to do with the question. It merely says: "Ryots not having rights of occupancy are entitled to pottahs only at such rates as may be agreed on between them and the persons to whom the rent is payable." A ryot is not at liberty to compel his landlord to give him a pottah at any rent he pleases.

The case will go back to the Division Bench which referred it for final disposal.

Bayley, J.—I think that the view expressed by the Judges who referred the case is correct.

Jackson, J.—I have already expressed my opinion upon the point, and have only to say that I concur in the judgment delivered by the Chief Justice.

Macpherson, J.—I concur.

Mitter, J.—I also concur with the Chief Justice.

The 7th August 1868.

Present:

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice*, and the Hon'ble H. V. Bayley, L. S. Jackson, A. G. Macpherson, and Dwarkanath Mitter, *Judges.*

Minority—Proprietors of revenue-paying estates—Act XL. of 1858.

Case No. 2127 of 1867.

Special Appeal from a decision passed by the Judge of West Burdwan, dated the 4th of June 1867, reversing a decision of the Sudder Ameen of that District, dated 6th January 1866.

Modhoo Soodun Manjee (one of the Defendants), *Appellant,*

versus

Dabee Gobind Newgee (Plaintiff), *Respondent.*

Baboo Hem Chunder Banerjee for Appellant.

Baboos Umbica Churn Banerjee and *Bhyrub Chunder Banerjee* for Respondent.

Every person (not being a European British subject) who has not attained the age of 18 years is a minor for the purposes of Act XL. of 1858, even though proceedings are not taken in the Civil Court for the care of his person or the protection of his property. If he is a proprietor of an estate paying revenue direct to Government, and has been taken under the protection of the Court of Wards, he is still a minor up to the age of 18 years (Section 2, Regulation XXVI. of 1793).

This case was referred to the Full Bench by Kemp and E. Jackson, JJ., under the following remarks:—

Jackson, J.—THE ground of special appeal in this case is that the Judge has erroneously decided the plea of limitation.

The question turned upon the date on which the plaintiff attained his majority. The first Court held that the plaintiff became a major at the age of 15 years, because, though he was a proprietor of land paying revenue direct to Government, he was owner of only a share in a revenue-paying estate. The Judge on appeal held that, as he was a landholder paying revenue directly to Government, be the estate large or small, his minority did not cease till he was 18 years of age. In support of this view of the law, the Judge quotes the precedent of Munsoor Ali, page 50, vol. 3, Weekly Reporter. There is not a word, however, in the judgment recorded in that case which bears upon the point. That decision relates only to the cases of proprietors of land not paying revenue direct to Government.

The point which the Judge had to decide, *viz.*, whether, considering that the plaintiff, as a zemindar paying revenue direct to Government, attained majority at the age of 18 or 15 years, turns at first on Regulation XXVI. of 1793, Section 2. That Regulation, referring to Regulation X. of 1793, extends the term of minority laid down in Section 28 of that Regulation, from 15 years to 18 years. It does not extend the class of proprietors to whom Regulation X. was applicable. It must, in fact, be read as if Section 28, Regulation X. of 1793, had fixed the minority of the class of proprietors to whom it was applicable at 18 years of age.

The next question is, whether Regulation X. of 1793 is applicable to all proprietors of land paying revenue to Government, be they large or small, as held by the Judge, or, as held by the first Court, only to those proprietors who hold entire estates, and not to those who only hold shares of estates. The Judge is right in stating that the loss of the estate is not the criterion to judge whether the Regulation applies to the plaintiff or not. But he was not right on this ground to overrule the judgment of the

Lower Court, because the Lower Court had not rejected the plaintiff's claim on the ground that the share which the plaintiff held was a small one. The Lower Court was right in the view of this Regulation which it took, that it applied not to sharers in any estate, but to proprietors of entire estates. Section 2 of the Regulation distinctly lays this down, and states that it applies to shares of an estate, only when all the sharers come under the head of disqualified proprietors, as, for instance, when all the sharers are minors. Section 3 of the Regulation equally distinctly lays down that this Regulation is in no respect to be held applicable to any landholders, except those stated in Section 2. It follows, then, that the first Court was right in laying down the law, that as the plaintiff was only a sharer in a revenue-paying estate, the plaintiff could, on this ground, not claim to delay his majority until the age of 18 years, because he did not attempt to show that all the other proprietors of the estate were disqualified proprietors.

But it is further argued before us that the Judge did not proceed on the terms of Regulation XXVI. of 1793, but on Section 26, Act XL. of 1858. If so, the question before the Judge was not whether the plaintiff was a revenue-paying proprietor, and the precedent the Judge has quoted is directly against the view which he has taken of the law. The Judges in the case of Munsoor Ali held that Section 26, Act XL. of 1858, was only applicable to cases where the estate of the minor had come under the charge of the Civil Court, and it is not alleged in this case that the estate of the plaintiff has been taken charge of by the Civil Court. Therefore, following that precedent, the Judge should have declared that the plaintiff attained majority at 15 years, and held the suit barred by limitation as far as this ground applied to it.

But after giving the question my fullest consideration, I hesitate to follow that precedent. I observe that one of the learned Judges who joined in that judgment, stated that he entertained doubts upon it. I do not read the words "for the purposes of this Act" contained in Section 26 as in any way confining the law contained in that Section to cases where this Act has been put in force. It seems to me that the Act can be put in force at any time until the minor has attained the age of 18 years. Act XL. of 1858 applies to all persons (not being European British subjects) who have not been brought under the superintendence of the Court of Wards, and it declares that the charge of their persons and property shall be subject to the jurisdiction of the Civil Court. And it goes on to say that for the purposes of this Act every person shall be held to be a minor who has not attained the age of 18 years.

The argument upon which it is attempted to confine this Section of the law to cases where the Act has been put in force, seems to be this: *First*, the old Law Regulation XXVI. of 1793 has been declared to be applicable only to matters connected with the revenue-paying estate, and not to matters unconnected with such estates—the rule which was followed in Deeboo Moyee Dossee's case, Vol. 1, Weekly Reporter, page 75; *Secondly*, the words contained in Section 26, Act XL. of 1858, *viz.*, "for the purposes of this Act" follow the same principle, and the law there laid down is only applicable similarly to the cases of minors whose estates have come under the jurisdiction of the Civil Court.

On the first point, with all deference to the learned Judges who in that precedent declare the law to be settled, I am not satisfied that it was so settled. I am certain that Mr. Justice Norman and I have held a different opinion in a case which came before us in 1864, though I cannot discover the case in the printed reports. I am unable also to find any printed reports of judgments in which the law has been settled as stated by the Judges, though there is a later precedent taking a contrary view of that law, page 50, Weekly Reporter, Vol. III. And there are certainly no restrictive words in Regulation X. or Regulation XXVI. of 1793, which confine the operation of Section 2, Regulation XXVI. of 1793, only to matters connected with revenue-paying estates.

On the second point, I admit there is more difficulty. The Act XL. of 1858 includes all minors, not European British subjects, who were excluded from the provision of Regulation XXVI. of 1793. These are all subject by that Act to the jurisdiction of the Civil Court up to the age of 18 years. For the purposes of that Act they are all declared not to attain majority until they have reached 18 years of age. It is admitted that the Civil Court can exercise its jurisdiction over them at any age up to 18 years. But it is said that if it does not exercise its jurisdiction, the minor attains his majority at 15 years of age. We have then the anomaly

that, although he has already attained his majority at 15 years, the Civil Court, on being moved to exercise its jurisdiction, can again declare him to be a minor at the age of 17, or any subsequent time up to his arriving at 18 years. I am not aware whether the Legislature intended to place any special meaning or stress on the words "for the purposes of this Act." But I should be inclined to give them their full meaning, *viz.*, that to enable the Civil Court to exercise its jurisdiction over the property and person of minors up to a proper age, the law of minority which usually prevailed was declared to be altered and extended to 18 years. In fact, I cannot read this law as having any other effect than altering the general law of minority, and in fixing one law for all minors not taken under the charge of the Court of Wards, and not European British subjects, *viz.*, 18 years of age.

As this view of the law is different from that which has been expressed by other Judges, the proper course is to refer the question to the determination of a Full Bench of this Court.

Kemp, J.—I concur in referring the question for the determination of a Full Bench; the question is one of very great importance, affecting, as it does, the proprietary *status* of native landholders.

The judgment of the Full Bench was delivered as follows:—

Peacock, C. J.—This case appears to me to be very clear when we look at the whole of Act XL. of 1858. The recital declares that it is expedient to make better provision for the care of the persons and property of minors not brought under the superintendence of the Court of Wards, treating those whose estates have been brought under the Court of Wards as minors. Certain Regulations are repealed, and then by Section 2 it is enacted that "except in the "case of proprietors of estates paying re-"venue to Government who have been or "shall be taken under the protection of the "Court of Wards, the case of the persons "of all minors not being European British "subjects, and the charge of their property "shall be subject to the jurisdiction of the "Civil Court."

By this Section also proprietors of estates paying revenue to Government who have been taken under the care of the Court of Wards are treated as minors, for such persons are excepted out of the general term "all minors," as if it had been said: "All minors except those who are under the care of the Court of Wards."

Section 26 declares that "for the purposes "of this Act every person shall be held a "minor who has not attained the age of "eighteen years."

Every person, therefore (not being a European subject), who has not attained the age of 18 years is a minor for the purposes of the Act, and unless he is a proprietor of an estate paying revenue to Government who has been taken under the jurisdiction of the Court of Wards, the care of his person and the charge of his property are subject to the jurisdiction of the Civil Court.

Then can it be said that, being a minor subject to the jurisdiction of the Civil Court, he is not a minor unless proceedings are taken in the Civil Court for the protection of his property or for the appointment of a guardian? His relatives may neglect his interests, but he is still a minor. There may be a minor whose interests are neglected as well as a minor whose interests are looked after and protected. The exception of the Statute of Limitation in the case of minors is more necessary for the former than for those who have some one to look after their interests.

Being a minor the plaintiff comes within Sections 11 and 12 of Act XIV. of 1859, and was under a disability until he attained the age of 18. As pointed out by Mr. Justice Elphinstone Jackson, if the law were otherwise, this anomaly would follow that a man may have attained his majority on one day, and become a minor on the next. A man cannot be said not to be under a disability as a minor when he is liable as a minor to have his property and person put under the charge of a guardian.

If he is a proprietor of an estate paying revenue to Government and has been taken under the protection of the Court of Wards, he is still a minor up to the age of 18—Regulation 26 of 1793, Section 2. It cannot be said that he is not a minor when, on account of his minority, his estates have been taken under the charge of the Court of Wards under the provisions of Regulation X. of 1793, when by Section 22 of that Regulation he is to have a guardian of his person, and by Sections 7 and 15 a manager of all his estates, real and personal, and by Section 32 he cannot sue in the Civil Courts for any cause of action.

f

With this expression of our opinion, the case will go back to the Division Bench which referred it.

The 8th August 1868.

Present:

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice*, and the Hon'ble H. V. Bayley, L. S. Jackson, A. G. Macpherson, and Dwarkanath Mitter, *Judges.*

Appeal—Section 347, Act VIII. of 1859.

Case No. 157 of 1868.

Miscellaneous Appeal from an order passed by the Judge of Beerbhoom, dated the 20th March 1868, affirming an order of the Moonsiff of Kandee, dated 15th June 1867.

Sheikh Ameerooddeen (Plaintiff), *Appellant,*

versus

Jeebun Bebee and others (Defendants), *Respondents.*

Baboos Bhobanee Churn Dutt and *Prosunno Coomar Roy* for Appellant.

Baboo Lukhee Churn Bose for Respondents.

No appeal lies against an order rejecting an application for the re-admission of an appeal under Section 347, Act VIII. of 1859.

This case was referred to the Full Bench by Peacock, C. J., and Mitter, J., under the following remarks:—

Peacock, C. J.—At present, I do not see that an appeal lies at all from an order rejecting an application for the re-admission of an appeal under Section 347, Act VIII. of 1859. If such an appeal lies at all, it appears to me that it must lie upon matters of fact as well as upon points of law. When the regular appeal was struck off and no decision pronounced upon it, I cannot see how a special appeal can lie to this Court. It has, however, been held in several cases that a special appeal does lie;—see II. Weekly Reporter, page 254, Civil Rulings, and pages 23 and 24, Miscellaneous Rulings; V. Weekly Reporter, page 27, Miscellaneous Rulings; and VII. Weekly Reporter, page 81.

In the Agra Court, it was held that a special appeal would not lie;—see III. Weekly Reporter, page 23;—see also case No. 56 of 1862, decided by the Calcutta Court, and other cases cited in the note to this Section of Act VIII. of 1859, collected in the 3rd Edition of Broughton's Civil Procedure Code.

In this state of the authorities, we think it necessary to refer the case for the decision of a Full Bench.

The judgment of the Full Bench was delivered as follows:—

Peacock, C. J.—We think that there is no appeal against an order refusing to re-admit an appeal under Section 347 of Act VIII. of 1859. The matter is left to the discretion of the Judge. The appeal is dismissed with costs.

The 8th August 1868.

Present:

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice*, and the Hon'ble H. V. Bayley, L. S. Jackson, A. G. Macpherson, and Dwarkanath Mitter, *Judges.*

Gomashta's sunnud—Stamp.

Cases Nos. 2251, 2252, and 2261 of 1867.

Special Appeals from a decision passed by the Judge of Tipperah, dated the 15th of June 1867, affirming decrees of the Deputy Collector of the District, dated 29th March 1867.

Rughoo Nundun Thakoor (Plaintiff), *Appellant,*

versus

Ram Chunder Kupali and others (Defendants), *Respondents.*

Baboos Onookool Chunder Mookerjee and *Annund Chunder Ghossal* for Appellant.

No one for Respondents.

A sunnud which authorizes a gomashta to attach rents and to sue for them must be stamped: if a general power-of-attorney authorizing him to collect and sue for rents, it must bear a four rupees stamp under Article 43, Schedule A, Act X. of 1862.

These cases were referred to a Full Bench by Bayley and Macpherson, JJ., under the following remarks:—

Bayley, J.—I THINK the appointment of a gomashta, such as this tuhseel mohurrir's *sunnud* shows him to have substantially been, is simply one made by such an order as that under which a servant does service for his master, to any extent recognized by law. Such an appointment as this has been held *not* to require a power-of-attorney to enable the person appointed to sue (page 384, Marshall, Meajan's case). I do not, therefore, consider a stamp required, as for a power-of-attorney. But as it is an important general question, we both concur in referring it to the Full Bench. The question for decision then is—Whether a gomashta employed in the collection of rents has authority to institute a suit under Act X. of 1859 in the name and on behalf of the landlord, his employer, without being authorized so to do by a stamped *sunnud* or power-of-attorney.

Macpherson, J.—I think that in these cases the Lower Appellate Court is right; for I concur with the Judge in the opinion that a gomashta cannot institute a suit in the name of the landholder by whom he is employed, unless he is authorized so to do by a duly stamped power.

Amjud Ali, the person who commenced these suits on behalf of his employer, calls himself a tuhseel mohurrir; but that he was substantially a naib or gomashta is clear from the terms of his *sunnud* of appointment, which has been read to us, and which gives him the fullest power to act for his employer. The Judge was, therefore, wrong, in my opinion, in so far as he considered that Amjud Ali was not in the position of a gomashta.

It is said that a gomashta's *sunnud* is a special document which needs no stamp, and that it is not to be deemed a power-of-attorney. I can only say of the *sunnud* under which Amjud Ali professes to act, that it is neither more nor less than a power-of-attorney, and being a power-of-attorney it requires, before it can be used in Court, to be stamped as provided for in Act X. of 1862. In the case of Meajan *versus* Sheikh Akally (Marshall, page 384), a Division Bench decided that a gomashta can sue on behalf of his employer without a power-of-attorney. From this decision I dissent; for I find no indication in Act X. of 1859 of any intention on the part of the Legislature that a gomashta should have power to sue, unless authorized by his employer in the ordinary manner. Certainly Section 69 of Act X. indicates no such intention; for, though it makes certain provisions as to what may be done in a suit which has been instituted by a gomashta on behalf of his employer, it does not directly or indirectly touch the question of whether he can or cannot institute the suit if he has not got a power duly stamped authorizing him so to do. As I am not prepared to follow the decision in Meajan's case, I think that the question proposed by Mr. Justice Bayley ought to be referred to a Full Bench.

The judgment of the Full Bench was delivered as follows:—

Peacock, C. J.—The question which is propounded in this case is not the one which really arises out of the facts of the case, and I understand from the two learned Judges who referred the question for the consideration of a Full Bench that the question which they require to be answered is this, whether a *sunnud* which authorizes a gomashta to collect rents and to sue for them requires to be stamped.

I am of opinion that such a *sunnud* does require to be stamped. If it is a general power-of-attorney which authorizes the gomashta to collect rents generally and to sue for them, if necessary, it requires a 4 rupees stamp under Article 43, Schedule A of Act X. of 1862.

Article 8 of Schedule B is mookhtearnamah, vakalutnamah, and other power filed or presented for the conduct of any case in any Court of Justice or before any Revenue Authority. The stamp required for such a document would not be sufficient for a general power to collect rents and to sue for them.

The appeals in these three cases are dismissed without costs.

The 8th August 1868.

Present:

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble H. V. Bayley, L. S. Jackson, and A. G. Macpherson, *Judges.**

Jurisdiction—Abatement of rent—Specific performance—Suit—Putneedar.

Cases Nos. 148, 149, and 364 of 1867.

Regular Appeals from a decision passed by the Principal Sudder Ameen of Maunbhoom, dated the 6th and 7th June 1866.

Rajah Nilmoney Singh Deo (Defendant), *Appellant*,

versus

Unnodapersaud Mookerjee and others (Plaintiffs), *Respondents*.

Baboo Tarucknath Sein for Appellant.

Baboos Sreenath Doss and *Doorga Doss Dutt* for Respondents.

A suit brought, not simply for an abatement of rent, but also for a specific performance of a contract to refund, under certain conditions, excess of rent and of consideration-money, is not a suit for abatement of rent within the meaning of Act X. of 1859, and the Civil Court has jurisdiction to try such a suit, mixed up as it is with a claim for a refund of excess of consideration-money.

Where, in a former suit, plaintiff, a putneedar, sued his zemindar for abatement of rent and for a refund of consideration-money and rents paid by him for 3 years, it was held that a suit for a refund of rent for 3 subsequent years is not barred under Section 7, Act VIII. of 1859.

These cases were referred to the Full Bench by Loch and Glover, JJ., under the following remarks:—

Glover, J.—Cases Nos. 148 and 149.—THIS was one of three analogous suits brought by the plaintiff and others, for an abatement of the rent of their putnee-holding, for a refund of the rent paid in excess, and also for a proportionate refund of the consideration-money, on the ground that their lessor, Rajah Nilmoney Singh, had wrongly stated the assets, and that the pottahs and bynamahs granted by the zemindar covenanted to make a reduction in the jumma, and in the consideration paid for the putnees, if after enquiry and preparation of *hustobood* papers by the lessees, it should be found that the estimated jummas were less than those actually paid by the ryots.

These three suits were in the first instance dismissed by the Deputy Commissioner of Purulia, on the ground that the plaintiffs had not furnished the *hustobood* papers required by their contracts, and were, therefore, not entitled to ask for any abatement.

On appeal to the High Court, all three suits, Nos. 130, 131, and 132 of 1864, were remanded (25th January 1865, Norman and Pundit, JJ.), with directions that an Ameen should be appointed and sent into the mofussil to prepare a regular *hustobood* of the whole of the putnee-mehals, in order to ascertain whether there was or was not a deficiency in the jummas.

The local enquiry ordered by the High Court was duly made, and an Ameen deputed. The defendant, however, did not make his appearance before the Ameen, although duly served with notice to attend; and the local enquiry was, therefore, conducted *ex parte*.

The Principal Sudder Ameen of Maunbhoom, by whom the suits were tried after the remand, found for the plaintiffs on the basis of the Ameen's report. He held that that officer's enquiry was satisfactory, and that it was supported by documentary evidence, whilst the evidence adduced by the defendant was worthless.

Against these decisions the defendant, the Rajah of Pachete, has in his turn appealed to this Court; and appeals Nos. 148 and 149 are now before us. The third appeal (No. 291) has already been disposed of by a Divisional Bench of this Court.

But, before going into the defendant's appeal, which is the same in both cases, it will be necessary to dispose of a cross-appeal taken at the hearing by the respondent under Section 348 of the Civil Procedure Code.

The objection is that, as the defendant did not appear before the Ameen, although duly summoned, and took no steps to have the Principal Sudder Ameen's order passed *ex parte* on the Ameen's report set aside under Section 119, Act VIII. of 1859, he is, by the provisions of Sections 114 and 180 read together, concluded, and has no right of appeal to this Court.

* Mr. Justice Mitter declined to express any opinion on these cases, as he was engaged in them when at the Bar.

The case of Eshan Chunder Chuckerbutty *versus* Soorjolall Gossain (Hay's Reports 335) is quoted in support of the argument.

It appears to me that the two cases are very distinguishable, and that the precedent quoted does not apply.

That was a suit to set aside a survey-proceeding, and both plaintiff and defendant were ordered to attend a local enquiry held by the Court Ameen. The defendant appeared, but the plaintiff did not, and the result was that the Ameen reported his inability to carry out the Court's orders, as no one on the part of the plaintiff had appeared to point out the disputed lands. On this, the Judge ordered the Ameen to return, and, on taking up the case in the presence of the parties, held that the absence of the plaintiff at the local enquiry was not sufficiently accounted for, and that, therefore, under Sections 114 and 180, Act VIII. of 1859, the suit ought to be dismissed with costs. Here no local enquiry was made, nor was any evidence as to the subject-matter of the dispute gone into. The Judge dismissed the case *ex parte* solely on the ground that the plaintiff had not appeared before the Ameen.

But in the case now before us, matters are very different. The suit was not dismissed *ex parte* by the Lower Court, but after a full enquiry into the evidence adduced by either side. The Principal Sudder Ameen did not treat, as he might have done, the Ameen's report as evidence which the defendant's "laches" left him no power to assail, but considered it in the light of ordinary evidence, supported by documentary proofs —such as Act X. and Civil Court decisions, settlement-proceedings, &c., &c., and in no way rebutted by the evidence adduced by the defendant. He mentions the defendant's evidence *seriatim*, and gives reasons for disbelieving it.

In short, in the one case there was no investigation at all, and the decision was not on the merits; in the other, the proceedings were regular throughout, and were not *ex parte* in any sense of the word.

I think, therefore, that the cross-appeal should be rejected.

The only objections taken by the appellant, Rajah Nilmoney Singh, are confined to a point of law. He urges that the suit, being one for abatement of rent, was not cognizable by a Civil Court, but by the Collector under Act X. of 1859.

This objection, I observe, is not taken in the printed grounds of appeal to this Court. nor did the appellant, on the occasion of the original appeals by the present respondents, file any cross-appeal against the Deputy Commissioner's finding that the suit would lie in a Civil Court.

That decision was passed on the 30th September 1863, and has never been reversed: the point, as I before observed, not having been taken when the case was before this Court on appeal, and not, therefore, forming any part of the order of remand, I doubt very much, therefore, whether the objection can now be taken. It is true, as urged by Mr. Allan for the appellant, that the question is one of jurisdiction which can be raised in appeal, even when it has not been taken below; but the majority of the cases decided by this Court have been those in which the want of jurisdiction was plain on the face of the proceedings, and not those in which the question of jurisdiction was one that admitted of considerable argument. But in any case it seems to me that the objection ought to be made within proper time, and it is quite clear from the record that the finding of the Deputy Commissioner on the issue of jurisdiction has been unimpeached since 1863, and that this Court's remand-order did not re-open that portion of the case.

But conceding, for the sake of argument that the objection can be taken at the present stage of the case, I do not think that it in any way mends the case for the appellant.

In the first place, the plaintiff's suit is not, as it appears to me, a suit for "abatement of rent" in the ordinary sense of the words. He sues for specific performance on the part of the defendant of a certain contract entered into between the two, a contract under which he was to have certain reductions made in his rent under a certain state of circumstances. His suit is, therefore, to enforce the performance of a contract, and is not such a suit as is contemplated by Act X. of 1859 for abatement of rent, for the *bynamah* did not fix the rent, but left it to be determined by after-enquiry, and until that enquiry was made, the tenant had not agreed to pay the amount of rent set down in the lease.

Moreover, in what way could the suit, as laid by the plaintiff, be brought under the provisions of the Act? The only Section which refers to the grounds for abatement is

Section 18, and under which of the Clauses of that Section could this suit be brought?

The words are, a ryot having a right of occupancy (a term which has been held by a Full Bench of this Court to include putneedars) is entitled to "abatement" if the area of his land has been diminished by diluvion or otherwise, if the value of produce or productive powers of the land have decreased, or if the quantity of land be proved to be less than that for which rent has been previously paid by him.

The plaintiff, whose suit is based on the ground that the jummas of the ryots have been erroneously stated, and that some of the lands never had any existence, could not come under any one of these three Clauses, which suppose the party claiming abatement to have been regularly paying the amount of rent stipulated for by his lease; and as these are the only grounds for claiming an abatement under Act X., it seems to me that the plaintiff's claim is substantially not a suit for abatement in the terms of that special law, and that his only *forum* was the Civil Court.

Another reason for holding that the present suit was rightly brought is, that a considerable portion of the relief sought could not, under any circumstances, have been given by a Revenue Court, but must of necessity have been sought in a Civil Court. The plaintiff claims, not only abatement, or rather, I should say, a determination of his rent for the putnee, but a refund of a proportion of the consideration-money already paid, and a refund of rent paid in excess. The suit, therefore, would, it appears to me, be analogous to suits for possession of land with mesne-profits, in which possession could be recovered under Act X. of 1859, and wassilat by a regular suit in the Civil Court; and it has been many times ruled by the High Court that such suits are cognizable in their entirety by a Civil Court—(1 Weekly Reporter 138, 160, 221; 2 W. R. 52, 157; 3 W. R. 176; 7 W. R. 243, 283, 414; 6 W. R. 20, Act X.).

For these reasons, therefore, I think that the present suit will lie, and that the appellant's objection should be overruled, and the result of this finding would be that the appeal should be dismissed, and the Lower Courts' order upheld with costs, and that the same order should be passed in appeal No. 149.

But it has been brought to our notice that, in another similar appeal-case, a Division Bench of this Court have ruled differently. This case is reported in 9 Weekly Reporter 92, and in it it is laid down that, when a plaint shows a distinct prayer for abatement of rent, and also sets forth as a main ground of the suit, a fraudulent breach of contract by misrepresentation and refusal of reduction and refund stipulated for, so much of the claim as refers to abatement is by Clause 3, Section 23, Act X. of 1859, beyond the jurisdiction of the Civil Court.

The case is precisely similar to the one now before us, and as I, for the reasons above given, think that this suit is not properly speaking a suit for abatement such as would be cognizable under Act X. of 1859, and that even if it were the Civil Court could still, under the circumstances, hear and decide it, I suppose that we must defer recording judgment, and send up the case for the authoritative opinion of a Full Bench.

The questions on which I would ask the ruling of the Full Bench are:—

(1.) Can a suit, brought under the circumstances of this one, be called a suit for abatement cognizable under Act X. of 1859?

(2.) If it be so, would not the Civil Court have jurisdiction to try it when mixed up with a claim to refund of consideration-money?

Loch, J.—I concur in rejecting the cross-appeal for the reasons stated by my colleague.

I concur, also, in sending the questions raised in this case up to a Full Bench.

The case reported at page 92 of 9 Weekly Reporter is similar in all respects to the present, though, in bringing his suit, the plaintiff in that case has charged the defendant with misrepresentation and fraud. The terms of the lease in that case and this are similar, and the grounds for asking an abatement in both is the same, *viz.*, the contract between the parties. The terms of the lease provided that the tenant should, within a certain period, ascertain what were the real assets of the property; that, if they were found to be less than the amount of rent specified in the lease, the landlord would deduct the difference, and would refund a proportion of the consideration-money. The assets were found to be less, and the zemindar failed to fulfil his part of the contract; and hence this suit for the abatement of the jumma, and refund of consideration-money, and of rent paid in excess of the rent really found to be payable to the landlord.

The Division Bench, which tried the case reported at page 92 of 9 Weekly Reporter, have

held that so much of the claim as is for abatement should be disposed of by the Collector under Act X. of 1859. We, on the contrary, are disposed to think that the claim is one for the performance of a contract, and can be heard, as brought, in the Civil Court; and the question to be tried by the Full Bench is, whether the view taken by the Division Bench in its judgment of the 7th of January 1868, or the view we now take of the case, is correct, as to the proper forum for trying this suit, which comprises a claim for abatement and a claim for refund of consideration and of rent paid in excess under a written contract.

Glover, J.—No. 364 of 1867.—The plaintiff took a putnee-settlement of Lot Purulia from the Pachete Rajah according to the terms of a lease, or, as it is called in the plaint, a *bynamah* which covenanted to make an abatement in the rent proposed to be fixed, and to refund a rateable proportion of the consideration-money, if it should turn out, on enquiry and after preparation of *hustobood* papers by the lessee, that the jumma stated by the Rajah was not the real rent of the estate.

In the former suit, plaintiff sued for abatement, for a return of a proportion of the purchase-money, and for refund of a rateable amount of the rents already paid in consequence of the misrepresentations of the Rajah during the years 1267, 1268, 1269, B. S. In this he sues for a refund of the excess rent paid by him during the years 1270, 1271, 1272, B. S., the Rajah having, under Regulation VIII. of 1819 (the putnee law), realized from him during those years the entire rent mentioned in the putnee-lease, notwithstanding the suit that had been brought for abatement. The Principal Sudder Ameen, the same officer who decided the suit for abatement in favor of the putneedar, decreed the plaintiff's claim to a refund, and the Rajah appeals.

No question is raised in this appeal on the merits; the defendant (appellant) rests his case upon a point of law, and contends that, as the plaintiff did not include his present claim in the suit originally brought by him (the suit for abatement, that is, noticed above), his remedy is barred by Section 7, Act VIII. of 1859.

In support of this contention, we have been referred to an analogous case between the Rajah and another putneedar (Rajah Neelmonee Singh, defendant, appellant, *versus* Eshur Chunder Ghosal, plaintiff, respondent, 9 Weekly Reporter 121), in which a Division Bench of this Court (Bayley and Phear, JJ.) have ruled that, so long as the pottah remained in force, the Rajah was entitled to be paid all the money due thereon, and to keep that money when received, he having committed no wrong against the plaintiffs since he made the misrepresentations which constituted the cause of action in the first suit; that, "when once the cause of suit is matured, the subsequent occurrence of further damage, whether after or before adjudication of the original matter, did not originate a fresh cause of suit;" and that the plaintiff could not, therefore, succeed in a second suit to get back a so-called excess of rent paid by him in terms of the putnee since the institution of the first suit.

I venture to dissent from this ruling. The contract between the Rajah and the putneedar was not *fixed* by the putnee-pottah. On the contrary, it was expressly stated in that deed that the amount of rent therein named was to depend upon certain enquiries to be thereafter made by the lessee in the mofussil; that, if the *hustobood* papers showed that the Rajah's estimate was correct, the putneedar was to pay the rent named in the pottah; if incorrect, he was to receive abatement and refund. It seems to me, therefore, that there was not, at the time either of the two suits were brought, an absolute contract on the part of the putneedar to pay the amount mentioned in his lease, and that the lease gave the Rajah no power to realize that amount until the mofussil enquiry had been concluded; and, that being so, I do not see how the decree obtained by the putneedar for refund of excess rents paid in previous years can prevent his suing for the excess of subsequent years.

It has been urged that he ought to have included these amounts in his estimate of damages when he brought the first suit. But how could he have done so? If he succeeded in that suit, the putnee-pottah would have been altered in the terms of the decree, and the rent for the putnee declared to be so much less. That suit might have been decided before the years for which plaintiff now claims a refund, and have, therefore, rendered such claim unnecessary. How far, moreover, should the plaintiff's claim have extended? If he ought to have included the excess rent which he might or might not have had to pay, for these three years in his estimate of damages in the former suit, he ought, I suppose, to have gone still further, and have sued

d

for the excess which might possibly have been taken from him (supposing him to fail in his suit for altering the terms of the pottah) for twenty years in advance.

It does not appear to me that the plaintiff's cause of action was matured when he brought his first suit; he was not compelled to do more then than sue for the injury already sustained, and that could not include an uncertain claim for a refund of what, in all probability, would never be paid. If the putnee-lease had definitely fixed the plaintiff's rent, it would have been different, as, until the pottah had been cancelled, the tenant would have been bound; but in this case the lease settled nothing, but left the amount of rent to be determined by after-enquiry. It seems to me, therefore, that the taking year by year of the full amount of rent mentioned in the pottah gave a constantly recurring cause of action to the plaintiff, and that he could not have included his claim for refund of what he might be made to pay improperly in the years 1270, '71, and '72 in a suit brought for refund of rents actually paid in 1267, '68, and '69.

There being no contention as to the merits of the plaintiff's claim, I think that this appeal ought to be dismissed, and the Principal Sudder Ameen's order upheld with costs.

But as another Division Bench has come to a different conclusion in a case precisely similar to this, judgment must, in accordance with our rules of practice, be deferred until a Full Bench decides which is the correct view.

Loch, J.—This case is a very simple one. The plaintiff holds a lease, under the terms of which he was to ascertain what were the real assets of the property, the zemindar (defendant) agreeing that, if they were less than the rent mentioned in the lease, a corresponding deduction therein should be made, and that he would refund the consideration-money in proportion. Before the investigation was completed, the defendant realized rents for three years at the rate given in the lease. The plaintiff then brought a suit for abatement of rent, for refund of consideration, and of rent paid in excess of the sum which would be payable, on the amount of the rent being adjusted according to the terms of the contract. While this suit was pending, the defendant, under the provisions of Regulation VIII. of 1819, realized the rents of other three years from the plaintiff at the rate specified in the lease, and plaintiff now sues to recover the difference between the rent mentioned in the pottah and that ascertained by him on local inquiry to be the proper rent. A Division Bench in a similar case, reported at page 121 of IX. Weekly Reporter, has held that the action would not lie; that the claim should have been included in a previous suit for damages brought by the same plaintiff. We differ from the view taken of the case by the Division Bench which passed the judgment referred to above; for we fail to see how a sum not realized from the plaintiff when his former suit was brought could have been included in that claim, whether such claim be looked upon as a claim for damages or a claim for refund of rent taken in excess of the sum due to the landlord. I concur with my colleague in referring this case for the consideration and decision of a Full Bench.

The judgments of the Full Bench were delivered as follows by--

Peacock, C. J.--Cases Nos. 148 and 149 of 1867.—The lease mentioned the amount of rent to be paid, but it provided that the tenant should, within a certain period, ascertain what were the real assets of the property; that, if they were found to be less than the amount of rent specified in the lease, the landlord would deduct the difference, and would refund a proportion of the consideration-money. The assets were found to be less. It appears to me that this suit is not for an abatement of rent, but for a declaration that, according to the terms of the lease, the rent really payable is less than the sum nominally inserted in it.

A suit for abatement of rent is a suit for reducing the amount which but for the abatement would be payable as rent. In this case the amount mentioned in the lease was never, according to the terms of the lease, payable as rent. The amount which was inserted in the lease was subject to a condition that it was not to be the rent in a certain event. The suit is, therefore, not a suit for abatement of rent within the meaning of Section 23 of Act X. of 1859. This answers the first question.

The second question is, whether, if such a suit can be brought, the Civil Courts have jurisdiction to try it when it is mixed up with a claim for a refund of consideration-money.

It appears to me that the Civil Court had the power to try this question when it was mixed up with the other questions in the suit. It has been held that a suit to recover

he possession of land may be tried by the Civil Court when it is mixed up with a claim for mesne-profits. It would be most inconvenient in the present case if the whole question could not be tried by the Civil Court. It is admitted that the Court has jurisdiction to enforce the refund of that which has been paid in excess; and if the Revenue Courts should refuse to abate the rent, the plaintiff would have again to sue in the Civil Court to have the excess refunded according to the terms of the lease.

The cases will be remanded to the Bench which referred them for final determination.

Peacock, C. J.—Case No. 364 of 1867.—I have no doubt that this suit was maintainable. There was a covenant, on a given event, to make an abatement in the rent nominally fixed, and to refund a rateable proportion of the consideration-money. The event was, if it should turn out on enquiry, and after preparation of the *hustobood* papers by the lessee, that the jumma stated by the Rajah was not the real rent of the estate. The fact has so turned out, and the defendant has not made the abatement, but has recovered the rents for the years 1271, 1272, and 1273, without making any deduction in the amount.

I am of opinion that the plaintiff is entitled to recover damages against the defendant for not making the abatement for those three years, which had not arrived at the time when the former suit was brought. The plaintiff could not, in that suit, have recovered damages in respect of those years for which he had not paid, and for which he had not at that time been called upon to pay any rent.

The case will go back to the Division Bench which referred it.

The 8th August 1868.

Present:

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice*, and the Hon'ble H. V. Bayley, L. S. Jackson, A. G. Macpherson, and Dwarkanath Mitter, *Judges*.

Execution—Procedure—Section 284, Act VIII. of 1859.

Case No. 24 of 1868.

Miscellaneous Appeal from a decision passed by the Officiating Judge of Backergunge, dated the 31st October 1867, reversing a decree of the Moonsiff of that District, dated the 22nd June 1867.

J. G. Bagram (Judgment-debtor), *Appellant*,

versus

J. P. Wise (Decree-holder), *Respondent*.

Mr. C. Gregory for Appellant.

Baboos Onookool Chunder Mookerjee and *Romesh Chunder Mitter* for Respondent.

When a decree of one Court has been transmitted, under Sections 284 *et seq* of Act VIII. of 1859, to another Court for execution, and when that Court has struck off for default the first proceedings in execution of the judgment-creditor, the Court to which the decree has been transmitted has jurisdiction to allow the proceedings to be revived.

This case was referred to a Full Bench by Mitter and Hobhouse, JJ., under the following remarks:—

Mitter, J.—The first question to be determined in this case is whether or not a Court to which a decree passed by another Court has been transmitted for execution under the provisions of Section 286 of Act VIII. of 1859 is competent of its own authority to entertain a fresh application for execution, after the first application had been "struck off" by itself for default. I am of opinion that this question ought to be answered in the affirmative.

It is extremely doubtful whether the Court below had any power to "strike off" the execution-case in the first instance. There is nothing in the provisions of Act VIII. of 1859 to sanction an order of this description, nor do I find that it is supported by any rule of practice prepared and issued by this Court, or even by the late Sudder Court, under the provisions of Section 381 of the Act. Assuming, however, that the order is one that is sanctioned by competent authority, I am of opinion that no higher value can be attached to it than that which is attributable to an order of "dismissal by default," passed in an original suit under the provisions of the 110th Section of the Code. Whenever, therefore, an application for execution is "struck off" for default, the decree-holder is competent to revive the execution-case, either by obtaining a cancellation of the order on his showing that no real default had been committed by him, or by preferring a fresh application for execution without any reference to such default, provided that, in the latter case, the decree is otherwise capable of execution. The first of these two modes of revival is seldom resorted to in our Courts, but there might be cases in which this particular remedy would be of the most vital importance to the decree-holder; as, for instance, where

the decree-holder would be otherwise barred by limitation, or where he might deem it too expensive and harassing to go over the same preliminary steps which he might have already gone through upon his original application. At any rate, it is clear that such a relief cannot be possibly refused to the decree-holder, if he is in a position to show that he has been no way guilty of the negligence on the basis of which the execution-case had been "struck off" the file; and it appears to me that in such a case it would be manifestly unreasonable to hold that the tribunal by which the order of "striking off" has been passed is not competent of its own authority to revive the execution-proceedings. The default is supposed to have been committed before that tribunal, and the Court which passed the decree has no right to interfere in the matter—it being clear that it has not been vested with any appellate jurisdiction over the Court by which the execution-case has been struck off. If in such a case, therefore, the decree-holder is competent to revive the execution by applying to the Court to which the decree has been transmitted for that purpose, I do not see any reason why a similar privilege should not be conceded to him when he is desirous of proceeding according to the second of the two modes described above. The whole law relating to the execution of a decree out of the jurisdiction of the Court by which it has been passed, and whose duty it, therefore, is to execute it in the first instance, is laid down in the following Section of Act VIII. of 1859.

Section 284 says that a decree of any Civil Court in British India which *cannot be executed* within the jurisdiction of the Court whose duty it is to execute the same *may be executed* within the jurisdiction of any other such Court. Section 285 says that, in such a case, *i. e.*, where the decree *cannot be executed* within the jurisdiction of the Court whose duty it is to execute it, the decree-holder may apply to such Court to transmit a copy of the decree, together with a certificate that satisfaction thereof has not been obtained within the jurisdiction of the said Court, to the Court by which the applicant might wish the decree to be executed. Section 286 says that, unless there be *any sufficient reason to the contrary*, the Court which passed the decree shall cause such copy and certificate to be prepared, and the same, after being properly certified, shall be transmitted to the Court indicated by the applicant, if that Court be within the said district, otherwise to the Principal Civil Court of original jurisdiction in the district in which the applicant may wish the decree to be executed; and the Court to which such copies and certificates shall be transmitted shall *cause the same to be filed* among its own record. Section 287 says that the copy of the decree, when *filed* in the Court in which it shall have been transmitted for the purpose of being executed, as aforesaid, shall *for such purpose, i. e.*, for the purpose of being executed, *have the same effect as if it were a decree passed by the said Court.* Section 288 says that *when application shall be made* to any Court to execute the decree of another Court which has been transmitted and filed in the manner aforesaid, the Court to which *the application shall be made* shall proceed to execute the same according to its own rules in the like cases. Section 290 says that the Court to which the application is made might suspend the execution of the decree for any reasonable time, or order restitution of property or discharge of the defendant, if good and sufficient cause is shown, until further orders are received from the Court which passed the decree, or from a Court exercising appellate jurisdiction in respect of the decree or the execution thereof. Section 292 says that *any order* of the Court in which the decree was passed, or of such Court of appeal as aforesaid, *shall be binding* upon the Court to which the application for execution was made.

There is nothing whatever in these provisions which can, in my opinion, afford the least countenance to the contention raised before us by the appellant. It will be observed that it is only when there are reasonable grounds for believing that the decree cannot be executed within the jurisdiction of the Court by which it was passed, and when there are no good and sufficient reasons to the contrary, that the decree is to be transmitted for execution within the jurisdiction of another Court. But when the decree and the certificate of non-satisfaction have been once transmitted to and filed in such other Court, that Court is required to give to the *decree the same effect as if it were a decree passed by itself.* The words of Section 288 are significant. That Section does not say that the provisions made therein are applicable to the first application for execution only, but the words are "*when application shall be made to execute the decree,*" *&c.* By the operation of the pre-

vious Section the decree has the same effect, *for the purpose of execution*, as if it were a decree passed by the Court to which it has been transmitted, and that Court is bound to execute it *whenever* the decree-holder shall apply for execution, provided that the decree does not appear on the face of it to have been made without jurisdiction, and that the application for execution, whether first, second, or otherwise, is not barred by any of the rules of the said Court in like cases, such as limitation, &c. It cannot be for a moment contended that the Court to which a decree has been transmitted for execution, and whose duty it has, therefore, become to execute the same, can refuse to execute it, merely upon the ground that a previous application for execution has been struck off for default. "If striking off execution-cases" for default is a rule of practice obtaining in that Court, the revival of the execution-proceedings upon a fresh application for execution is also a rule of practice of that very Court; and it appears to me neither legal nor just to hold that the decree-holder is to be deprived of the benefit of the second rule, if he is at all to suffer by the first. It is perfectly true that the Court to which a decree has been transmitted for execution is bound by any order that might be issued by the Court which passed the decree; but its own order for "striking off" the execution-case from *its own* file cannot for a moment be taken as a substitute for an order of the latter Court directing it to abstain from further proceedings.

It has been said that to allow the decree-holder to revive the execution-case in this manner would be productive of the greatest hardship to the judgment-debtor in such cases; for instance, where the decree might have been in the meantime satisfied in the Court by which it was passed. I am of opinion, however, that the force of this objection is entirely the other way. It will be borne in mind that a decree passed by one Court can be transmitted for execution within the jurisdiction of another Court, only when there are reasonable grounds for believing that the satisfaction thereof cannot be obtained within the jurisdiction of the former Court, and the certificate transmitted along with the copy of the decree is a sufficient guarantee that satisfaction has not been obtained within the jurisdiction of that Court, at all events down to the date of the transmission thereof. It is equally clear that an order passed by the Court to which the decree has been transmitted for striking off the execution-case for default cannot by itself raise any such presumption as to nullify the effect of this certificate. Under such circumstances, I am wholly unable to perceive how the judgment-debtor can possibly be prejudiced if execution is permitted to go on in that Court. The satisfaction of the decree (if any) must have taken place on some date subsequent to the transmission of the decree, and it is by no means likely that a debtor who had notice of such transmission would go and notify the satisfaction of the decree to the Court by which it has been so transmitted, instead of notifying it to the Court where the execution-proceedings have been hitherto going on. I should always look upon a plea of this sort with suspicion. At any rate, it is always open to the debtor to put a stop to the execution-proceedings by procuring an order to that effect from the Court which passed the decree, according to the provisions of the 292nd Section of the Act, or to apply to the Court to which the decree has been transmitted to suspend proceedings for a reasonable time to enable him to procure a copy of that order under the provisions of the 290th Section.

It will be further observed that the law does not contain any express provision as to how and when the execution-records are to be re-transmitted to the Court by which the decree was passed. I do not mean to say that such a thing cannot be done at all, but all that I mean to say is that it can be done only when an order to that effect has been received from the said Court, or from some other Court exercising appellate jurisdiction over the matter. The Court to which the decree has been transmitted for execution has no power to send up the execution-records of its own authority, merely because it has "struck off" one single application for execution on the ground of default. If, therefore, the proceedings that have taken place subsequent to the date of the transmission are to remain on the records of the Court by which the execution-case has been struck off, no order to the contrary having been received from the Court which transmitted the decree, would it not amount to a highly vexatious and unnecessary rule of procedure to drive the decree-holder back to the latter Court, if he is still desirous of obtaining the satisfaction of his decree within the jurisdiction of the former Court? Indeed, it appears to me that the Legislature never intended that the execution-case is to be shifted backwards and forwards in this

manner. As a general rule, decrees passed by one Court are not to be transmitted to another Court unless good and sufficient reasons are shown; but when they have been once transmitted, the Court directed to execute them is bound to do so as long as they are legally capable of execution, and as long as it has not received any order to the contrary from the Court whose duty has been delegated to it. An opposite construction of the law would in all cases entail the greatest hardship and inconvenience upon the decree-holder, and in some it might lead to an absolute denial of justice; as, for instance, where the Court which passed the decree is situated at such a distance from the Court which struck off the execution-case (it being remembered that it might be anywhere in British India) as to render it physically impossible to the decree-holder to renew his application in that Court within the time prescribed by the Law of Limitation.

The appellant, however, relies upon two decisions of this Court reported in page 5, Volume 3, Weekly Reporter, and page 47, Volume 6, Weekly Reporter, respectively. I am of opinion that these decisions are erroneous, though the second is somewhat distinguishable from the first. It appears that in that case the Court to which the decree was first transmitted for execution had transmitted it to a third Court, and this last Court had revived the execution-case after it had been once struck off from its file. Whether these facts would make any difference in the result, it is unnecessary for me to determine; nor is the decision itself placed upon any such distinction. Both the decisions, however, are in support of the appellant's contention, and for the reasons given above, I am of opinion that the question ought to be referred to a Full Bench of this Court for an authoritative decision. The question submitted to the Full Bench is:—

Whether or not a Court to which a decree passed by another Court has been transmitted for execution under Section 286 of Act VIII. of 1859 is competent of its own authority to entertain a fresh application for execution when a previous application for such execution has been struck off by itself for default, provided that the decree is otherwise capable of execution.

Hobhouse, J.—The facts are these: "The decree was a decree of the Moonsiff's Court of Mymensingh District. This decree could not, we must presume, be executed within the jurisdiction of the said Court, so it was transmitted for execution in the Court of the Moonsiff of Choukee Dowlut Khan in the district of Backergunge, under the provisions of Sections 284 and following of Act VIII. of 1859. Execution was allowed to proceed in the above-named Court in the district of Backergunge up to a certain time, when the execution-case was, what is technically called, "struck off" in default of prosecution. Thereafter execution was revived by the usual application in the said Court, and resulted in the present judgment in favor of the decree-holders, respondents before us."

The first objection taken in special appeal is, that the proceedings of the Courts below were without jurisdiction; and in support of this contention, Mr. Gregory for appellant relies on the cases reported at Vol. III., Weekly Reporter, page 5, and Vol. VI., page 47, Miscellaneous Rulings.

The first case relied on seems to me to be exactly in point, and the second to some extent so; and in both the Judges were clearly of opinion that a Court, which has simply executed a decree of another Court under a certificate from that other Court, has no jurisdiction to revive execution-proceedings once struck off. In this opinion I do not concur. In the first place, I do not find any warrant in law, though I am aware that the practice is universal, by which a Court is authorized to proceed and strike off (usually the Court in such a case acts on its own motion, in the absence of the parties, and simply to clear its files) a proceeding in execution of decree.

But after all, the effect of the procedure to strike off is simply to put the execution-proceeding on the shelf, *i. e.*, in abeyance, until such time as the execution-creditor applies to revive execution, and then it is revived as a matter of course, and is heard and disposed of, subject only to such fresh notices as the law requires or to such objections as the judgment-debtor may take.

I take it, therefore, that the order to "strike off" simply, if it is a legal order at all, is nothing more than an order made for the convenience of the Court, and is certainly not a final order, but is admittedly an order which would not prevent the Court which passed the decree originally from, the order to strike off notwithstanding, reviving execution-proceedings.

And, if this is so, if the Court which passed the decree could, such an order notwithstanding, revive proceedings in execution,

then I think the Court executing a decree of another Court under certificate can also revive proceedings; for the words of the law seem to me to place the Court executing under certificate exactly in the position of the Court that passed the decree.

By Section 286, the Court which passed the decree transmits a copy thereof to that other Court by which the decree-holder may wish the decree to be executed, and then such copy (Section 287), "when filed in the "Court to which it shall have been trans-"mitted for the purpose of being executed, "shall for such purpose have the same "effect as a decree for execution made by "such Court, and may be executed by such "Court," and (Section 288) "when appli-"cation shall be made to any Court to ex-"ecute the decree of any other Court as "aforesaid, the Court to which the applica-"tion shall be made shall proceed to exe-"cute the same according to its own rules," &c.

These words seem to me to place the Court executing, under the certificate and copy of decree, the decree of another Court, exactly in the position as if it were executing one of its own decrees; and as beyond a doubt it could, an order to strike off notwithstanding, revive execution of one of its own decrees, so it seems to me it can revive execution of a decree made like to its own under the law for transmission.

The objection taken by the learned Judges who gave the decision at Vol. III., Weekly Reporter, to the revival of execution-proceedings in the Court to which a decree has been transmitted for execution, is thus stated at page 6: "Though the law makes no express "provision for cases of decrees transmitted "to other Courts, when they are struck off, "and when they are sought to be revived "in such Courts, it is still sufficiently clear "to us that the same procedure ought to be "strictly followed over again. Were it other-"wise, all sorts of irregularities and frauds "might be committed. The decree might "have been satisfied to the last anna in the "Court where it was obtained, and it yet "might be again revived, after being struck "off in the Court to which it had once been "transmitted by any vindictive, reckless, or "unscrupulous creditor, for the mere pur-"pose of annoyance and harassment. The "Court of Patna, and any Court so situ-"ated, has not the whole record before it, "and can have no means of knowing the "exact position of the parties and the real "state of the case."

With much deference, I do not regard this reasoning as conclusive; for I fail to see what the irregularities or frauds are that might be committed, or how, supposing such to be liable to be committed, they may not be committed just as readily under the first execution by one Court of the decree of another as under any revived execution; and surely, if the decree have been satisfied in the Court in which it was obtained, the judgment-debtor could prove such satisfaction at any time, and just as readily, as on a revived as at a first execution.

On a consideration of the whole argument, I am of opinion that in this case the Courts of Backergunge had jurisdiction; and I concur in sending this case to a Full Bench.

The question is this—when a decree of one Court has been transmitted, under Section 284 *et sequitur*, Act VIII. of 1859, to another Court for execution, and when that other Court has, what is technically called, "struck off" the first proceedings in execution of the judgment-debtor in default, has that other Court jurisdiction to allow the proceedings to be revived, or does such jurisdiction rest solely with the Court which originally passed the decree?

The judgment of the Full Bench was delivered as follows by—

Peacock, C. J.—It is quite clear that the Court to which the decree was sent had jurisdiction over its own order striking off the case, whatever the striking off amounts to. As soon as a copy of the decree which is sent for execution to another Court is filed in the Court to which it is transmitted, it has the same effect as a decree of that Court; and by Section 288 that Court is to proceed to execute it according to its own rules in the like cases. The order for striking off the application for execution of the decree did not strike the copy of the decree off the records of the Court to which it was sent for execution; and as long as it remains there, the Court to which it was sent may deal with it, and any application for execution of it as if it was a judgment of that Court. If in the present case the decree had been a decree of the Backergunge Court, that Court would have had power to entertain the application.

The case will go back to the 6th Bench for disposal, and the question answered in the affirmative.

b

The 7th August 1868.

Present:

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice,* and the Hon'ble H. V. Bayley, L. S. Jackson, A. G. Macpherson, and Dwarkanath Mitter, *Judges.*

Suit—Contract—Registration—Secondary evidence—Section 84, Act XX. of 1866.

Case No. 1707 of 1867.

Special Appeal from a decision passed by the Principal Sudder Ameen of Hooghly, dated the 22nd June 1867, affirming a decision of the Moonsiff of that District, dated the 6th February 1867.

Sheikh Ruhumutoollah (Plaintiff), *Appellant,*

versus

Shuriutoollah Kagchee and others (Defendants), *Respondents.*

Baboos Kalee Mohun Doss, Bungsheedhur Sein, and *Mohinee Mohun Roy,* and *Moulvie Murhumut Hossein* for Appellant.

Baboos Bhyrub Chunder Banerjee, Umbica Churn Banerjee, and *Gopeenath Banerjee* for Respondents.

A suit was brought to establish the plaintiff's right to certain lands alleged to have been purchased by him. A written *kubala,* or bill of sale, had been executed; but it was refused registry, because the defendant appeared at the Registry Office, and declared that the contract had not been completed. The plaintiff claimed to prove the contract of sale by oral evidence, and sued for possession of the property covered by the contract.

HELD by the majority (*Mitter, J., dissenting*) that the suit could not be maintained so long as the *kubala* remained unregistered, and that secondary evidence of its contents was not admissible; and that the plaintiff should have taken steps to establish his right to have the written contract registered under the provisions of Section 84 of the Registration Act, XX. of 1866.

This case was referred to a Full Bench by Kemp and E. Jackson, JJ., under the following remarks:—

Jackson, J.—THIS appeal raises an important point of law upon which there appears to be a difference of opinion among the Judges of this Court. The suit was brought to enforce a contract which was refused registry because the defendant at the Registry Office declared that the contract had not been completed. The plaintiff claims to prove the contract by oral evidence. It has been already held by a Division Bench of this Court (Loch and Mitter, JJ.), in a decision* reported at page 197, Volume 6, Wyman's Journal, that such a suit can be brought; and again (Loch and Seton-Karr, JJ.), in a decision reported at page 423, Volume VIII., Weekly Reporter.

I am of opinion that there is no bar to such a suit, if it is distinctly brought to enforce registration. The Registrar was right in this case to refuse registration. The plaintiff might have appealed to the Judge under the Registration Law to establish his right to registration. But the Judge could on such appeal, under the circumstances of the case, only have confirmed the orders of the Registrar. If the law declared that, on such appeal, in trying the question of the plaintiff's right to registration, the proceedings should be carried on as a suit in the Civil Court, and the judgment and decree passed on it should have the same effect as a decree in the Civil Court, and should be capable of enforcement as such a decree, I should be inclined to hold that the appeal to the Judge would bar any further suit for registry; but in the absence of any such declarations in the Act, I am of opinion that the appeal to the Judge is only on the question whether the Registrar was right in the orders which he passed, and that the right to prefer that appeal does not bar the right to prefer a suit to enforce the contract, and to have it registered. I look upon the suit in this case to be virtually a suit to enforce registry, and that the first Court should have required the plaint to be amended to that extent. I would, therefore, remand this case to the first Court to require the plaintiff to amend his plaint by adding words to that effect, and then to proceed to try the suit. If the plaintiff's allegations in this case are true, he is entitled to some remedy. He states that he has purchased lands, and has paid up the full consideration-money. The defendant states that he has only paid up a portion of the consideration-money. The plaintiff, if his allegation is correct, is entitled to have his contract registered and enforced. I see no bar to his bringing a suit to obtain his rights. The former Registration Law distinctly gave a person in the position of the plaintiff a right to bring such a suit. It has been omitted from the present law; but I think this has been done because the plaintiff could, under the general law, Act VIII. of 1859, Section 2, bring his suit before the Civil Court.

Kemp, J.—The plaintiff is the special appellant. He sued on the allegations that the defendants (special respondents), conveyed to

* *See* 9 W. R., p. 351.

him by an out-and-out sale (*saf kubala*) a few beegahs of rent-free land for a consideration of Rupees 300, which sum was duly paid; that a deed of conveyance was executed on or about the 20th Srabun 1273 B. S.; that possession was given to him; that, on sending the defendants to the Registrar's Office for the purpose of registering the deed, the defendants set up fraudulent objections to the effect that a stipulation "to return the property to the vendors on the payment by them of the consideration-money" had not been entered in the body of the deed; and further that a portion of the consideration-money was still unpaid; the Deputy Registrar, on these objections, refusing to register the deed, returned it to the defendants with a memorandum of the grounds upon which registration was refused, this memorandum being dated the 30th August 1866; that, in fact, there was no such stipulation as averred by the defendants, and that the whole of the purchase-money was paid; that the objections raised by the defendants, being subversive of the terms of the contract entered into between the parties, have injured the title of the plaintiff; hence this suit is brought to set aside those fraudulent objections, and to establish the full title of the plaintiff in the land purchased by him. The suit is valued at the price paid for the land, *viz.*, Rupees 300.

The defendants answered that they had not sold the property in dispute to the plaintiff; that they had not made over possession to him; that there was a verbal contract to mortgage the property; that the plaintiff not agreeing to insert the terms of the mortgage in the deed of sale, it was returned from the Registrar's Office; that, as the deed is not registered, the sale is incomplete, and the deed cannot be used as evidence; that it was agreed that the property was to be held in mortgage by the plaintiff, he advancing Rupees 300 to the defendants, which they agreed to re-pay in two years, the plaintiff enjoying the usufruct in lieu of interest; that plaintiff advanced Rupees 48 in cash to the defendants; that Rs. 177, which were due to the plaintiff by the defendants, was set off against the purchase-money due from the plaintiff to the defendants; and that the balance, or Rupees 75, was arranged for by bonds.

The Court of first instance raised two issues—one in bar, and the other on the merits.

The issue in bar was to this effect. When the deed of conveyance alluded to in the plaint has not been registered, can the plaintiff's suit, with respect to the land covered by the deed of conveyance, proceed or not? As the case was decided on the issue in bar, it is not necessary to state the issue on the merits. The Moonsiff held that, as the deed had not been registered, it was inadmissible as evidence under the provisions of Section 49, Act XX. of 1866. The Moonsiff further remarked that, as the suit was not brought on the contract, but upon the deed of conveyance itself, and as that deed, not being registered, was inadmissible as evidence, the plaintiff's suit must fail. Further, that secondary evidence of the deed could not be received, for by so doing the objects of the Registration Law would be frustrated. The Moonsiff further remarked that the plaintiff might have proceeded according to Section 84 of Act X. of 1866; that, having neglected to have recourse to the remedy available to him under that Section, he was not entitled to any redress in the Civil Court. The suit was, therefore, dismissed. On appeal, this decision was confirmed by the Principal Sudder Ameen.

In special appeal it is urged—

First.—That the Lower Courts were wrong in dismissing the suit altogether on the ground of the non-registration of the deed of sale—Section 49, Act XX. of 1866, not applying to the circumstances of this case.

Second.—That, owing to the objections of the defendants, the deed was not registered, and the present suit was brought, according to the instructions of the Registrar, to establish the plaintiff's purchase of the lands in dispute, and to recover possession of the same.

Third.—That Section 49, Act XX. of 1866, does not contemplate cases like the present one. The Lower Courts should have tried the case on its merits, *viz.*, whether the objections of the defendants for refusing to complete the registration were valid or not, and whether the plaintiff's purchase was good and valid.

I am of opinion that the suit of the plaintiff (special appellant) has been properly dismissed.

In his plaint he avers that he was put in possession of the purchased property: he does not state whether he has been dispossessed. If he has been illegally dispossessed, his remedy was under Section 15, Act XIV. of 1859.

If he sues under a contract—such contract being one which purports to create a right in immoveable property of the value of more than one hundred rupees—it cannot be received in evidence under Section 49, Act XX. of 1866, inasmuch as it is not registered, as required under Clause 2, Section 17 of the same Act.

If he sues under the deed of conveyance, the same objection will apply. Without the contract or the deed of conveyance, the plaintiff cannot make out his case; and as both are inadmissible for want of registration, the suit of the plaintiff must necessarily fail.

I also observe that the plaintiff took no steps to establish his right to have the document registered under the provisions of Section 34 of the Registration Act. Had he done so, and been able to prove that he had complied with the requirements of the Act, the Judge would have ordered the registration of the deed, and it would then have been admissible as evidence.

The contract or deed being the primary evidence of the transaction between the vendor and vendee, and such not being admissible as evidence owing to the laches of the plaintiff, who, moreover, should not have parted with his money before registration, secondary evidence of an alleged verbal contract is, in my opinion, inadmissible. I would dismiss this special appeal with costs and interest; but as this opinion is at variance with two decisions, one reported in Wyman's Journal, Volume 6, page 197, and another in the Weekly Reporter, Volume VIII., page 423, the case must be submitted for the determination of the Full Bench.

The judgments of the Full Bench were delivered as follow:—

Mitter, J.—I am extremely sorry to differ from my learned and honorable colleagues.

If the plaintiff in this case is in a position to prove that besides the bill of sale in question there was an independent parol contract, by virtue of which the land in dispute was transferred to him by the defendants, he would be entitled, in my opinion, to succeed on the strength of that contract, notwithstanding that the said bill of sale has not been registered under the provisions of the Indian Registration Act. As I read the plaint, I see nothing in it to justify the conclusion that the plaintiff intends to rely upon a written instrument as the sole foundation of his title. On the contrary, it is distinctly stated therein that the transaction in question had been completed and even followed by actual delivery of possession before the bill of sale was executed. As far as I am aware, certain words sufficient to constitute a valid and complete transfer of property from one person to another always pass between a vendor and vendee in this country, even when the contract between them is reduced to writing; and I see no reason in justice or equity why the plaintiff in this case should be precluded from showing that such words had actually passed between him and the defendants. There is no statute of frauds in force in this country. Parol contracts for the sale of land are expressly sanctioned by the Hindoo and the Mahomedan Law, and I am unable to find any reason whatever why such contracts should not be enforced as between the parties thereto.

Assuming, however, that the bill of sale in question is the sole foundation of the plaintiff's title, I am still of opinion that he is entitled to the relief he has asked for, provided he proves the allegations set forth by him in his plaint. If these allegations are true, there can be no doubt whatever that a gross fraud has been perpetrated against him by the defendants, and that it was in consequence of this fraud that his title-deed has not been registered by the Registrar of Assurances. The plaintiff has done every thing that he was required by the law to do; and if the Registrar refused to register his bill of sale, it was because the defendants stated something before that officer which amounted substantially to a denial of its genuineness, and which, therefore, obliged him to refuse to register it. Under such circumstances, the defendants ought not to be, in my opinion, permitted to say that the plaintiff is not entitled to rely upon his purchase, in consequence of the provisions of the Registration Act, when it is clear that the plaintiff's failure to comply with those provisions has been owing entirely to their own misconduct.

Act XX. of 1866 does not require the registration of titles; it is an Act for the registration of assurance only. The object of the Legislature in passing that Act was, as I believe, to protect innocent persons dealing with landed property in this country, and not to protect dishonest vendors who have themselves prevented their vendees from complying with its provisions. I take it by

an universal principle of justice that no man ought to be permitted to take advantage of his own fraud, and it would be, in my opinion, a flagrant violation of this principle if we were, that the plaintiff in this case ought to suffer to hold because the defendants have succeeded in preventing him from registering his deeds by their own fraudulent conduct. It is perfectly true that the words of Section 49, Act XX. of 1866, are positive as far as they go; but the question we have to determine is whether the Act itself was intended by the Legislature to be applicable to a case like the present. I believe that it was not; and in advancing this position, I am glad to find that I am not altogether unsupported by authority.

The first authority I wish to refer to is the case of Sreenath Bhuttacharjee *vs.* Ram Comul Gangooly and others, decided by the Lords of the Judicial Committee and reported in Sutherland's Privy Council Judgments, page 600. One of the questions involved in that case was whether a deed registered under the provisions of Act XIX. of 1843 (the old Registration Law), but tainted by fraud, was entitled to precedence over a prior deed not registered in conformity to that Act, and this question was determined by their Lordships in the negative. It is to be borne in mind that all that the subsequent purchaser was required to prove under that Act in order to entitle himself to the benefit of it was the "authenticity" or genuineness of the deed relied upon by him; but their Lordships went on to observe: "The word 'authenticity' would seem, according to its natural meaning, to point merely at the exclusion of a forged deed from the benefit of the Act; but their Lordships think that it could not be intended by the Act that a deed which was tainted by fraud, although in other respects genuine, should be placed on the same footing as an honest *bonâ-fide* deed."

I admit that the question determined by their Lordships is not identical with the question we are called upon to determine in this case; but the principle of construction adopted by their Lordships is equally applicable to this case, and I may even say that it is *a fortiori* applicable to it. A subsequent purchaser might be guilty of fraud without being guilty of having prevented the prior purchaser from securing the registration of his title-deed. But if we are to hold that the Registration Act was not intended to apply to the case of a fraudulent purchaser, I am unable to understand why a fraudulent vendor should be permitted to take advantage of that Act, more especially when it appears that the non-registration of the deed relied upon by the vendee was owing, not to any negligence on the part of the latter, but to the fraud and misconduct of the former. The Registration Law, I may observe, was intended more for the protection of purchasers than for that of sellers. But be this as it may, I do not see any reason whatever why we should hold that that law is applicable to the case of a fraudulent vendor, if it is not applicable to that of a fraudulent vendee. I wish to add that it has been already decided that a subsequent fraudulent purchaser is not entitled to claim the benefit of Section 48 of Act XX. of 1866, and this decision is in strict unison with that of the Privy Council just now quoted by me. Now, the provisions of Section 48 are as imperative as those of Section 49—I mean so far as the mere wording of those two Sections is concerned; but if the penalty prescribed by the former does not apply to a case of fraud, I do not see any reason why the penalties prescribed by the latter Section should be visited upon a purchaser in the predicament of the plaintiff in this case. The defendants say that the plaintiff is not entitled to rely upon his purchase, because he has failed to register his deed—the obligation to register being imperative under the law. But the answer of the plaintiff is "It is true I was required by the law to register my deed, but I had done all that I was required to do for that purpose; and were it not for your fraud, my deed would not have been in the condition in which it now is." I cannot conceive that a more complete and satisfactory answer could have been given by a party who is charged by his adversary with violation of the law.

The next authority I wish to refer to is the case of Nawab Sidhee Nazir Ali Khan *vs.* Ojoodhyram Khan, also decided by the Lords of the Judicial Committee and reported in page 635 of Sutherland's Privy Council Judgments. The question in that case was whether a purchaser at a sale for arrears of revenue under Act I. of 1845, was entitled to get rid of the title of the former proprietor when the sale itself had been brought about by his own fraud. It is to be borne in mind that the title of a purchaser at a sale for arrears of revenue is one of the strongest known in this country, and the provisions of Act I. of 1845, defining the nature and extent of that title, were as express and as imperative as they possibly

could be. But their Lordships decided that the Act was never intended for the benefit of a purchaser whose purchase was tainted by fraud. "If these facts cannot be displaced," their Lordships observed, "the agreement was "undoubted a gross fraud on the mortga-"gor committed by both the actors in it, *viz.*, "Abbott and M'Arthur. But it was argued "that even if this case were true, the remedy "would be under Act I. of 1845 for damages "only. This argument is in conformity to the "opinion of the Zillah Judge. But it is to "be observed that this argument assumes the "very question under discussion, which is "whether the Act extends to the present "case. Mr. Justice Bayley thought that the "Act was not designed to protect a fraudulent "purchaser. He put his decision on the "ground that a man is not allowed by law to "take advantage of his own wrong, and he "treated the case of such a purchaser as "beyond the protection intended to be given "by the Act to purchasers under an auction-"sale." In the same manner I say that if the allegations of the plaintiff are true, there can be no doubt that a gross fraud has been committed on him by the defendants; and that to argue that the plaintiff's purchase should not be recognized by the Court under the provisions of Section 49 of Act XX. of 1865, is to assume the very question we have to determine, namely, whether the Act itself was intended for the protection of fraudulent vendors, in contravention of the general principle that no man ought to be allowed to take advantage of his own wrong.

Their Lordships then go on to cite authorities in support of the principle referred to. "The question was considered," their Lordships proceed to observe, "in the "decision of the Supreme Court in the cause "so often referred to, to which this suit is "alleged to be supplemental. Mr. Justice "Colvile in that judgment, whilst he declares "a Government sale for arrears of revenue to "give a title against all the world with "certain exceptions, engrafts on that general "rule this exception, that a fraudulent pur-"chase at such auction-sale by a mortgagee "will not defeat the equity of redemption. "The subject is treated in Mr. Arthur Mac-"pherson's book on Mortgages, at page 91, "who there quotes a prior decision, Kellsall "*vs.* Freeman, of the same Supreme Court to "that effect. The author, now a Judge of "the High Court at Calcutta, expresses a "similar opinion; and as his book is one well "known and frequently consulted in India, "the discision under review cannot be re-"garded as unsettling a previously settled "state of the law, and as raising for the first "time an exception to the general protection "which this legislative title affords to pur-"chasers. In support of this view, we may "refer to other authorities. In the celebrated "opinion of Chief Justice DeGrey in the "House of Lords, in the Duchess of King-"ston's case, he says: 'But if it was a direct "and decisive sentence upon the point, and as, "it stands, to be admitted as conclusive evi-"dence upon the Court, and not to be im-"peached from within, yet, like all other acts "of the highest judicial authority, it is im-"peachable from without. Although it is "not permitted to show that the Court were "mistaken, it may be shown that they were "misled.' 'Fraud,' his Lordship proceeds to "state, 'is an extrinsic, collateral act, which "vitiates the most solemn proceedings of "Courts of Justice.' Lord Coke says: 'It "avoids all judicial acts, ecclesiastical or "temporal,' &c. The case of Collins *vs.* "Blantern is an authority to show, if any "were needed, that a Court *will strip off all "disguises from a case of fraud, and look "at the transaction as it is.* In addition to "these authorities, it may be observed that "the principle embodied in this distinction "pervades the law. Under sales in market "overt, the purchaser acquired a title against "all the world; but this protection did not "extend to a fraudulent buyer who knew that "the seller had no authority to sell. If the "thief who sold in market overt re-purchased "the article, the defrauded owner could then "assert his title against such re-acquisition. "The same principle applies to bills of ex-"change and other negotiable instrument," &c.

Taking this principle for my guide, I say that the Indian Registration Act was never intended for the protection of fraudulent vendors, and that, in such cases, the duty of the Court is to *strip off all disguises from the transaction, and to look at it as it really is.*

The last authority I wish to quote is that of Mr. Justice Story. When I refer to authorities on the English Law, I do so with the utmost diffidence, in consequence of my own ignorance of that law; but if I have correctly understood the passage I am going to cite, the principle laid down therein appears to be exactly applicable to the circumstances of the present case. "Another exception to the Statute" (the Statute of Frauds), says Mr. Justice Story, "is where

the agreement is intended by the parties to be reduced to writing according to the Statute, but it is prevented from being done by the fraud of one of the parties. In such a case, Courts of Equity have said that the agreement shall be specifically executed, *for otherwise the Statute designed to suppress fraud would be the greatest protection to it.* Thus, if one agreement in writing should be proposed and drawn, and another should be fraudulently and secretly brought in and executed in lieu of the former, in this and the like cases equity will relieve. So, if instructions are given by an intended husband to prepare a marriage-settlment, and he promises to have the settlement reduced to writing, and then fraudulently and secretly prevents it from being done, and the marriage takes place in consequence of false assurances and contrivances, a specific performance will be decreed." It is to be borne in mind that the requirements of the Statute of Frauds are at least as imperative (if not more so) as those of the Indian Registration Act; and if the former is not to be used for the protection of fraud, I do not see why the latter should be permitted to be used for that purpose.

It has been contended before us that the bill of sale in question is the primary evidence of the title set up by the plaintiff; and as that instrument is not admissible in evidence under Section 49, Act XX. of 1866, the plaintiff ought not to be permitted to prove his title by secondary evidence. The first answer I should give to this argument is, that it is based entirely upon the assumption that the bill of sale in question is not admissible in evidence. I have shown already that the provisions of the Indian Registration Act are not applicable to a case like the present; and it is therefore erroneous, in my opinion, to say that the document in question is not admissible in evidence according to those provisions.

I should further add that if the rule of English Law which prohibits the reception of secondary evidence, is to be adopted as our guide in determining Indian cases, the ends of justice absolutely require that it ought to be adopted in its integrity, *i. e.*, subject to all its necessary limitations. Secondary evidence is excluded when the absence of the primary evidence has not been satisfactorily accounted for; but the plaintiff in the present case is in a position, as I have already observed, to give a most satisfactory and complete explanation as to why he is unable to place before the Court the primary evidence upon which his title depends. If the bill of sale in question is inadmissible in evidence, the plaintiff ought to be permitted to show that it has been rendered inadmissible by the fraud of the defendant, as he alleges. It seems to me highly unjust and inequitable to apply the general rule against the plaintiff, and at the same time to deprive him of the benefit of the exception which the framers of that rule have engrafted upon it for the ends of justice.

It has been said that the document in question is actually in existence, and that, therefore, it cannot be said that the plaintiff is unable to produce it. I confess that I do not understand the force of this argument. If the document in question is inadmissible in a Court of justice, it is exactly the same as if it had no legal existence at all, and the plaintiff is clearly entitled, in my opinion, to show that this inadmissibility has arisen not from his own fault, but from the fraud of his adversaries. Suppose, for instance, that the bill of sale in question had been registered, and suppose also that the defendants have fraudulently defaced or otherwise injured it in such a manner as to render it altogether illegible. Would not the Court allow the plaintiff to prove its contents by secondary evidence, provided he satisfied the Court that the illegible condition of the deed is owing to the misconduct of his adversaries? To my mind it appears that in point of principle the case supposed by me is no way distinguishable from the case we have now to deal with: and I, therefore, think that this objection is entitled to no weight. I wish further to remark that if this objection is of any force or validity in the present case, it would be of equal force and validity in any other suit that the plaintiff may choose to bring, say, for instance, for damages. In such a suit, the plaintiff's cause of action would of course be *fraud;* but if the plaintiff is not to be allowed to prove the sale in question either by producing the deed or by secondary evidence, how is it that he would be in a position to prove the fraud upon which he relies? Surely, it cannot be supposed for one moment that the law of the country is in such a condition that the plaintiff must go wholly without a remedy against the gross fraud which, he alleges, has been committed against him by the defendants.

It has been further contended that the plaintiff ought to have gone up to the District Judge under the provisions of the 84th Section of the Act. But I am of opinion that the omission of the plaintiff to do so is by

no means fatal to his case. The Section referred to merely says that "it shall be lawful" for any one who feels himself aggrieved by an order of refusal passed by the Registrar of Deeds, to go up to the District Judge to secure the registration of any document in which he is interested; and it further provides that the District Judge "*may, if he thinks proper,*" order the deed to be registered, provided he is satisfied that the party complaining before him had done everything that he himself was required by the law to do in order to register the deed. It is clear that this Section leaves it to the discretion of the party aggrieved by the order of the Registrar, to go up to the District Judge, if he chooses; and it also leaves it to the discretion of the District Judge to order the registration of the deed, "if he thinks proper." I think, therefore, that the plaintiff was not bound to go up to the District Judge, and to invoke the *discretion* of that officer to protect him against the fraud of the defendants. At any rate, it is clear that the plaintiff in this case is willing to show what he would have been required by the District Judge to show, namely, that he himself has done everything that he was "*required*" by the law to do in order to secure the registration of his deed; and I am by no means prepared to admit that the remedy prescribed by Section 84 was the only remedy available to him. To invoke the assistance of the District Judge under the provisions of that Section does not and cannot entitle the defendants to benefit by their own fraud; nor do I think that the object of the Legislature in making those provisions was to deprive the ordinary Civil Courts of the jurisdiction which is vested in them by Section 1, Act VIII. of 1859. The Legislature itself has not said so; and in the absence of an express legislative enactment, we cannot decline to exercise that jurisdiction which we are bound to exercise under Section 1, Act VIII. of 1859, and in a case of fraud.

Suppose, for instance, that the defendants in this case, after having sold the property in dispute to the plaintiff, and having received from him the full amount of the purchase-money, had kept him in confinement until the period prescribed by Act XX. of 1866 for presenting documents for registration before the Registrar of Deeds had expired. The District Judge could not have afforded any relief in such a case, for, before that officer could exercise the discretion vested in him by Section 8, the plaintiff would be bound to show that he had done everything that he was required by the law to do in order to secure the registration of his deed. Can it be said that the plaintiff would go without a remedy—and remedy there would be none, not even in the shape of damages, if the plaintiff is to be prevented from proving his purchase either by the unregistered bill of sale in question, or by secondary evidence of the transaction to which it relates? I think, therefore, that the provisions of the Registration Act are wholly inapplicable to a case of fraud like the present.

Suppose, again, that the plaintiff had gone to the District Judge under the provisions of the Section in question, and the District Judge had refused to exercise his discretion in his favor. What would have been the remedy of the plaintiff in such a case? Section 49, Act XX. of 1866, would have then stood in his way just as much as it does in the present case.

In conclusion, I have but one remark to make. It has been said that this is a suit merely for the declaration of title, and that the Court ought not to exercise its discretion in passing a mere declaratory decree when it sees that the main document upon which the plaintiff relies has not been registered as required by law. I think, however, that, if the allegations of the plaintiff are correct, there can be no doubt that a thick cloud has been cast upon his title by the gross fraud of his adversaries, and that it is absolutely necessary for the protection of that title that this cloud should be removed, as far as possible, by making a binding declaration of right between him and the defendants. The claims of third parties deriving through the defendants will be determined upon their own equities; but the possible existence of such claims is not, in my opinion, a sufficient ground to bar the maintenance of the present action. As between the parties to this litigation, there can be no doubt that, under the circumstances stated, a binding declaration of right is absolutely required by the ends of justice.

Macpherson, J.—The question which, as I understand it, we have to answer is whether the plaintiff, who sues for a declaration of his title to the land which is the subject of this suit, can give parol evidence of the contract under which he alleges he acquired that title; the contract having been reduced to writing in the form of a *kobala,* or deed of sale, executed by the defendant, but not

having been registered, owing to fraud on the part of the defendant. The fraud alleged (and for the purpose of the argument I assume it to be truly alleged) is, that the defendant, having received the purchase-money, and having executed the deed of sale, afterwards induced the Registrar to refuse to register the deed upon the ground (which was false in fact) that the deed did not contain a certain clause which the plaintiff had undertaken to put in it, and that he had not received the whole of the consideration-money.

The question is not whether a suit for specific performance of a contract to register a bill of sale will lie, or whether an action for damages for breach of contract (in not giving the plaintiff a registered deed of conveyance) will lie. If that were the question, I should probably reply that a suit for damages or a suit for specific performance would lie as against the vendor, although not as against the Registrar. The passage just now cited from Story's Equity Jurisprudence (Volume II., page 92, 6th Edition) by Mr. Justice Dwarkanath Mitter shows that a suit for specific performance will lie. I agree with the Judges of the High Court at Agra, who, in delivering judgment in a case which was heard by a Full Bench (page 148 of Volume I. of the Full Bench decisions of that Court), said: "It appears to us "that the Act (XVI. of 1864) contained "nothing to limit or affect the right conferred by law on a purchaser to enforce specific performance of the contract of sale, "and that the Code of Civil Procedure in "the Sections relating to decrees and the "execution of decrees has made sufficient "provision for compelling a complete performance of the contract, whether by "execution of a conveyance, or by its registration, or otherwise." The question before the Agra Court was one arising out of Act XVI. of 1864; but the remarks of the Court are applicable to the present case, because the general terms in which an unregistered instrument is in that Act declared not to be receivable in evidence are very similar to the terms used in Act XX. of 1866.

I return to the point immediately before me, whether parol evidence can be received to prove the plaintiff's contract. I have no hesitation in saying that it cannot. It is an undoubted rule of our Courts that, when a contract has been reduced to writing, the contract can be proved only by the writing itself, and parol evidence of the contents of the written instrument cannot be given, except in certain special instances in which the writing is not forthcoming, and therefore cannot be produced.

It has been contended for the plaintiff that the defendant ought not to be permitted to benefit by his own fraud, and therefore ought not to be allowed to plead that oral evidence is inadmissible. Fully admitting the soundness of the general proposition that a man ought not to be allowed to benefit by his own fraud, it appears to me that that proposition is wholly foreign to the present question, which is, not whether the defendant is entitled to benefit by his own fraud, but whether the plaintiff can evade the provisions of the Registration Act, and can be allowed, in breach of one of our most elementary rules, to give secondary or parol evidence of the contents of an instrument which the Registration Act (Section 49) has declared expressly shall not be received in evidence or acted on by any Court of Justice. It is admitted that the unregistered instrument itself cannot be received in evidence; yet to reject it because unregistered is to allow the defendant to benefit by his own wrong just as much as the refusing to admit secondary evidence of the contents of the deed allows him to do so.

On this subject of fraud, reference has been made to the judgment of the Privy Council in the case of Sreenauth Bhuttacharjee *vs.* Ram Comul Gangooly (10 Moore's Ind. Ap., page 220). But that judgment really has no bearing on the present case; for although their Lordships say that "it could "not be intended by this Act (XIX. of 1843) "that a deed which was tainted by fraud, "though in other respects genuine, should be "placed on the same footing as an honest "*bond-fide* deed"—the only thing that their Lordships had to decide, so far as this part of the case was concerned, and the only thing that they did, in fact, decide, was that, "at all events, a registered deed cannot be "deprived of the priority given by the Act, "unless it be both alleged and proved that "there was fraud on the part of the grantee." The question under consideration there differs widely from that which we have to deal with.

The object of the present Registration Act, XX. of 1866, is to force people to register deeds of a certain class; and as the most effectual mode of compelling registration, the 49th Section enacts that "no instru-

ment" (the registration of which is compulsory) "shall be received in evidence in any "civil proceeding in any Court, or shall be "acted on by any public servant as defined "in the Indian Penal Code, or shall affect "any property comprised therein, unless "it shall have been registered in accordance with the provisions of this Act." The question is whether, because the defendant has behaved dishonestly, and is attempting to cheat the plaintiff, the latter can evade the express language of the Act by giving secondary evidence of an instrument which ought to have been registered before he paid his purchase-money, and which the law says shall not be received in evidence because it is not registered. It has been argued that in this country people in making a contract usually enter, first, into a verbal contract whether they eventually put it in writing or not, and therefore that, though there is this unregistered *kobala* in existence, the plaintiff may ignore it, and fall back upon the original verbal agreement. In every country, and just as much in England as in India, certain negotiations almost invariably take place before a contract is reduced to writing; and in every country it is usual that the terms of the contract should, with more or less accuracy, be agreed on verbally before the written instrument embodying them is prepared. I am not aware that any difference whatsoever exists between natives of this country and natives of any other country, as regards contracts which have been entered into verbally, and are afterwards put in writing. When a contract has once been put in writing and signed by the parties, the written instrument contains, and is the only evidence of the contract, and the parties cannot give it the go-by and fall back upon the original verbal agreement. It may be that in India a title to land may be passed without writing. But once the sale or conveyance has been embodied in a written instrument, that instrument, and that instrument alone, contains the contract between the parties.

The question has been before me on several occasions, and the more I consider it the more I am confirmed in the opinion which I have now expressed, and which I first expressed in the case of Monimohenee Dossee, reported in 7 W. R, p. 112. The point really involved is whether or not the Courts, by admitting parol evidence of unregistered deeds, are to assist parties in ignoring and evading the provisions of the Registration Act.

I attach no weight to the argument which has been pressed upon us, based on the supposed hardship of the case of a *bonâ-fide* purchaser, who, having paid his money, gets no return for it by reason of the vendor fraudulently preventing registration. A purchaser has only himself to blame if he parts with his purchase-money until he has secured the registration of his conveyance. And when obstacles are improperly thrown in the way of registration, the Act in its 82nd, 83rd, and 84th Sections gives the simple and speedy means of removing these obstacles. In the case now before us, the plaintiff's proper course was to proceed under these Sections. Not having availed himself of the remedy given him by the Act, I fail to see any special hardship in his being now told he is not entitled to that particular kind of remedy which he seeks in this suit.

On the whole, I think that as the Act expressly declares that a deed, such as is the plaintiff's *kobala*, shall not, if unregistered, be received in evidence, secondary evidence of its contents cannot be received.

Jackson, J.—There is always considerable difficulty in answering a question which is not very distinctly put; and it appears to me that, in the present case, it is not quite certain what the question is which we have to answer; but I will assume that the question before us is whether, supposing the facts alleged in the plaint be true, plaintiff is entitled to maintain his suit, and whether proofs of his allegations could be had in the Court in which he has sued, otherwise than by production of the document referred to in the plaint.

I wish, in the first place, to say a few words upon the question of fraud, which it seems to me has introduced a good deal of complication, aud which has very much colored the argument on both sides. Under the old law of limitation, in which plaintiffs derived certain advantages as to the time of bringing their suits on proof of violence or fraud on the part of their adversaries, it was a very common allegation made by plaintiffs that they had been unable to bring their suit earlier on account of violence and fraud on the part of the defendants; and such allegations were not proved nearly so often as they were made. In the present day, owing to the existence of Courts with limited jurisdictions and the cognizance of particular suits being restricted to special

tribunals, parties often find it advisable to recite in their plaints that fraud has been committed, such recitals being considered necessary with a view to have their case entertained by the regular Civil Courts which might otherwise have doubts as to their competency to entertain them.

The allegation of fraud in the present case is probably an allegation of this nature, and was, it seems to me, intended to win the ear of the Court, and to have the suit entertained. The allegation is that defendant agreed to sell to plaintiff; that the sale was intended to operate as an out-and-out sale; that he received the consideration-money; that he executed the deed, and agreed to have it registered; that, when defendant appeared before the Registrar of Deeds, he denied that he received the consideration-money in full, and that the transaction was not a sale, but a mortgage; that the Registrar thereupon refused to register, and returned the deed to the defendant. Now, it is true that no question as to the payment of the consideration-money in full could have arisen in this case without there being fraud on one side or the other; but that is not what influenced the Registrar. What he considered was the defendant's denial that the document had been drawn up in conformity with the intention of the parties.

It seems to me that this question might very well arise between the parties without any fraud on either side. The parties, no doubt, knew generally what they agreed to, but there might be some misunderstanding between persons not having either legal or much general education in attempting to reduce to writing an agreement not of the most simple character.

The parties could not resort to skilled persons to draft the agreement, partly because such assistance is not easily obtained in the Mofussil, and partly because the land in question is not of great value. A difference between them having arisen, the vendee, wishing to obtain registration, comes to the Civil Court to compel the vendor to carry out what he considers was the transaction agreed upon; and in order to get the Civil Court to entertain his suit, he thinks it right and to his advantage to make a distinct allegation of fraud.

It appears to me upon the main question that it was not the intention of the Legislature that suits should be entertained by the Civil Courts for the purpose of doing that which the plaintiff seeks in his plaint. He says that, by reason of the objections advanced by the defendant, which prevented the registration of the document which had been executed, injury had been done to his rights. He does not ask to obtain possession of the land, but that the Court will set aside the fraudulent objections of defendant, and ascertain the plaintiff's rights so as to declare an out-and-out purchase by him of the lands in dispute.

It appears to me that such a suit for declaration of title cannot be maintained otherwise than on proof of the *specific title* relied on, and that the remedy for the plaintiff here lay in the appropriate proceeding to enforce registration of his deed.

Section 84 of the Registration Act provides the way by which persons desirous of enforcing registration of documents are to proceed.

As to the other question, whether plaintiff can give other evidence to establish his right to have the deed registered, I am of opinion that he cannot be so permitted. It has been suggested that the plaintiff did not claim to hold the land solely under the written document. I am not aware how any person could be entitled to the same land partly on a written contract and partly by verbal agreement; and in this suit, where plaintiff sets out that defendant executed a *kobala* to him on a certain date, he shows that the land could not have been previously conveyed by parol agreement, because, if the land was conveyed by the parol agreement, then there was nothing left to sell. In the case of a parol contract, which it was agreed should be reduced to writing, if the parol agreement passed the land, then, if the defendant refused to reduce it to writing, I can understand that a suit for damages by the purchaser might lie on the ground that he had been endamaged by such refusal.

It has been said that the document in this case comes within the exception to the ordinary rule as to secondary evidence, because it was not producible in Court. The fact is that it was producible. Setting aside the peculiar circumstance in this case, that the Registrar returned the document to the defendant, the possession of the document would be always with the plaintiff-purchaser, and it would be producible; but under Section 46 of the Act, it would not be receivable in evidence, which is quite a different thing.

It appears to me that there was a plain course open to the plaintiff to go to the Civil Court, and to enforce the registration of the deed, and so make it receivable in evidence; and then, having done so, he might come and sue upon the deed so registered. But the present suit ought not to have been entertained by the Civil Court, and was, I think, rightly dismissed.

Bayley, J.—This case has been referred to a Full Bench by Mr. Justice Kemp and Mr. Justice Elphinstone Jackson.

Mr. Justice Elphinstone Jackson would remand the case to the first Court with a view that the plaint might be amended to one "to *enforce the contract, and to have it registered.*"

Mr. Justice Kemp would dismiss the special appeal on the ground that secondary evidence of the deed of sale was not admissible; but that learned Judge observed that this view was opposed to the decisions of this Court, which he cited.

The plaint shows that the suit is clearly based on the deed of sale of 20th Srabun 1273, the registration of which, under Act XX. of 1866, was sought by plaintiff, and was refused by the Registrar on the objection of the defendant. There are in the plaint some preliminary allegations as to the agreement to sell, and as to the receipt of the consideration-money; but this is followed by, and indeed the whole case really rests on, the allegation of title by the plaintiff on the fact of the execution of the deed of absolute sale. The plaint then sets forth that, on plaintiff presenting that deed to the Sub-Registrar for the purpose of completing the title by registration, the defendant fraudulently objected, on the ground that the deed did not express, but ought to have expressed, certain reservations to the effect that the property would be returned to the defendant on re-payment of the consideration-money. The plaint concludes by averring that, owing to the above-mentioned objections of the defendant and consequent non-registration, a cloud was cast on the plaintiff's title which he wished to have removed by a declaration of the transaction as evidenced by the deed being one of absolute sale.

After the long judgments given by my learned colleagues, I would only briefly remark that, in my opinion, Section 49, Act XX. of 1866, not only prevents the *kobala* referred to in this case from being received as evidence in any Civil Court, but also from having any effect in any Court on any property. The case in the Agra High Court, Full Bench Reports, page 148, and that in 7 Weekly Reporter, page 112, clearly and strongly support me.

It was, in my view, open to the plaintiff, when the Sub-Registrar refused to register the deed, to have proceeded according to Sections 81 to 84 of Act XX. of 1866. Section 84 allows to a party who is refused registration to petition the District, *i. e.*, Zillah Court, and to proceed as laid down in the law referred to. The remedy therein is a full and easy one against fraudulent or other objections to registration by an opponent, and so far obstructing the completeness of a title by preventing registration.

The fourth paragraph of Section 84 enacts that "the Court may, if it shall think proper, "order such Registrar, or Registrar-General, "to register the document, or to direct its "registration in the proper manner, and he" (the Registrar) "shall thereupon obey such "order, and shall, as far as may be practicable, "follow the procedure prescribed in Sec-"tions 66, 67, and 68, and (provided the "documents be duly presented for registra-"tion within thirty days after the making "of such order) the registration pursuant "to such order shall take *effect as if the* "*document had been registered when it* "*was duly presented for registration to the* "*officer so refusing as aforesaid.*"

If the plaintiff had so obtained an order for registration, he could proceed to establish his right and title under the deed of sale propounded by him.

Supposing, however, that he had not got that order, I am far from holding that still the plaintiff might not have a remedy in a Civil Court if he sued for specific performance of an agreement to sell and to execute a conveyance, and to register the same.

As to the plea that no man can take advantage of his own fraud, I do not think that the decisions of Her Majesty's Judicial Committee of the Privy Council, cited from Sutherland's Privy Council Reports, page 600 and page 635, apply. Those were general cases of the recognition of the above ordinary rule of equity; but this is a special case of the construction of the Registration Act, XX. of 1866, Sections 81 to 84, and the procedure open to plaintiff under it.

I concur with Mr. Justice Kemp in holding that in this suit parol evidence to prove the deed of sale of 20th Srabun 1273 is inadmissible.

Peacock, C. J.—The case appears to me to be a very clear one. I regret very much to differ from my honorable colleague who first delivered judgment, because I always consider that his opinion is entitled to very great weight. But I am forced to form my own opinion upon the subject, and I have done so after having attentively considered the arguments of Counsel and the reasons which have been urged by my honorable colleague.

It is not for me to show that the Registrar of Assurances acted discreetly or wisely in refusing to register the document. Nor is it for me to prove that the remedy which the Legislature has given to a person who considers himself injured by the refusal to register a document is the most expedient. All that I have to do is to ascertain the intention of the Legislature by the ordinary and legal rules of interpretation, and, having ascertained what that intention was, to carry it into effect.

The point of law referred to this Court to be determined is, as was pointed out by one of my learned colleagues, not very clearly defined, but I understand that the whole appeal is referred to this Bench for determination. The appeal is a special appeal, and involves merely questions of law. If the Moonsiff ought to have entered into the questions of fact, the case would have to be remanded; but if, assuming all the facts stated to be true, the plaintiff is not entitled to relief, then, without further enquiry, his suit ought to be dismissed.

I do not concur with Mr. Justice Elphinstone Jackson that the case might be sent back to the Moonsiff to amend the plaint. Mr. Justice Elphinstone Jackson says: "I "would remand this case to the first Court to "require the plaintiff to amend his plaint "by adding words to that effect, that is, to "enforce registration, and then to proceed to "try the suit."

I differ from my honorable colleague for two reasons: *first*, because a Court of justice has no right to require a man to ask for more than he thinks fit to ask for. The plaintiff asks for relief by enforcement of the contract without registration. We might, if the law allowed us, hold that the plaintiff is entitled to relief without registration, but we have no right to tell him to ask for registration.

In the next place, it appears to me that the Moonsiff would not have authority in this suit, even if the plaint were amended, to require the registering officer to register. The registering officer is no party to this suit, and I think the Moonsiff had no power to order him to register the deed. But even if he should order the registering officer to register the document, he would have no power to enforce the contract before registration.

Section 49 of the Registration Act says that no instrument required by Section 17 to be registered (and this is one of that nature) shall be received in evidence in any civil proceeding in any Court, or shall be acted on by any public servant, or affect any property comprised therein, unless it shall have been registered. Section 82 renders an unregistered document admissible in evidence on the presentation and hearing of a petition of appeal against an order refusing registration, but not in a suit to compel registration. The Moonsiff's order to register would not amount to registration, and if he should order the deed to be registered, he could not act upon the document, or give effect to it as regards the property comprised therein, until his order for registration should have been complied with.

There is considerable force in the argument that, unless the ordinary Courts of Judicature have power to order registration, and to give relief in the same suit, or, in the case of a refusal without good cause, can give effect to the document without registration, a party would be driven to what may be called two suits in order to obtain full relief. If he is to adopt the course of appeal pointed out in the Act, he must apply to the Judge to enforce his right to have the document registered. In the proceeding before the District Judge, all that can be obtained is an order to register. The applicant cannot obtain an order for enforcing the document. He may be in a worse position than the plaintiff in this suit. He may not, even in the case of a conveyance, have got possession of the property conveyed. When he has established by means of the process pointed out by the Act that he is entitled to register, and obtains an order for registration, he must then, in case of refusal on the part of the grantor, go to the Civil Court which has jurisdiction over the matter, to get the deed enforced. He is to pay only 8 annas for stamp-duty upon his application to the Judge of the district to enforce registration; but he must go to the regular Court with a plaint upon the usual stamp-duty to obtain full relief. I have considered whether, for the purpose of avoiding this two-

fold proceeding, we might not possibly put such a construction upon the Act as Mr. Justice Elphinstone Jackson seems to have done, by holding that, in the case of an unauthorized refusal to register, one suit might be maintained to compel registration, and to enforce the document. But the words of the Act appear to me to be too strong to allow us to put that construction upon it. I consider that the conclusion at which Mr. Justice Kemp arrived was the correct one.

The suit is in substance for a declaration of right under Section 15 of Act VIII. of 1859. It has been held that it is not in every case that a Court is bound to give a declaration of right, or that it would be proper to do so. The plaintiff says that the vendor (the defendant) sold this property to him; that he received the purchase-money; that he put the plaintiff into possession; and that he executed the deed. Assuming for the present purpose that, before the deed was executed, there was a distinct verbal sale of the property which, between these parties, there being no Statute of Frauds, would have operated as a transfer of title if no deed had been executed, I am of opinion that, when the transaction was completed by the execution of a deed, the parties must be considered to have intended that the verbal sale was not to be the operative one, or the conclusion of the transaction between them.

I agree with the remark of the Division Bench in case No. 1250 of 1866, reported in page 112 of Volume 7 of the Weekly Reporter: "Where a party comes into Court "resting his claim on a written title which "the law requires to be registered, he can-"not, when he has failed to register, and is "in consequence unable to use his title-"deed, turn round and say I can prove my "title by secondary evidence." But the plaintiff in this case wants something more. He is not satisfied to let his contract rest on the verbal contract and possession. He tells the Court that a deed was executed; that he was entitled to have that deed registered; that the defendant went before the Registrar and fraudulently stated that the deed was not intended to operate as a bill of sale, but merely as a mortgage; that the Registrar consequently refused to register the deed; that the declaration of the defendant and the refusal of the Registrar have cast a cloud over his title, which he asks the Court to dispel by declaring that, looking to the whole of the transaction between the parties, he is entitled absolutely to the lands.

It appears to me that, independently of other considerations, we ought not, unless we can say that the deed operated and intended to operate as an absolute sale, to declare upon the faith of that deed that the plaintiff had a title.

If the parties did enter into a complete contract of sale before the deed, our decree will place them in a very different position from that in which they would have been if they had relied upon that verbal contract alone.

By Section 48 of the Registration Act, it is enacted "that all instruments duly registered "under this Act, and relating to any move-"able or immoveable property, shall take "effect against any oral agreement or de-"claration relating to the same property."

Now, putting the deed out of the question, if the defendant, after he had sold by oral contract, had the next day sold by deed of sale to a *bonâ-fide* purchaser who had no notice of the plaintiff's contract, and such purchaser had got his deed registered, he would have taken priority over the verbal contract. So also, if we admit, for the sake of argument, that the deed was executed and ought to have been registered, but was not registered; if the defendant, notwithstanding that deed, had sold to a *bonâ-fide* purchaser, and the purchaser was ignorant both of the verbal contract and of the unregistered deed, he would have priority under Section 50, which enacts that "every instrument of the "kinds mentioned in Clauses 1, 2, and 3 of "Section 18" (and this is one of them) "shall, "if duly registered, take effect, as regards "the property comprised therein, against "every unregistered instrument relating to "the same property, whether such other "instrument be of the same nature as the "registered instrument or not."

It would have been useless as against the second *bonâ-fide* purchaser, who knew nothing of this deed, for the plaintiff to allege and prove that he could not register it on account of the fraud of the defendants. There would have been the plaintiff claiming, under a verbal contract, an unregistered deed, and a *bonâ-fide* purchaser ignorant of the verbal contract and of the unregistered deed, claiming under a registered deed, and there could be no rule of equity which could give the former preference over the latter.

Memoranda of decrees are by Section 41 to be sent in to the Registration Office; and if we were to declare to-day that plaintiff

has a right to the land either by virtue of the verbal contract or by virtue of the unregistered deed, that decree of ours would have to be registered, and the decree would neither be an oral agreement under Section 48, nor an instrument under Section 40. By the interpretation clause of the Registration Act, it is said that the word instrument is not to include a will or an authority to adopt. A decree of this Court is not an instrument within the meaning of the Registration Act; and if we were to make a decree declaring that, by virtue of an oral contract of sale, independently of the unregistered deed, the plaintiff gained a title, and the defendant should sell the estate to-morrow to a *bonâ-fide* purchaser who has no knowledge whatever of any part of the transaction or even of this litigation, the decree would take priority over a subsequent purchaser without notice.

It appears to me that we should frustrate the object which the Legislature had in enacting Section 48 if we were to declare a right upon a mere verbal contract, and thus give it an effect of which the Legislature intended to deprive it.

We cannot decide whether the deed was intended to operate as a bill of sale or not, unless we receive it in evidence; nor can we declare that it operated as a bill of sale without acting upon it, and giving effect to it as regards the property comprised therein, which, so long as it remains unregistered, would be contrary to the express terms of Section 49.

Two cases were referred to by my honorable colleague. The first is that of Sreenauth Bhuttacharjee *vs.* Ram Comul Gangooly and others, reported in Sutherland's Collection of the Judgments of the Privy Council, page 600. The question in that case turned upon Regulation XIX. of 1843. That Act says that "from the 1st day of "May last every deed of sale, or gift of lands, "houses, or other real property, a memorial "of which has been or shall be duly regis-"tered according to law, *shall, provided its* "*authenticity be established to the satisfac-*"*tion of the Court, invalidate any other* "*deed of sale or gift for the same property* "*which may not have been registered, and* "*whether such second or other deed shall* "*have been executed prior or subsequent to* "*the registered deed.*"

The question turned upon the meaning of the word "authenticity," and was whether the defendant could rely upon a deed which he has obtained by fraud, and had got registered, with a view to get rid of *bonâ-fide* purchaser without notice. The Lords of the Privy Council say as to the second question: "The proviso is that "the authenticity of the deed be established "to the satisfaction of the Court. The "word authenticity would seem, according "to its natural meaning, to point merely "at the exclusion of a forged deed from "the benefit of the Act; but their Lordships "think that it could not be intended by the "Act that a deed which was tainted by "fraud, although in other respects genuine, "should be placed on the same footing as "an honest and *bonâ-fide* deed;" but they thought that, "at all events, a registered "deed could not be deprived of the priority "given by the Act, unless fraud on the part "of the grantee were both alleged and "proved."

I am ready to admit that, under Section 50 of the Registration Act, the word "instrument" refers to an honest *bonâ-fide* instrument, and does not include a fraudulent one. If a man should get a fraudulent deed registered before an honest one, he could not, under Section 50, rely upon that document as an instrument. It is a well-recognized maxim of law that no man can gain title by fraud.

Under the Act relating to the registration of deeds relating to lands in Middlesex, it was held that a subsequent registered deed has no priority over an unregistered one, if the man who held under the registered deed knew of the sale to the holder of the unregistered deed. But that was on the principle that a person is not to benefit if he purchases with notice of a prior *bonâ-fide* sale.

The other case, which was cited by my learned colleague, was also a very clear case of fraud. It is the case of Nawab Nidhee Nazir Ali Khan *vs.* Ojoodhyram Khan, and reported in Sutherland's Privy Council cases, p. 635. There the mortgagee in possession and another person sought to deprive the mortgagor of his title to redeem by means of a purchase of the mortgaged estate under an auction-sale for arrears of revenue which was designedly and fraudulently brought about by the act of mortgagee in possession, who, for the purpose of the fraud, neglected to pay the revenue. The Lords of the Judicial Committee say: "If these facts "cannot be displaced, the agreement was "undoubtedly a gross fraud on the mortga-"gor committed by both the actors in it, *viz.*, "Abbott and McArthur. But it was argued

"that even if this case were true, the remedy "under the Act I. of 1845 was for damages "only. This argument was in conformity "to the opinion of the Zillah Judge. But "it is to be observed that it assumes "the very question under discussion, which "is, whether the Act extends to the pre-"sent case. Mr. Justice Bayley thought "that the Act was not designed to protect "a fraudulent purchaser. He puts his de-"cision on the ground that a man is not "allowed by law to take advantage of "his own wrong; and he treated the case "of such a purchaser as beyond the protec-"tion intended to be given by the Act to "purchasers under an auction-sale."

Both these cases turned on the principle that a man cannot obtain a right by means of fraud. But that principle does not apply to this case. It is said that defendant is claiming a right by means of fraud. Defendant is entirely passive. It is the plaintiff who wants us to declare that a verbal sale or an unregistered deed has given to the plaintiff a title; and if it gives him a title against the defendant, it will give it to him as against all persons who may purchase the same property from defendant in ignorance of the plaintiff's rights, and get their deeds registered.

Suppose this land were to be sold to-day by defendant to another person without notice, could the plaintiff have a declaration of right against such purchaser, if he should register his deed? Surely not. The plaintiff is not affected by fraud, but a purchaser also ought not to be affected by defendant's fraud, assuming that in consequence of the non-registration of the plaintiff's bill of sale he should be ignorant of the plaintiff's rights.

A purchaser can always protect himself; and if he does not, it is his own fault. He should take care, before he pays his purchase-money, to get the deed registered, or to obtain an authenticated power from the vendor authorizing some one in whom the purchaser has confidence to register the deed as agent of the vendor. I have seen instances in which a purchaser has refused to pay the purchase-money before he has got the deed registered, or an authenticated power to his own attorney from the vendor appointing him the vendor's attorney to register.

Section 34 of the Registration Act says: "Subject to the provisions to the last "preceding Section, every document to be "registered under this Act, whether such "registration be compulsory or optional, shall "be presented at the proper Registration Office "by some person executing or claiming under "the same, or by the representative or assign "of such person, or *by the agent* of such "person, representative or assign, duly au-"thorized by *power-of-attorney executed* "and authenticated in manner hereinafter "mentioned."

Section 35 says: "For the purposes of the "last preceding Section, the powers-of-"attorney next hereinafter mentioned shall "alone be recognized; that is to say, if "the principal at the time of executing "the powers-of-attorney resides in any "part of British India in which this Act "operates, a power-of-attorney executed "before and authenticated by the Registrar "or Sub-Registrar within whose district or "sub-district the principal resides;" so that if a man in Calcutta sells lands in Lahore, he can go before the Registrar in Calcutta, and can there execute a power-of-attorney in favor of the attorney of the vendee, who will then go to Lahore, and as the agent of the vendor register the deed there. To make the purchaser safe, he ought to require the vendor to admit the deed of sale before the Registrar, or get the vendor to execute an authenticated power. If the purchaser neglects this precaution, and another man gets a subsequent deed of purchase registered first, it is the first purchaser's own fault if the latter obtains priority over him.

Section 35 makes a further provision. It enacts that if the person executing is in jail or sick, the Registrar or the Judge may himself go to the jail or to the house of the person executing, and examine him or issue a commission for his examination.

It is said that a person may be imprisoned by the purchaser immediately after he has executed a deed, and by those means prevent registration; so he may put a pistol to his head, and threaten his life unless he returns the document. But men who commit such atrocities are subject to very serious punishments under the Penal Code. The plaintiff here is seeking a declaration of right which may affect a *bond-fide* purchaser who was not intended by the Act to be affected by an unregistered deed.

I have said that it is not necessary to decide whether the Registrar acted discreetly in refusing registration. I am of opinion that he did not act discreetly, and that he

has put the parties to serious difficulties by his refusal. His registering the document would not have made the sale valid or binding, if it was otherwise invalid or not binding. The vendor, notwithstanding registration, could have the deed set aside or rectified if he could prove that it was fraudulent, or drawn up as a bill of sale, when, in fact, it was intended to operate only as a mortgage.

There was no necessity for refusing to register the deed. The defendant did not deny the execution, but he merely denied that the deed was intended to operate as a bill of sale. If the defendant admitted, as I understand he did, the execution of the deed, the Registrar ought to have registered the document and left the parties to contest their rights in a Civil Court. (See Section 36 of the Registration Act, and Rule 86 of the Rule made under that Act.)

Registration does no harm, and there is, therefore, no appeal against an order of registration (Section 81), but a refusal to register may cause much injury and inconvenience.

It appears to me that so long as the deed remains unregistered, the Court cannot in a civil proceeding act upon it or receive it in evidence or give it any effect. The plaintiff might have appealed under Sections 82 to 84 of the Act. But the Court cannot remove the cloud from his title by giving him a declaration of right founded upon an unregistered deed, or admit an unregistered deed in evidence.

I am of opinion that the appeal ought to be dismissed with costs.

The 9th September 1868.

Present:

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble H. V. Bayley, L. S. Jackson, A. G. Macpherson, and F. A. Glover, *Judges*.

Butwara — Ameen's fees — Section 33, Act XI. of 1859.

Case No. 2524 of 1867.

Special Appeal from a decision passed by the Principal Sudder Ameen of Shahabad, dated the 31st July 1867, affirming a decision of the Moonsiff of that District, dated the 23rd March 1867.

Byjnath Sahoo and others (Plaintiffs), *Appellants*,

versus

Lalla Seetul Pershad and others (Defendants), *Respondents*.

Baboo Romesh Chunder Mitter for Appellants.

Mr. R. T. Allan for Respondents.

A butwara was decreed by the Civil Court which made provision in its decree for the payment of the expenses of partition by certain co-sharers indicated. On proceedings taken before the Collector in pursuance of the decree, he called upon certain co-sharers (not being those who were by the Civil Court ordered to pay the expenses) to pay the expenses (Ameen's fees) remaining due; and on failure by such co-sharers to comply with this direction, the Collector put up their share for sale as for an arrear of Government revenue. The co-sharers whose share was sold, without making an appeal to the Commissioner of Revenue under Section 33, Act XI. of 1859, brought a suit to set aside the sale and to recover the property, alleging that there was nothing due which was recoverable as an arrear of Government revenue, and that the provisions of the Act did not apply to the case.

HELD that the suit would lie, and was cognizable by the Civil Court.

This case was referred to the Full Bench by Louis S. Jackson and Dwarkanath Mitter, JJ., under the following remarks:—

Mitter, J.—THE property in dispute in this case consists of a mehal paying revenue to Government. It appears that the Civil Court had passed a decree for a butwara of this mehal into two distinct shares, namely, 14½ annas and 1½ annas. This decree was passed in a suit brought by a certain individual who had purchased the latter share from one of the proprietors, and the plaintiff in this case and certain other persons representing the remaining 14½ annas share were made defendants in that suit. The Civil Court, however, decreed the entire expenses of the butwara to be borne by the plaintiff in that case, upon the ground that it was for his benefit alone that the butwara was ordered to be made. It is to be borne in mind that the Legislature has vested the Civil Court with full and ample jurisdiction in the matter of such expenses, as is expressly provided for by the 5th Section of Regulation XIX. of 1814. Whilst the estate was under butwara, the Collector suddenly called upon the plaintiff and the other holders of the 14½ annas share to pay in a certain proportion of the fees due to the Ameen who was employed in making the butwara. No heed appears to have been paid to the direction contained in the decree of the Civil Court, nor does it appear that any permission was taken by the Collector from the Board of

Revenue as to the mode in which the fees of the Ameen were to be realized, as required by Section 2, Act XI. of 1838. The butwara record merely shows that the plaintiff and the other holders of the 14½ annas share were called upon to pay simply upon the kyfeut of an amlah, who was directed by the Collector to prepare an estimate of the respective liabilities of the different shareholders. The respondents are unable to deny these facts, but they rely simply upon a Circular Order of the Board of Revenue, to which I shall refer hereafter. The plaintiffs paid in what they stated to be their own quota of the amount due, but the other holders of the 14½ annas share having failed to pay up the balance, the whole 14½ annas was sold under the provisions of Act XI. of 1859, and purchased by the respondents. The plaintiffs have accordingly brought this suit for recovering their own share out of the 14½ annas aforesaid by annulling the sale. Both the Lower Courts have dismissed the suit, upon the ground that the irregularities complained of by the plaintiffs have not been made out according to law. Hence the present special appeal.

Upon the facts stated above, I am of opinion that the plaintiffs are entitled to a decree. It is manifest that there was no arrear due from the holders of the 14½ annas share. The Civil Court had already decreed that the expenses of the butwara were to be borne exclusively by the purchaser of the 1½ anna share, who was the plaintiff in the former suit; and the Revenue Authorities were bound to submit to that decree. I do not think that the Board of Revenue is competent to override the directions regarding the distribution of the butwara expenses contained in a decree passed by a Court of competent jurisdiction, even when the sanction of the Government has been obtained under the provisions of Section 2, Act XI. of 1838. It is very true that that Section authorizes the Revenue Board, with the sanction of the Governor of Bengal, to fix the amount of remuneration to be paid to a Butwara Ameen, and *to cause the same to be levied from the parties concerned, in the same manner as an arrear of revenue, and at such periods and in such proportions as the said Board might think fit.* But these last words "in such proportions," &c., do not authorize the Board of Revenue or even the Governor of Bengal, to interfere with an award made by a competent Court in the matter of such remuneration. It will be observed that the Civil Court is the only authority that can make an order for an unequal distribution of the expenses of a butwara. In other cases, where the butwara is made without a suit in the Civil Court, there is but one uniform rule regarding the payment of those expenses—in proportion to the jummas of the shares respectively held by the co-parceners among whom the butwara is to be made (*see* Section 4, Regulation XIX. of 1814). I think that the words "such proportions" merely refer to the instalments by which the amount is to be realized, and that they have nothing to do with the respective liabilities of the different co-parceners as between themselves, these liabilities being expressly defined by Sections 4 and 5 of Regulation XIX. of 1814, both of which Sections are still in force. To give any further latitude to the words of Act XI. of 1838 would be to nullify those two Sections altogether, whereas the only Section of Regulation XIX. of 1814, which was intended to be repealed by the latter Act was Section 15. At any rate, it is clear, that in this case the Revenue Board has not made any order in the matter of the butwara expenses. The Collector seems to have acted merely upon the report of an amlah, and a proceeding of this description can be by no means taken as a proceeding within the meaning of Section 2, Act XI. of 1838, conceding, for the sake of argument only, that a proceeding under that Section can override a decree of the Civil Court.

It has been said that there is a general Circular Order of the Board of Revenue, which lays down the mode in which the fees of Butwara Ameens are to be levied, but such a Circular Order can hardly supply the place of a proceeding under the provisions of Section 2 of Act XI. of 1838, if we are at all to hold that by virtue of those provisions the Board of Revenue has been authorized to alter the respective liabilities of the different co-parceners contrary to the express directions of the Civil Court. A Circular Order issued once for all, and laying down a uniform rule for the distribution of the butwara expenses, would not be sufficient to meet the requirements of that Section, if that Section is to be interpreted as vesting the Board of Revenue with the power of setting aside the provisions of a final decree passed by a Court of competent jurisdiction; for if we are to suppose that the Board of Revenue possesses such a power, that power must necessarily be exercised according to some supposed grounds of justice arising

from some change in the circumstances of each particular case. It follows, therefore, that there was not a single pice that could be realized from the 14½ annas shareholders as an arrear of Government revenue. It has been said that the plaintiffs are estopped from contending that there was no arrear due, because they have already paid in a certain amount as their own quota of that arrear. But this argument is not entitled to the least weight. If no arrears were due from the plaintiffs, it matters very little that they have paid anything under the erroneous order passed by the Collector. It may be doubted as to whether they can recover it back from the Collector; but it is perfectly clear that the Collector did not stop the sale of the plaintiff's share on the receipt of that amount, and it does not lie in any one's mouth to say that the plaintiffs are precluded by their conduct from impugning the existence of a legally sufficient arrear.

The last objection taken by the pleader for the respondent requires a separate notice. It has been contended that the plaintiffs did not make this a ground of their complaint before the Commissioner of Revenue, and they are, therefore, precluded from raising any objection against the validity of the sale upon such a ground under the provisions of Section 33, Act XI. of 1859. I am of opinion that this objection is not sound. The ground taken by the special appellants is one which strikes at the very root of the Collector's jurisdiction to sell the property in question; nor does it appear to be a ground that could have been properly urged before the Commissioner of Revenue, inasmuch as that officer could not have set aside the sale even if the plaintiffs had brought it to his notice.

Section 33 merely says that "*no sale for arrears of revenue or other demands realizable in the same manner as arrears of revenue are realizable*, made after this Act, shall be annulled by a Court of Justice, *except upon the ground of its having been made contrary to the provisions of this Act*, and then only in proof, that the plaintiff has sustained substantial injury by reason of the *irregularity* complained of, and no *such* sale shall be annulled upon *such ground* unless *such ground* shall have been declared and specified in an appeal made *to the Commissioner under Section 25 of this Act, and no suit to annul a sale made under this Act* shall be received by any Court of Justice unless it shall be instituted within one year from the date of the sale becoming final and conclusive as provided in Section 27 of this Act."

It will be observed that the very first words of this Section pre-suppose a sale *for arrears of revenue or for other demands leviable in the same manner as an arrear of revenue*, and the provisions of that Section can by no means apply to a case in which no such arrears were actually due. It will be seen that Section 25 of the Act authorizes the Commissioner to annul a sale, only when there is an irregularity in conducting it in contravention of the provisions of Act XI. of 1859: but the non-existence of an arrear being a ground which affects the jurisdiction of the Collector to proceed under that Act is not a mere irregularity in conducting the sale in contravention of that Act. The plaintiffs were no way bound to ask for the exercise of the discretion vested in the Commissioner under the provisions of the following Section, *viz*, Section 26. That Section evidently applies to those whose estates have been regularly and properly sold, but who, under the special circumstances of the case, might be deemed by the Commissioner as parties entitled to some merciful consideration from the hands of the Government. At any rate, it is clear that the Commissioner himself could not have granted any relief in this case under the provisions of Section 25, and it is an appeal under that Section, and that Section only, that is required by the provisions of Section 33. The wording of this last Section is very significant. It has been already observed that the first portion of the Section starts with an *admitted sale for arrears of revenue*, and then it goes on to say that when *such* a sale has taken place, it shall not be annulled by the Civil Court, except upon the ground that the sale has been conducted in an irregular manner, contrary to the provisions of the Act, and except when the irregularity complained of has been productive of substantial injury, and has been already made the ground of an appeal to the Commissioner of Revenue. The words are "and *no such sale* shall be annulled *upon such ground, unless* an appeal has been preferred to the Commissioner under the provisions of Section 25." The words *such sale* and *such ground* clearly show that a sale for arrears realizable as arrears of revenue is assumed throughout; and the only objection which can be brought forward for obtaining a reversal of it when that assumption is found to be correct, is that of irregularity in conducting it. Such irregularity when opposed to Act XI. of

1859 is made the only ground upon which the Commissioner can grant any relief under Section 25 of that Act. The words of the succeeding Clause with reference to the period of limitation applicable to such suits also go to show that there are grounds other than that of irregularity in conducting the sale upon which the Civil Courts might annul it. Act XI. of 1859 does not lay down any rule as to what should be realized as arrears of revenue. It merely lays down the formal rules which the Collector should go through for the purpose of effecting a sale for arrears of revenue, when such arrears are legally in existence under other Acts and Regulations.

It is clear, therefore, that the provision of an appeal to the Commissioner is not applicable to this case, and our general jurisdiction under Section 1, Act VIII., 1859, remains unaffected. I have already observed that the jurisdiction of the Collector to hold a sale under Act XI. of 1859 is essentially dependent upon the existence of legally sufficient arrear, and it appears to me unreasonable to suppose that the Legislature has taken away from parties their remedy in a case in which no arrear was due, when a mere informality in conducting the sale might be sufficient to vitiate it. To put such a construction upon Section 33 appears to me to lead to the inevitable conclusion that the Collector might safely contravene the provisions of all other Acts and Regulations, provided he adheres to the mere formalities of a sale prescribed by Act XI. of 1859, unless the Commissioner would choose out of mere commiseration to report the matter to Government as a case of hardship, under Section 26, which Section is not even alluded to in Section 33, and under which Section, therefore, the special appellants were not bound to appeal to that Officer against the proceedings of the Collector. Suppose, for instance, that the Collector had sold the estate of one person for arrears of revenue due from another, which, in fact, is the present case, and that the sale had been conducted in strict conformity with the provisions of Act XI. of 1859, can it be said that the sale would stand good if no appeal had been preferred to the Commissioner, when it is clear that the Commissioner could not have granted any relief under Section 25, as there would be nothing in the Collector's proceedings contrary to the provisions of Act XI. of 1859 in such a case? It appears to me manifestly erroneous to hold that a party is bound to appeal to a particular authority upon a particular ground, when that authority to whom that appeal is to be preferred can give him no relief upon that ground. I think that such a construction would be opposed to the letter as well as to the spirit of the Act, and there can be no doubt that, if no remedy were available to the plaintiffs in the present case, it would be passing over a gross act of injustice, however unwittingly that act might have been committed by the Collector. The sale in question appears to me, consequently, to have been, *ab initio*, null and void; and it cannot, therefore, be taken as a "sale for arrears of revenue" within the meaning of Section 33, Act XI. of 1859.

The case cited from page 439 of the 8 Weekly Reporter is, no doubt, directly in favor of the respondents, but I am sorry to say that, for the reasons given above, I am unable to concur with the learned Judges who passed that decision. I would, therefore, refer this case to a Full Bench for an authoritative decision.

Jackson, J.—I incline to think generally, for the reasons stated by Mr. Justice Dwarkanath Mitter, that the Civil Court was competent to entertain a suit for the reversal of the sale in the present case, and that the sale ought to have been set aside, and the property restored to the plaintiff; but as this opinion is in conflict with the ruling cited from 8 Weekly Reporter, p. 439, it is necessary the case should go before a Full Bench.

The question to be decided is as follows:—

On the suit of one or more co-sharers a butwara is decreed by the Civil Court, which makes provision in its decree for the payment of the expenses of partition by certain co-sharers indicated on proceedings taken before the Collector in pursuance of the decree. He calls upon some of the co-sharers, not in accordance with the decree, but upon other considerations, to pay in the expenses (Ameen's fees) remaining due, and on failure by such co-sharer (not being the party ordered by the Civil Court to bear the expense), puts up the share of such co-sharer for sale as for an arrear of Government revenue. The co-sharer whose share is sold, without making an appeal to the Commissioner of Revenue under Section 33, Act XI. of 1859, brings a suit to set aside the sale, and to recover the property, alleging that there was no arrear due, which was recoverable as an arrear of Government

revenue, and that the provisions of the Act do not apply.

Is the suit cognizable by the Civil Court or not?

The judgments of the Full Bench were delivered as follow:—

Macpherson, J. (Peacock, C. J., and Bayley, J., concurring).—I would answer this question in the affirmative; for there was nothing due from the plaintiff which was recoverable as an arrear of Government revenue, and therefore the provisions of Act XI. of 1859 are not applicable to the case, and the plaintiff is not debarred by that Act from bringing the present suit.

As the partition was being carried out by the Collector under a decree of a Civil Court, and as the latter had directed that all the costs of the partition should be paid by the proprietor of the 1½-anna share alone, the Collector had no power to order the Ameen's costs to be paid by the plaintiff. That this is so appears upon a consideration of Regulation XIX. of 1814 and Act XI. of 1838, upon which two enactments the whole question turns. It is quite clear that, when the partition is made under a decree of a Civil Court, the Court, and not the Collector, has power to direct by whom and in what proportions the costs are to be paid.

Section 3 of Regulation XIX. of 1814 enacts that "the division of every zemin-"dary, independent talook, or other estate "paying revenue immediately to Govern-"ment, which may be ordered to be divided "into two or more distinct estates and * * * "are to be executed *under the superintend-"ence* of the Collector of the District in "which the estate may be situated."

Section 4 relates to cases in which the co-sharers all join in applying to the Collector for a partition, without their having recourse at all to a Civil Court. It is provided that all authorized expenses incurred in making the division are to be borne by the proprietors in the proportion which the jumma of their respective shares, after the division has been completed, shall bear to the jumma of the whole estate. "This "rule, however, is not to be understood to pre-"clude the parties concerned from entering "into private adjustment among themselves "of the proportions in which such ex-"penses shall be severally borne by them; "and whenever the whole amount demand-"able on that account shall be tendered to "the Collector by one or more of the par-"ties, he shall receive the same accordingly; "and, on the contrary, if the amount be not "so tendered, *he is to enforce the rule "above laid down* (if it be not paid) by the "same process against the sharer, or sharers, "failing in the payment of their proportions, "as is prescribed for levying arrears of "revenue."

Section 5 relates to cases in which the partition is to be carried out by the Collector in obedience to the direction of a Civil Court. It says: "Whenever the Courts of "Justice may pass a decree awarding to any "person the proprietary right in * * *, and "may issue a precept to the Collector re-"quiring him to divide the estate, * * * "they shall make it a general rule to direct "at the same time that the party, or parties, "who may have withheld the right so "decreed, shall defray the whole of the "expense which may be incurred in the "subsequent process of dividing, separating, "and giving possession of, and apportioning "the public revenue on the portion of the "estate or land so decreed. Provided, "however, that, if any special reason shall "appear for a deviation from this general rule, "the Court shall be at liberty to direct the "expense in question to be defrayed by all or "any of the parties to the decree, in such pro-"portions as the Court passing the decree "may, from a consideration of the particular "circumstances of the case, deem equitable. "Copies of all orders which the Courts may "pass under this Section are invariably to "be transmitted to the Collector *for his "guidance*, together with the precept "which the Court may issue to him requir-"ing him to divide the estate, &c."

It will be observed that it is *not* provided that the Collector is to enforce payment of expenses or costs which are payable under Section 5, or that the amount is to be levied (like costs or expenses payable under Section 4), by the process "prescribed for levying arrears of revenue."

Section 12 enacts that, "when an estate "shall be ordered to be divided, the Collec-"tor shall appoint a creditable Ameen to "make the division, who shall receive a "percentage on the amount of the jumma "of the whole estate, as a remuneration for "his trouble and the expense of establish-"ment."

Section 15 fixes the amount of the Ameen's percentage, and provides that, when a measurement of the land is necessary, the additional establishment for the performance

of this special duty "shall be separately "paid by the several sharers in proportion to "their respective interests in the estate, by "a monthly allowance to be approved by the Collector." This Section also provides that the Collector, on delivering the sunnud to the Ameen, shall advance to him one-third of his percentage; and it gives directions as to how and when the remaining two-thirds are to be paid.

But this Section 15 is repealed by Act XI. of 1838, Section 2 of which enacts "that it "shall be lawful for the Sudder Board of "Revenue at Calcutta, with the sanction of "the Governor of Bengal * * * to fix the "remuneration of an Ameen, * * * and to "cause the same to be levied from the parties "concerned, in the same manner as an arrear "of revenue, at such periods, and in such "proportions, as the said Board may think "fit."

It is under the authority supposed to be given by these Sections that the Collector in the present case treated the amount in the payment of which the plaintiff made default, as an arrear of revenue, and sold his share under Act XI. of 1859.

Section 5 of Regulation XIX. of 1814, which gives the Civil Court power to direct by whom and in what proportions the expenses of the partition are to be borne, remains unrepealed. Section 15 alone is expressly repealed by Act XI. of 1858; and the object of that Act is merely to abolish the fixed percentage and the other rules relating to the percentage contained in Section 15, and to substitute in their room a variable remuneration, to depend upon the discretion of the Board of Revenue, exercised with the sanction of the Governor of Bengal. Section 2 of Act XI. cannot be read as repealing one of the most material parts of Section 5 of Regulation XIX. of 1814, merely because it empowers the Board of Revenue, with the sanction of Government, to fix the remuneration of an Ameen, and to cause the same to be levied as an arrear of revenue in such proportions as the Board may think fit. It is to be read as applying only to cases under Section 4, which empowered the Collector to enforce payment of the expenses incurred in making partitions under that Section, and not as interfering with the jurisdiction expressly given to the Civil Courts by Section 5.

Section 15 of Regulation XIX. of 1814 having been repealed, the Collector is not now, whatever he may have been so long as that Section remained in force, under any obligation to make an advance to the Ameen. If the party who has been directed by the Civil Court to pay the costs does not do so, and if none of the others interested put the Collector in funds to proceed, all that the Collector has to do is to hold his hand, and report the state of things to the Civil Court, under whose precept he is acting. The Civil Court has ample power to deal with such a contingency.

It is not unworthy of remark that in none of the letters or orders of the Board of Revenue upon the subject of partitions, can I find any allusion to Section 5, Regulation XIX. of 1814, or to the case of a partition which is made by the Collector in obedience to an order of a Civil Court. Section 4 is the Section to which alone express reference is made, and the form which is given in the later rules as that to be used by the Collector in making his report to the Commissioner as to butwaras which are pending, is expressly stated in the rule to be the form of the report to be made by Collectors under Clauses 1 and 3 of Section 4. It is probable that it never was intended by the Board of Revenue that their rules should be applied to cases falling under Section 5.

It remains to consider whether the sale having, as a matter of fact, been conducted under Act XI. of 1859, the present suit is therefore barred. I agree substantially with Mr. Justice Dwarkanath Mitter in the observations which, in referring the matter to a Full Bench, he made on this part of the case. I think that as nothing was due from the plaintiff which could legally be recovered from him as an arrear of Government Revenue, the Collector had no jurisdiction to proceed against the plaintiff's property under Act XI. of 1859. That Act defines what the term "arrears of revenue" means and declares that the Civil Courts shall have no jurisdiction to interfere when sales have taken place "under the provisions of the Act." In the present case, no arrear of revenue was due, nor any thing which could legally be levied as such. Act XI. of 1859, therefore, did not apply to the case at all, and the sale did not take place under its provisions.

The case resembles an adjudication of bankruptcy where there is no petitioning creditor's debt, or where the alleged bankrupt is not a trader. (*See* Perkin *versus* Proctor, II. Wilson's Reports, page 382.)

The Collector's jurisdiction was a limited one, and as he had no power to ask the plaintiff to pay any part of the costs of the butwara, and there was, therefore, no demand against the plaintiff realizable in the same manner as arrears of revenue, he had no power to order the sale, and consequently the case is not one within Section 33 of Act XI. of 1838. There was an absence of jurisdiction to order the sale, and not a mere error or irregularity in conducting it.

On the whole, I think the plaintiff's suit was properly brought in a Civil Court, although no appeal was made to the Commissioner under Section 33 of Act XI. of 1859.

Jackson, J.—The question before us in this case is as follows:—

"On the suit of one or more co-sharers, "a butwara is decreed by the Civil Court, "which makes provision in its decree for "the payment of the expenses of partition "by certain co-sharers indicated on proceed-"ings taken before the Collector in pursu-"ance of the decree. He calls upon some "of the co-sharers, not in accordance with "the decree, but upon other considerations, "to pay in the expenses (Ameen's fees) "remaining due, and in failure by such "co-sharer (not being the party ordered by "the Civil Court to bear the expenses) puts "up the share of such co-sharer for sale as "for an arrear of Government revenue. "The co-sharer whose share is sold, without "making an appeal to the Commissioner of "revenue under Section 33, Act XI. of "1859, brings a suit to set aside the sale "and to recover the property, alleging that "there was no arrear due which was re-"coverable as an arrear of Government "Revenue, and that the provisions of the "Act do not apply. Is the suit cognizable "by the Civil Court or not?"

The facts of the case out of which the question arises are stated in the judgment of Mr. Justice Mitter, one of the Judges who referred the case to this Bench; and it is only necessary to say in this place that the special appellants were plaintiffs in one of the four suits brought by the several parties whose interests in the aggregate make up 14½ annas share in the Mehal sold (Mouzah Mungulpore Musha), and that the Civil Court had made a decree for the separation from the estate of 1½ annas share, directing that the expense of the partition should be borne by the owner of that share, and had issued a precept to the Collector accordingly. The Collector, notwithstanding the provisions of the decree, called upon the plaintiffs and other co-sharers to deposit the fees of the Ameen, and, on their failure to do so, put up the estate for sale as for "a demand realizable in the same manner as arrears of revenue are realizable." It was purchased for the sum of 105 rupees by the defendants Nos. 1, 2, 3, and 4, who are described as mookhtars, the value of the property being stated in the proceedings below as 15,000 rupees. It also stated that the butwara or petition on account of the expenses of which the estate was sold, has never taken place, and this statement is not gainsaid.

After the sale, some of the parties interested made an appeal to the Commissioner of Revenue, complaining of irregularities in the Collector's proceedings; but their appeal was rejected, and, in consequence of that rejection, the suits were commenced.

As far as we can discern, the defendants in their written statement appear to have confined themselves to answering the objections raised before the Commissioner, observing also that as the majority of the 14½ annas co-sharers had not appealed to him, the sale had become final.

All the suits were dismissed by the Moonsiff, and his judgment was affirmed by the Principal Sudder Ameen.

No issue as to the Collector's right to sell was framed in the Moonsiff's Court, nor does the point appear to have been distinctly made in the memorandum of regular appeal, from which it may perhaps be objected that the question submitted to us does not properly arise in the special appeal, inasmuch as the Lower Appellate Court was not called upon to determine it.

I think, however, that as the plaint fully disclosed the character of the butwara proceedings, that is, that they were commenced by order of the Civil Court, which has authority to determine by whom the expenses are to be paid, it became a material question in the suit *against which party* the order to pay had been made, and whether a demand of the expenses from any one but such party was a demand realizable in the same manner as arrears of Government revenue.

It is the duty of the Court which has to try an original suit to frame the issues of law and fact which arise out of the circumstances of each case; and there can be no doubt that in the present case the question before us is one which it was essential to determine.

It is now distinctly raised by the third ground of special appeal and by the respondent's contention that, whoever may have been the party originally liable to pay the butwara-expenses, the act of the Collector in selling under Act XI. of 1859 cannot be questioned otherwise than in accordance with Section 33 of that enactment.

I proceed, therefore, to state the opinion at which I have arrived, and the subject may, for this purpose, be conveniently divided into two heads.

1st.—Is it competent to the Civil Courts, with a view to affording relief to a suitor who complains of a sale as made without authority of law, to inquire whether, in the particular case, the Collector had authority to sell?

2nd.—Was the Collector in the present case competent to sell?

The jurisdiction of the Civil Courts is broadly based on the 1st Section of the Code of Civil Procedure, which declares that "the "Civil Courts shall take cognizance of all "suits of a civil nature with the exception "of suits of which their cognizance is bar-"red by any Act of Parliament, or by any "Regulation of the Codes of Bengal, Mad-"ras, and Bombay, respectively, or by any "Act of the Governor-General of India in "Council."

This Section comprises matters cognizable by the Civil Courts. By the use of the words "suits of a civil nature" the Code avoids the details given in the Regulations, and it is thereby intended to include all suits of a civil nature. The provision for exemption is generally given so as to include exemptions already made, or which may hereafter be made, by any Act of Parliament, Regulation, or Act. For instance, all causes of action in matters of a criminal nature are excepted by the Regulations; actions thereon will not, therefore, lie in the Civil Courts under this Code.

And certainly the compulsory sale of a man's estate in order to realize a demand for which he was not liable, on account of the expenses attending an operation which he did not desire, and which was never completed, is a wrong, than which it is difficult to conceive any more serious. And the recovery of an estate taken out of the plaintiff's hands by such a sale appears to be a relief which he may most reasonably ask for, unless the cognizance of the wrong and the granting of the relief be expressly barred by any existing legislative prohibition.

The purchasers contend that Section 33, Act XI. of 1859, expressly prohibits the cognizance of this suit, and we must, therefore, consider the precise effect of that Section.

The words are: "No sale for arrears of re-"venue or other demands realizable in the "same manner as arrears of revenue are "realizable, made after the passing of this "Act, shall be annulled by a Court of Justice, "except upon the ground of its having been "made contrary to the provisions of this Act, "and then only on proof that the plaintiff "has sustained substantial injury by reason "of the irregularity complained of; and no "such sale shall be annulled upon such "ground unless such ground shall have been "declared and specified in an appeal made "to the Commissioner under Section 25 "of this Act; and no suit to annul a sale "made under this Act shall be received by "any Court of Justice, unless it shall be in-"stituted within one year from the date of "the sale becoming final and conclusive, as "provided in Section 27 of this Act; "and no person shall be entitled to contest "the legality of a sale, after having received "any portion of the purchase-money. Pro-"vided, however, that nothing in this Act "contained shall be construed to debar any "person considering himself wronged by any "act or omission connected with a sale under "this Act, from his remedy in a personal "action for damages against the person by "whose act or omission he considers himself "to have been wronged."

It will be seen that there is one ground, namely, a contravention of the provisions of the Act accompanied by proof that the plaintiff had sustained substantial injury by reason of the irregularity complained of, upon which sales made "after the passing of the Act" and "under the Act" may be annulled by a Court of Justice, provided that the plaintiff shall have made an ineffectual appeal on the same ground to the Commissioner, and provided that the suit be commenced within one year, and that the plaintiff have received no part of the purchase-money.

Now, the only ground on which the Commissioner can entertain an appeal and annul the sale is stated in Section 25, *viz.*, that "it "shall appear to him not to have been con-"ducted according to the provisions of the "Act."

Taking the two Sections together, it is clear that the appeal to the Commissioner and the resort to a civil suit here spoken of,

and guarded by so many restrictions, were meant to apply to errors of procedure, the authority to sell being unquestioned.

But if the respondent's contention be correct, the Collector might not merely sell for an arrear of revenue where no arrear was due, but sell one estate for the arrear due upon another, or sell to recover an amount due upon a bond; and so long as he carefully observes the forms and rules prescribed by the Act, the unfortunate owner would be without a remedy. For the power reserved to the Commissioner by Section 26 to represent a case of hardship or injustice to the Board of Revenue, who, *if they see cause*, may recommend to the Local Government to annul the sale—a power which may be exercised or not at the discretion of the Commissioner—affords a safe-guard (if it would touch the case at all) very far short of the right of submitting one's wrong to the Courts of Law, which are governed by settled principles, and where redress, if denied by an inferior tribunal, may be obtained on appeal.

I think that Section 33 refers to sales for arrears of revenue, &c., made under the Act, that is, where the Collector had authority to sell, but which, from defect of procedure, are productive of injury to the party, may be set aside, but that cases in which there is a total want of jurisdiction in the Collector, for example, the cases mentioned in the 8th Section, are not touched by Section 33 at all.

This view derives confirmation as well from the different class of circumstances by which the sale is to be affected, as from the use of a different term in Section 8 to indicate the way in which the sale is to be affected; for, while Section 33 provides that, by reason of irregularities in the conduct of the sale, the sale may be *annulled* or cancelled, and have its efficacy taken away; on the other hand, there seems to be fair ground for inferring that Section 8 refers to circumstances which *à priori* ought to bar the sale, and which, if the sale take place notwithstanding, will *avoid* it or make it *avoidable*.

It is, no doubt, possible to make too much of mere verbal distinctions, and all that is necessary for the purposes of the present discussion is to show that the Act itself contains a reference to cases in which a sale under the Act might be avoided other than the cases in which an appeal might be entertained by the Commissioner.

But it is quite possible to conceive sales under color of Act XI. which are not sales on account of an arrear of revenue or of any demand recoverable in the same manner as arrears of revenue; and the appellant contends that the sale which took away his estate is a sale of that character.

Take, for instance, the case of a Collector selling land which was not an estate paying revenue to Government, or selling for the realization of unpaid Municipal taxes.

It would clearly be no answer to a suit brought for the purpose of setting aside such a sale that the suit was barred by Section 33, Act XI. of 1859.

Where the competency of a Court or an authority invested with a limited jurisdiction to do a particular act depends upon a condition precedent, and that condition is not shown to exist, the act done in the absence of such condition will, I think, be wholly void, and an action will lie to set it aside, as in the case of an adjudication of bankruptcy, where the party adjudged a bankrupt is not a trader, or there is no debt to a petitioning creditor.

I take it, therefore, that, if the plaintiff can show that the act is irrelevant, his suit to set aside the sale will be quite maintainable, though he should not have made an appeal to the Commissioner.

I am under the impression that it has been decided by the late Sudder Court that, in a suit of this description, the 12 years' rule of limitation, and not that of one year, will apply.

It is necessary, therefore, to see whether in this case, the sale was under the provision of the Act. Was it made on account of any demand which, by any Regulation or Act in force, is directed to be realized in the same manner as arrears of revenue?

Act XI. of 1859 does not itself contain any enumeration of such demands, though some of them are specified; but the authority for so realizing particular demands is contained in the enactments which deal with the different subjects.

Regulation XIX. of 1814 and Act XI. of 1838 have been supposed to give authority for treating the expenses of butwaras generally as demands recoverable under the sale-law. But it seems very clear that such authority extends only to cases in which the parties make direct application to the Collector.

The Act of 1838 was merely a substitute for the repealed Section 15 of Regulation XIX. of 1814. That Section itself provided rules under which the Ameen was to be remunerated by a fixed percentage, and certain portions of the sum allowed were to be paid to him at various stages of the inquiry.

By the new Act, it was left to the discretion of the Board of Revenue with the sanction of Government to fix the remuneration of an Ameen, and to cause the same to be levied from parties concerned, in the same manner as an arrear of revenue, at such periods and in such proportions as the Board might think fit.

The repealed Section did not contain any authority for the levy of the Ameen's fees, the needful authority being contained in Section 4, by which, unless the parties came to an agreement as to the proportions in which the expense was to be borne and made tender to the Collector accordingly, the whole was to be levied from them "by "the same process against the sharer or "sharers failing in the payment of their pro-"portions as is prescribed for levying arrears "of revenue." That Section has not been repealed, nor has the 5th Section; and consequently the words of Act XI. of 1838 must be so read with the words of those two Sections that the words "parties concerned" shall be interpreted strictly in accordance with the circumstances; that is, to mean the co-sharers in general where the application has been made to the Collector direct, but where the partition is under a decree of the Civil Court, then the sharer or sharers who may have been ordered by the decree to bear the expense.

Nor indeed now that the Collector is no longer called upon to advance the funds required, does there seem to be any reason why he should proceed in the matter until he has received the necessary amount; and if a precept were issued in any case to the Collector to make a butwara at the expense of any party indicated, I conceive that it would be a perfectly good return if the Collector certified that the expenses had not been deposited, on which the Court might proceed to make further order as it thought fit.

If the law were otherwise, one co-sharer might ruin or seriously injure the others by obtaining a decree for partition at his own expense, and then, by wilfully withholding the Ameen's fees, causing the whole estate to be put up to sale.

In this case, it is quite clear that the plaintiffs were under no liability to pay in the expenses of a proceeding which was not for their benefit, and that the sale, under such circumstances of their estate as for an arrear of Government revenue, was an act done wholly without authority, that the sale conveyed no title, and that the plaintiffs are consequently entitled to recover possession by a suit in the Civil Court.

I would, therefore, answer the question put to us in the affirmative.

I have stated my own view founded upon such construction as I have been able to put upon the Sections of Regulation XIX. of 1814, and it is a satisfaction to me to be able to cite in confirmation of it the opinion of Sir Henry Ricketts, one of the ablest and most experienced Revenue Officers this country has seen in our days.

The opinion is to be found in a little work of his, no doubt of an elementary character, but prepared with much care for the assistance of young officers in passing their examinations, and it is all the more emphatic from the particular form, that of question and answer, in which the book was composed.

The question and answer will be found at page 52 of the 2nd edition.

Glover, J.—I concur in the answer proposed to be delivered to the question which has been put to us.

The 12th September 1868.

Present :

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice*, and the Hon'ble L. S. Jackson, J. B. Phear, A. G. Macpherson, and Dwarkanath Mitter, *Judges.*

Hindoo Law—Succession—Mitakshara — Sister's son.

Case No. 3095 of 1866.

Special Appeal from a decision passed by the Judge of Hooghly, dated the 31st July 1866, reversing a decision of the Sudder Ameen of that District, dated the 27th February 1866.

Omrit Koomaree Dabee (Plaintiff), *Appellant,*

versus

Luckhee Narain Chuckerbutty (Defendant), *Respondent.*

Baboo Kalee Prosunno Dutt for Appellant.

Baboo Romesh Chunder Mitter for Respondent.

In the absence of nearer relatives a man may be heir to his mother's brother as regards property subject to the Mitakshara.

This case was referred to the Full Bench by Bayley and Phear, JJ., under the following remarks :—

Bayley, J.—In this case plaintiff Nundlal (now deceased, but represented in the appeal by his widow) sued for the property of one Rughoonath, his maternal uncle, on the allegation of a right of inheritance.

It appears that Rughoonath had a daughter Koochilmonee, and that on her death one Suroop obtained Rughoonath's property. Nundlal sued Suroop for possession in case No. 92 of 1861, got a decree and possession, but was dispossessed by one Luchminarain, a decree-holder, who sold the property in suit in execution as that of his judgment-debtor, Suroop.

Defendant, Suroop, denied that plaintiff ever was in possession, and stated that Luckhee Narain's decree against Suroop was collusive. Suroop also pleaded that plaintiff's ancestor having come from the *Mithila* country, plaintiff was incapable under Mitakshara law of inheriting, being a sister's son, and so also could not sue.

The Lower Appellate Court has found that plaintiff's suit against Suroop, decided on an admission by Suroop of plaintiff's right of inheritance, was collusive and in fraud of Luckhee Narain and other of Suroop's creditors; and further, that the plaintiff's possession was not proved. The Lower Appellate Court finally held that the plaintiff's family came from *Mithila;* that they maintained the rights and ceremonies of the Mithila branch of the Hindoo law; and that they were bound by the Mitakshara law; that according to that law (citing page 28, Vol. 1, Macnaghten) a sister's son is excluded from inheritance, and "therefore plaintiff, never having been in possession, and not being entitled to inherit, is not in a position to sue defendant and is not entitled to possession."

The plaintiff's appeal was, therefore, dismissed by the Lower Appellate Court with costs.

On special appeal it is urged :—

1. That under the *Mithila* law a sister's son can inherit.

2. That the *Mitakshara* law does not govern the case.

3. That plaintiff's possession does not affect the rights of the case.

4. That Koochilmonee only succeeded her uncle Gunganarain under a compromise, and that the rights of the reversioners were fully reserved thereby.

The 1st and 2nd grounds only are pressed on us, and indeed, in my view of the case, the 3rd and 4th grounds do not arise, for I think that *Mitakshara* law does govern the case: and that even according to it the sister's son does inherit as a *bundhu.*

As to the question whether *Mithila* law governs the case, I would observe that it is quite clear from the evidence that the family is one of *Kanouj** Brahmins; and that there is nothing in that evidence to show that they emigrated from the *Mithila* country. That country is as defined in the map annexed to Baboo Prosono Coomar's translation of the Bibadh Chintamoni. It is, however, pleaded that the Judge has found that the plaintiff's ancestor did come from, and retain the religious rites and ceremonies of *Mithila.* But the Judge finds this wholly without or rather against evidence; and in the face of plaintiffs' own pleading that they were governed by the laws of the *Bengal* School, and also in the face of the entire absence of evidence that the plaintiffs' ancestor came from *Mithila,* the statement of the Lower Appellate Court cannot, I think, under such circumstances, be accepted as a legal finding of fact.

* কনৌজ ব্রাহ্মণ।

Then it is pressed on us (and I will not say altogether wrongly) that, even if the family be not shown to come from *Mithila*, still the *Mithila* law may be looked to with a view to illustrate *Mitakshara* law, as they approach very nearly, and indeed agree, on many points.

In this view, the Bibadh Chintamoni, (p. 228, Ed. 1863), Baboo Prosono Coomar's translation, is referred to as an authority recognized and relied on for *Mithila law*. The passage is as follows:—

Vishnu says: "The wealth of him who "leaves no issue goes to his wife. On failure of her, to his daughter. If there be "none, to the mother. If she be dead, to "the father. In failure of him, to the brothers. After them, it descends to the "brother's son. If none exist, it passes to "the kinsmen (bundhu). In their default, "to relatives (saculya).* On failure of "these, to the fellow-student. For want of "these heirs, the property escheats to the "king, excepting the wealth of a Bramin."

Again a passage in page 299 of the same work is cited. It is as follows:—

"Therefore, the summary of the above-mentioned heirs is this—first, the son; on failure "of him, the grandson; in his absence, the "grandson's son; on failure of him, a chaste "wife; in her default, the daughters; in "their absence, the mother; in her default, "the father; and in his default, the daughter's son; and in default of him, the brother; "in his default, the brother's son; and on his "death, the *nearest kinsmen;* in default of "them, *the remotest kindred according to their* "*order;* in default of all these, the *nearest* "*saculya;* on failure of them, the *remotest* "*saculya;* in their absence, maternal uncles "*and others;* but, on failure of *all these* "heirs, the king inherits, except the property of Brahmana, which goes to another "Brahmana."

It is further argued that the Mitakshara law shows that a sister's son would inherit in this case, and Section 6, page 332, Colebrooke's translation of the *Mitakshara*, is first cited to us in support of this plea.

It is as follows:—

"On failure of *gentiles*, the *cognates* are "heirs. Cognates are of *three* kinds: related "to the person himself—to his father—or "to his mother—as is declared by the following text: 'The sons of his own father's "sister, the sons of his own mother's sister, "and the sons of his own maternal uncle, "must be considered as his own cognate "kindred. The sons of his father's paternal "aunt, the sons of his father's maternal "aunt, and the sons of his father's maternal "uncle, must be deemed his father's cognate kindred; the sons of his mother's "paternal aunt, the sons of his mother's "maternal aunt, and the sons of his mother's "maternal uncles, must be reckoned his "mother's cognate kindred."

Next, Chapter 2, Section 5, verses 3 and 6, are cited, *viz.:* "On failure of the paternal "grandmother, the (*Gotraja**), kinsmen "sprung from the same family with the deceased, and (*Sapinda* †) connected by "funeral oblations, namely, the paternal "grandfather, and the rest, inherit the estate. "For kinsmen sprung from a different family, "but connected by funeral oblations, are "indicated by the term *cognate*." "If "there be none such, the succession devolves on kindred connected by libations "of water, and they must be understood to "reach to *seven* degrees, *beyond* the kindred "connected by funeral oblations of food, or "else as far as the limits of knowledge "*as to birth and name* extend. Accordingly Vrihat-Menu says: The relation of the "*Sapindas*† or kindred connected by the "funeral oblation ceases with the *seventh* "person, and that of *Samanodakas*,‡ or "those connected by a common libation of "water, extends to the *fourteenth* degree. "or, as some affirm, it reaches as far as the "*memory of birth and name extends.* This "is signified by '*gotra*,' or the relation "of family-name."

Then a passage of the *Mitakshara* not in Colebrooke's translation is cited. It is, on a translation of the original accepted by both parties, as follows: "When one "having gone to a *foreign* country dies, let "the descendants, cognates (*bundhus*), "gentiles, or his companions, take the "goods; in their default, the king. When "of those who are associated in trade, any "one having gone to a *foreign* country "dies, then his share shall be taken by his "heirs, *i. e.*, the son and other descendants, cognates, *bundhava*, § *i. e.*, the "*mother-side* relatives, the maternal uncle, "and others, the gentiles, *i. e.*, *sapindas*, "besides the son and other descendants, "and those who are come, *i. e.*, those asso-

* সকুল;

* গোত্রজ † সাপণ্ড ‡ সমানোদকা § বান্ধব।

"ciated in trade, from the foreign country. "In their default, *i. e.*, in default of the de-"scendants, &c., let the king take. By the "word *ba* (or), the sage shows their rights "severally. The rule as to the order con-"tained (in the text)—the wife, daughters, "&c.—is also to be understood for this place. "The necessity for the text is to exclude the "pupil, the fellow-student, the Brahmin, "and to include the trader." (Mitakshara, p. 322, 3rd Ed., 1829.)

The next passage cited is from the *Virmi-trodaya*, a work which Mr. Colebrooke "states (and the vakeel of the opposite party admits) is one recognized as of authority on Mitakshara law.

"In default of the Samanodakas, *bundhus* "(cognates) are heirs. Cognates are of *three* "kinds, related to the person himself, to his "father, or to his mother. Accordingly, the "following text: 'The sons of his own "father's sister, the sons of his own mother's "sister, and the sons of his maternal uncle, "must be considered as his own *cognate* "kindred. The sons of his father's paternal "aunt, the sons of his father's maternal aunt, "and the sons of his father's maternal uncle, "must be deemed his father's cognate kindred. "The sons of his mother's paternal aunt, the "sons of his mother's maternal aunt, and the "sons of his mother's maternal uncle, must "be reckoned his mother's cognate kindred. "Here, by reason of near affinity, the cognate "kindred of the deceased himself in the first "instance, then the father's *cognate* kindred, "and *next* his mother's cognate kindred, suc-"ceed. This is the order of succession. In "the text of Menu: 'Then the distant "kinsman shall be the heir, or the spiritual "preceptor, or the pupil,' the term *Sakulya* "comprehends the persons descended from "the *same* family (*sagotra*), and the kinsman "allied by common libation of water (*Sama-"nodaka*); the maternal uncles and the rest; "and the *three* kinds of cognates. The term "cognate (*bundhu*) in the text of Jogeesh-"wara or Yagnavalkya must comprehend "also the maternal uncles, and the *rest*; "*otherwise the maternal* uncles, *and the rest* "would be omitted, and their sons would be "entitled to inherit, and not they themselves, "*though nearer in the degree of affinity*—a "*doctrine highly objectionable.*" (Virmi-trodaya, p. 209.)

Lastly, the special appellant cites the *Nirnaya Shindhu* in which is the passage: "In default of the brother's son, the father, "the mother, the daughter-in-law, *sister and* "*her son*, are entitled to perform the Shrad. "*because they are heirs.*"

It is also pleaded that, by Mitakshara law, that which becomes woman's property is not *peculium*, but does, as *stridhun* (*peculium* does also), descend to the wife's own kindred. The passage in page 38, Vol. I. of Macnaghten (given below.) is cited to support this plea.

"In the Mitakshara, whatever a woman "may have acquired, whether by *inherit-"ance*, purchase, partition, seizure, or "finding, is denominated *woman's property*; "but it does not constitute her *peculium*. "Authors differ in their enumeration of the "various sorts of *stridhun*, some confining "the number to eight, others to six, others "to five, and others to three; but as the "difference consists in a more or less com-"prehensive classification, it does not re-"quire any particular notice. The *most* "*comprehensive* definition of a married "woman's *peculium* is given in the follow-"ing text of Menu: 'What was given "before the *nuptial fire*, what was given "at the *bridal procession*, what was given "in *token of love*, and what was *received* "from a *mother*, a *brother*, or a *father*, are "considered as the *six-fold separate property* "of a married woman.' And it may be here "observed that *stridhun*, which has once "devolved according to the law of succession "which governs the descent of this peculiar "species of property, ceases to be ranked "as such, and is ever afterwards governed "by the ordinary rules of inheritance;—for "instance, property given to a woman on "her marriage is *stridhun*, and passes *to her* "*daughter* at her death; but at the daugh-"ter's death, it passes to the heir of the "daughter like other property, and the bro-"ther of her mother would be heir in pre-"ference to her own daughter, such daughter "being a widow without issue."

On the other side, the ruling of Trevor and Campbell, Justices, is cited to us (8 Sevestre 491, Gridharee Lall's case),* in which it was held that the enumeration of *bundhus* is exhaustive, and not illustrative, and that none not enumerated can inherit. Under this ruling, a father's maternal uncle was excluded in that case, and the plaintiff's sister's son might be so in this case.

The respondent uses on his part most of the arguments on which the learned Judges Trevor and Campbell came to the decision

*See 4 W. R., *Civil Rulings*, p. 13, and 10 W. R., *Privy Council*, p. 31.

cited. It is also pressed on us on the same side by respondent's pleader that the word "inheritance" in page 38 of Macnaghten refers to inheritance of *personal* property; that the context shows that *personal* property only, and not in any way *real* property, was in the contemplation of the writer. It would be against all recognized and well-known principles of Hindoo law to allow the husband's property to go to the wife's relatives instead of reverting to the husband's relatives, and that, if there be any doubt, the passage here cited from Menu fully clears that doubt, by expressly restricting the *six-fold* property of woman, and thus *excluding inheritance* of the husband's estate.

I am free to admit that at one time I felt that we ought to follow the ruling in Gridharee Lall's case, but I think otherwise now.

Because, *firstly*, it is quite clear that the sister's son is enumerated in the *Virmitrodaya* and *Nirnya Shindhu*.

Secondly.—Where sister's son is not enumerated, remoter kinsmen, such as maternal uncle and aunt's sons, are so. Why then should the nearer kinsmen of sister's sons be supposed to be excluded where more remote kindred are included?

Thirdly.—It would hardly be compatible with the known texts of the Hindoo law, for prescribing the provision of kinsmen, to exclude a kinsman as a sister's son, and to prefer a king, a Brahmin, a fellow-student, to the sister's son; more especially as the passages cited all look to *remote* kindred and others in preference to the king, Brahmin, fellow-student, &c.

Fourthly.—I think the passage of the Mitakshara *not* translated by Colebrooke, though referring to those who die in a foreign land, only recognizes kinsmen before the king, and only refers to the king of that foreign land, and perhaps as to the fellow-trader, but in all other respects *prefers all* kinsmen to others *not* kinsmen.

These considerations lead me to think that it has been wrongly held in Gridharee Lall's case that the enumeration of the *bundhus is exhaustive*, not illustrative.

I would, therefore, not now, go into subsidiary points as to *stridhun*, but refer the case to the Full Bench to decide whether, under Mitakshara law, *a sister's son can inherit the real property of his maternal uncle*.

Phear, J.—The material facts of this case appears to me to be as follows:—

The land which forms the subject of the suit was formerly the property of one Rughoonath, on whose death, without leaving male issue, it came into the possession and enjoyment of his widow. When the widow died, Rughoonath's daughter Koochilmonee succeeded to the property, and at her death it passed into the possession of *her* husband's nephew named Suroop.

While the property was thus in possession of Suroop, one Luckhee Narain, the holder of a bond from Koochilmonee, brought a suit upon it against Suroop as Koochilmonee's representative. The plaint was filed on the 30th April 1867, and Luckhee Narain obtained a decree on the 27th November of the same year. In execution of this decree, the property in question was sold. It was bought by Luckhee Narain himself; and, in virtue of this purchase, he has obtained possession of it.

The present suit was instituted on 21st April 1864 by one Nundlall, seeking to obtain possession of the property for himself on a title superior to that of Lukhynarain, Suroop, and all others who claim through Koochilmonee. Nundlal, who has died since the filing of the plaint, was the son of Rughoonath's sister, and in that character he contended in this suit that, on the death of Koochilmonee, he was the heir of Rughoonath, and entitled to take his immoveable property.

On this state of facts, as no effort was made by the defendants to justify as against the heir's recourse to Rughoonath's property for the satisfaction of Koochilmonee's bond, the first issue between the parties was, whether or not Nundlal, as sister's son, could by law inherit from Rughoonath.

The Lower Appellate Court, finding as a fact that the plaintiff's family came from the *Mithila* provinces, and had always adhered to the religious rites and customs of those provinces, curiously enough held as a consequence that the plaintiff was bound, by *Mitakshara* law. The Lower Appellate Court, following the then construction of the Mitakshara law given by Macnaghten (Hindoo Law, Vol. I., p. 28), determined that the plaintiff, as sister's son, was excluded from the inheritance, and accordingly it dismissed his suit.

Against this decision, the plaintiff appeals, specially on grounds which are so worded as to appear very inconclusive as they stand; but, as argued before us by both sides, they seem to be substantially, *1st*, that the Court ought to have applied the Mithila law to the case instead of the Mitakshara law, and that, by the Mithila law, the plaintiff was entitled to succeed; *2nd*, that, even by the Mitakshara law, if properly interpreted, the sister's son was not excluded from the inheritance.

As to the first objection, it seems to me that the Lower Appellate Court would have been wrong, notwithstanding its finding of fact, if it had applied the Mithila to the case. The preliminary question before that Court ought to have been not "what law governed the plaintiff," but "according "to what law was inheritance to Rughoo-"nath's property to be made out." Now, Rughoonath, as I understand, was domiciled, and the property itself was situated, in a district where the Mitakshara prevails. Consequently, as nothing appears in the whole case to suggest that Rughoonath was subject to any other proprietary law, it follows that the Matakshara law was the law according to which the matter of inheritance was to be determined.

As to the second ground of special appeal, the inclination of my own opinion, as at present advised, is that, according to the Mitakshara text-books, the sister's son is heir in default of nearer of kin. The current of judicial decisions, however, runs so strongly against this construction, that I should not alone have considered myself justified at this date in resisting it. But as Mr. Justice Bayley desires to refer the case to a full Bench, I am willing to concur in doing so, and think the question should be simply whether, under the *Mitakshara* law, a sister's son can, in any case, be heir to his mother's brother as regards immoveable property?

The judgments of the Full Bench were delivered as follows:—

Milter, J.—The question we have to determine in this case is whether, according to the Hindoo law current in the Benares School, a sister's son is entitled to inherit as a *bundhu* or *cognate*. Before proceeding, however, to determine the question, we must answer a preliminary objection that has been raised before us by the pleader for the respondent. It has been contended that the point under our consideration has been already set at rest by a decision of the Privy Council reported in page 681 of Sutherland's Privy Council judgments. We are of opinion that the contention cannot be maintained. True it is that the decision of the late Sudder Court at Agra, which was reversed by the Lords of the Judicial Committee, was based upon the ground that the sister's son is entitled to inherit as a *bundhu*, but this position appears to have been abandoned before their Lordships by the learned Counsel who conducted the case on his behalf. What were the reasons which induced the learned Counsel to adopt this course—whether it was because he thought that, under the circumstances of the case, his client could not succeed in the suit, unless he was placed in a higher rank than that of a bundhu, or otherwise—it is difficult for us to make out from the facts as reported. It is sufficient, however, for the purposes of the present argument, to state that the result of this concession was, as their Lordships have themselves observed, to reduce the whole matter in controversy to the simple question as to whether, upon the proper construction "of the Mitakshara, the sister's son is not "entitled to come in among the earlier class "of heirs or sapindas." This was, in fact, the only question that was discussed before their Lordships, and the only one upon which they have pronounced a judicial opinion. To remove all doubts on this point, the following passage in their Lordships' judgment might be conveniently referred to. "He "there puts the sister's sons out of the cate-"gory in which Mr. Piffard would place "them, though erroneously *perhaps* he has "put them in the category of bundhu." The word "*perhaps*" in the above sentence is sufficient to show that their Lordships did not intend to decide the point that we have now got before us, and the preliminary objection is accordingly overruled.

With reference to the main question itself, we are of opinion that the sister's son is entitled to rank as a *bundhu* according to the definition of that term as given in the Mitakshara itself. This definition is contained in the following passage:—

"On failure of the paternal grandmother, "the (gotraja) kinsmen sprung from the same "family with the deceased and allied by funer-"al oblations, namely, the paternal grand-"father and the rest, inherit the estate. *For* "*kinsmen sprung from a different family, but* "*allied by funeral oblations, are indicated*

"*by the term cognate (bandhu.*" — (Colebrooke's Mitakshara Verse 3, Section 5, Chapter 2, page 350.)

It will be observed that two conditions are necessary to meet the requirements of this definition, namely, first, that the claimant should be a kinsman sprung from a different family; and, second, that he should be connected by funeral oblations. Both these conditions are strictly fulfilled in the case of the sister's son, and, as we will show further on, in a much higher degree in his case than in that of any of the nine individuals whose claims to succeed as bandhus are admitted on all sides. That he is a kinsman sprung from a different family is unquestionable, and it is equally clear that he is a sapinda, or one allied by funeral oblations, though some objections have been raised before us on this last point. It has been argued that, according to Menu, a Hindoo is required to perform the funeral obsequies of his paternal ancestors only; that, in consequence of this rule, the *sagotras*, or those who belong to the same *gotra* or family, are the only persons entitled to be recognized as sapindas; and that the sister's son must be accordingly excluded from that category. We are of opinion that there is no authority whatever to support this contention; and we might even say that, whatever other objections might have been hitherto urged against the heritable right of the sister's son, this is the first time that his position as a sapinda has been questioned or disputed. Indeed, the very definition before us is a sufficient answer to this sophism; for if the sagotras alone are entitled to rank as sapindas, bandhus, or kinsmen sprung from a different family, but allied by funeral oblations, must be non-existent. We have, however, the express authority of Menu himself to decide this point, and what is of still greater importance for the purposes of the present discussion, it is an authority quoted and acted upon by the author of the Mitakshara.

"For with regard to the funeral obsequies "of ancestors, daughter's sons are regarded "as son's sons. Menu likewise declares: "By that male child whom a daughter, whe-"ther appointed or not, shall produce by a "husband of equal class, the maternal grand-"father becomes the grandsire of son's sons. "Let that child give the oblation and take "the inheritance."

It is manifest from the above that the maternal ancestors also are entitled to receive funeral oblations, and this proposition strikes at the very root of the contention that has been raised before us. Now, the sister's son is no other relative than the daughter's son of the father; and if it be once conceded, as it must be, that the daughter's son is a sapinda, it would follow as a matter of course that the sister's son is at least a sapinda of the father; and as such he would be clearly entitled at all events to rank as a *pitree-bandhu*, or father's cognate. In point of fact, however, he is also a sapinda of the deceased proprietor himself, not so near as the daughter's son, but nearer than every one of those individuals who are admittedly recognized as *bandhus*.

It is a well known principle of Hindoo law recognized in all the Schools current in the country, that the relation of sapinda exists not only between the immediate giver and the immediate recipient of funeral oblations, but also between those who are bound to offer them to a common ancestor or ancestors. This principle is based upon the theory according to which a Hindoo is supposed to participate after his death in the funeral oblations that are offered by any one of his surviving relatives to some common ancestor, to whom he himself was bound to offer them when living; and hence it is, that the man who gives the oblations, the man who receives them, and the man who participates in them, are all recognized as sapindas of each other. Thus, for example, brothers are not required to perform the obsequies of each other, but they are nevertheless sapindas, being connected with each other through the medium of the oblations that they are respectively bound to offer to their common ancestors. The same rule holds good in the case of the brother's son, and in fact of every sapinda who does not stand in a direct line of ascent or descent with the deceased proprietor himself. To place this point, however, beyond all dispute, we wish to refer particularly to the nine admitted *bandhus* themselves. It will be seen that six out of these nine individuals are no other relatives than the daughter's son of the paternal grandfather, the daughter's son of the maternal grandfather, the daughter's son of the father's paternal grandfather; the daughter's son of the father's maternal grandfather, the daughter's son of the mother's paternal grandfather, and the daughter's son of the mother's maternal grandmother. The remaining three are the son's son of the maternal grandfather, the son's son of the father's maternal grand-

mother, and the son's son of the mother's maternal grandfather. Not one of these individuals, not even the highest among them, or, in other words, the daughter's son of the paternal grandfather, is required to offer funeral cakes either to the deceased proprietor himself, or to his father, or to his mother, but at the same time they are admittedly entitled to rank as the sapindas of the man himself, or of his father, or of his mother, as the case might be. We can scarcely imagine upon what principle of Hindoo law it can be seriously contended that the daughter's son of the father is not a sapinda when the daughter's sons of the paternal and maternal grandfathers are acknowledged as such.

As regards the performance of funeral obsequies, the daughter's son of the father occupies the same position as a son's son of the father, or, in other words, as a brother's son; whereas the daughter's son of the paternal grandfather, who is the highest in rank among the admitted *bandhus*, does not stand an inch higher than the son of a paternal uncle. It is perfectly true that the lawyers of the Benares School sometimes use the word sapinda in the sense of consanguinity, or mere connection through the body; but in either case the position of the sister's son would remain unaffected. We have already pointed out that as regards funeral oblations, the sister's son occupies the same position as a brother's son; and as to consanguinity, the very nature of the relationship with the deceased proprietor obviously shows that he is nearer than the nearest of the admitted *bandhus*. If authority is needed on this last point, the following passage of the Mitakshara might be referred to as conclusive:—

"A sapinda—she who has the same pinda "or body is a sapinda; a sapinda, not a "sapinda, (take) her. The relation of sa-"pinda arises from connection as parts of "one body. So the relation of ekpinda in "the son with regard to the father arises "from the connection as parts of the body "of the father. And with the grandfather, "&c., in consequence of the connection with "their body through the father. In the "same manner in regard to the mother from "connection as part of the body of the "mother. In the same manner in regard "to the maternal grandfather, &c., through "the mother. In the same manner with "the mother's sister and maternal uncle, and "the rest, by reason of the connection or parts "of one body." (*Mitakshara Acharadhyaya*, leaf 6).

It is scarcely necessary to point out that in the passage before us the maternal uncle and the sister's son are distinctly recognized as sapindas of each other. The whole doctrine of sapinda, according to the authorities of the Benares School, has been correctly expounded in the Vyavashta cited in the case reported in the third volume of the Select Reports, page 37. The Pundits were unanimously agreed in declaring that there are two significations only in which the word sapinda is used by the lawyers of that School, namely, consanguinity and connection through funeral oblations; and the following passages from the *Purasur Madhub* and the *Nirnoy Sindhu*, both of which works are recognized as authorities concurrently with the Mitakshara, were cited by them in support of this opinion.

"Those are sapindas who are connected "by the tie of consanguinity; for instance, "the father and the son are sapindas to each "other, and the body of the father is per-"petuated in the son without any interven-"tion. So also is the son by the medium of "the father a sapinda of his paternal grand-"father, and of his paternal great grand-"father. So also the son by the medium of "his maternal grandfather is a sapinda of his "maternal aunt and uncle, and by the medi-"um of his paternal grandfather he becomes "a sapinda of his paternal aunt and uncle, "&c." (*Purasur Madhub*).

"Those are sapindas between whom ex-"ists a reciprocity of giving or receiving "funeral oblations. The fourth person and "the rest share the remains of the oblation "wiped off with the Kusagrass; the father "and the rest share the funeral cakes. The "seventh person is the giver of oblations. "The relation of sapinda or men connected "by the funeral cake extends, therefore, "to the seventh person, or sixth degree of "ascent or descent. It should not be sup-"posed that an uncle or nephew are not "reciprocally sapindas, as he who shares "in the oblations offered by the uncle "shares also in those offered by the nephew. "*In short, if any one of those who par-"ticipate in the funeral oblation offered by "one individual, be also the presenter of "funeral oblations to one of his co-partici-"pators, then the whole number become "sapindas of each other.*" (*Nirnoy Sindhu*)

It is perfectly clear that according to either of these authorities, the sister's son is entitled to rank as a sapinda. Before concluding this part of our judgment, we

cannot pass over an important point connected with the Vyavashta we have already alluded to. The case in which it was given related to the daughter's son of the brother; and the Pundits, whilst admitting that he was entitled in every respect to rank as a sapinda, nevertheless stated that he was not entitled to succeed as an heir. No text or authority of any kind was cited by them in support of this opinion, and the only reason put forward was that he is not a sagotra. This reason, we need hardly observe, is obviously unsound; for if the sagotra sapindas are the only persons entitled to inherit, the word *bandhu*, which signifies sapindas of a different family, must be struck out from the Law of Inheritance. It has been said in a note attached to this case that it is universally admitted that such description of persons (evidently meaning those who are sapindas, but not sagotras) "are not sapindas for the purpose of inheritance." We are not aware of the authorities by whom this admission was made; and with all deference to the learned author of that note, we are bound to say that it is obviously incorrect. It may, however, be fairly asked that, if the word sapinda, when used for "the purpose of inheritance," does not mean either consanguinity or connection through funeral oblations, in what other sense is it to be understood when it is used for that purpose, particularly with reference to such heirs as the daughter's son of the paternal grandfather, and the rest.

We have stated above that there are two significations only in which the word sapindas is used in the Benares School, and the pleader for the respondent has not even been able to suggest a third. We might also add that, so far at least as the *Nirnoy Sindhoo* is concerned, the sister's son is expressly recognized as heir, as the following passage will show:—

"In default of the brother's son, the father, mother, the daughter-in-law, the sister, and her sons, are entitled to perform the shrad, because they are the heirs." (Page 219)

We have shown by the foregoing remarks that the sister's son is entitled to rank as a *bandhu* according to the definition of that term as given in the Mitakshara.

We will now proceed to examine the various objections that have been urged, both before us and elsewhere, against his right to succeed as an heir. These objections may be all classified under the following heads:—

1st.—That the definition referred to has no connection with the Law of Inheritance.

2nd.—That the enumeration of *bandhu* made in verse 1, Section 6, Chapter 2, is exhaustive, and that the sister's son is neither included in that enumeration, nor mentioned as an heir in any other part of the work.

3rd.—That it has been settled by a uniform course of decisions that the sister's son is not entitled to inherit under the Hindoo law administered in the Benares School.

With reference to the first objection, we are of opinion that it is altogether untenable. The definition in question occurs in a part of the work which is exclusively devoted to the exposition of the Law of Inheritance; and it may be fairly asked, if it has no connection with that law, for what other purpose has it been introduced in such a place? A little reflection, however, will remove all doubts on this point. The Mitakshara, it is well known, is a professed commentary on the Institutes of Yajnavalkya The following text of that ancient sage contains the law of inheritance applicable to the estate of a deceased proprietor who has left no male issue.

"The wife and the daughter also, both "parents and their sons, Gentiles (gotraja), "cognates (bandhu), a pupil, and a fellow-"student; on failure of the first among these, "the next in order is, indeed, heir to the estate "of one who departed for heaven leaving no "male issue." (Mitakshara, verse 2, Section 1, Chapter II., page 324.)

The whole of the second Chapter from this point downwards as far as Section 7 is nothing but a commentary upon the text cited above, and which, for the sake of convenience, we shall hereafter designate by the name of the general text. The definition in question occurs in verse 3, Section 5, which has been already set out at length at the very commencement of this judgment, and the words are: "*For kinsmen sprung from a different family, but connected by funeral oblations, are indicated by the term (bandhu) cognate.*" It is obvious that the word *indicated* here means 'indicated in the general text which contains the Law of Inheritance.' It would, therefore, be manifestly unreasonable to argue that the definition in question has nothing to do with that law.

It might be as well said that the definition of gotraja given in the earlier part of the verse is also unconnected with it.

The second objection is also untenable. Verse 1, Section 6, Chapter II., runs as follows: "On failure of gentiles, the cognates "are heirs. Cognates are of three kinds: "related to the man himself, to his father, or "to his mother, as is declared by the following text: 'The sons of his own father's "sister, the sons of his own mother's sister, "and the sons of his own maternal uncle, "*must be considered* as his own cognate kindred. The sons of his father's paternal "aunt, the sons of his father's maternal aunt, "and the sons of his father's maternal uncle, "must be deemed as his father's cognate "kindred. The sons of his mother's paternal "aunt, the sons of his mother's maternal "aunt, and the sons of his mother's maternal "uncles, must be recognized as his mother's "cognate kindred."

There is nothing whatever in this verse to justify the contention that the author of the Mitakshara intended thereby to lay down an exhaustive list of bandhus or cognates. He says, first of all, that bandhus are entitled to inherit in default of gotrajas; and, secondly, that bandhus are of three kinds, namely, those who are related to the man himself, and those related to his father and mother respectively. There can be no doubt whatever that, if he had finished the sentence at this point, no one could have seriously contended in the face of these two propositions, so manifestly general in their character, that he intended to exclude one single individual who is really entitled to claim the benefit of his own definition. The only argument, therefore, which can be advanced in support of this contention is the simple fact of his having concluded this sentence by quoting a text from one of the Hindoo sages which contains the names of a limited number of bandhus. We are of opinion that this argument *per se* is entitled to no weight whatsoever. Isolated texts from various Hindoo sages and of a similar description are to be frequently found in the Mitakshara, and it would be manifestly erroneous to contend upon the authority of any one of them that an exhaustive enumeration of heirs was intended to be made thereby. The following text of Vrihat Vishnu, quoted in page 326 of the Mitakshara, might be referred to as an illustration:—

"The wealth of him who leaves no male "issue goes to his wife. On failure of her, "devolves on daughters; if there be none, "it belongs to the father; if he be dead, it "appertains to the mother." It would be obviously improper to say from the mere fact of the author of the Mitakshara having referred to this text that he intended to declare that the particular persons mentioned therein are the only heirs to the estate of a deceased Hindoo who has left no male issue; or that such even was the intention of Vrihat Menu himself. As to the particular text before us, there is absolutely nothing in it from which it can be reasonably inferred that the author of it at least, if not the author of the Mitakshara, had such an intention in view. All that it says is that certain relatives must be considered as bandhus of one class, and certain others as bandhus of two other classes respectively; it nowhere says that these persons are the only bandhus recognized by the Hindoo law. The object which the author of the Mitakshara had in view in referring to this text is evident. His own words are, "as is declared by the following text;" and these words are sufficient to show that this text was referred to, merely for the purpose of establishing the three-fold classification of bandhus involved in the second of the two general propositions before adverted to. The necessity of this reference is also obvious. The first proposition required no special authority for its support, inasmuch as it was an obvious deduction from the order of succession laid down in the general text upon which he was commenting.

The second proposition, however, stood on a different footing, there being nothing in the Institutes of Yajnavalkya to sanction it directly; and hence it was that the author of the Mitakshara was obliged to rely upon the authority of another Hindoo sage in order to support it. Why, then, are we to put a construction upon his words, which is not only inconsistent with his own definition, but also with every general principle of law that has been inculcated by him throughout the treatise? It has been justly remarked by Sir William Jones that the doctrine of funeral cakes is the key to the whole Hindoo Law of Inheritance. All the Schools of Hindoo law that are current in the country are agreed in accepting this principle as their guide, however much they might differ from one another with reference to particular points connected with its application. Those commentators who adopt the other doctrine of consanguinity merely extend the limits of the sapinda relation

by including a large number of persons *besides* those who are connected by funeral oblations. The author of the Mitakshara at all events is no exception to the general rule. The text of Menu, which says "to the nearest sapinda the inheritance belongs," is frequently cited by him as a leading authority on all questions of Hindoo law. Indeed, the very definition of bandhus under our consideration is based upon this fundamental doctrine, and in the very next verse he distinctly lays down that the order of succession to be observed among the different classes of bandhus is to be regulated by "nearness of affinity." We have already stated that our argument would not be affected in the slightest degree, whatever interpretation might be put upon the word "affinity." Are we then to suppose that the author of the Mitakshara has been so far forgetful of this fundamental principle, as to render himself guilty, unconsciously, as it were, of the gross inconsistency of laying down a definition and of excluding those very persons who are best entitled to claim the benefit of it? In what way, we might repeat in this place, are the sister's son of the father and of the mother better qualified to inherit than the sister's son of the deceased proprietor himself? What doctrine of Hindoo law, directly or indirectly sanctioned by the author of the Mitakshara, can be cited in support of the contention that the maternal grandfather himself is not an heir when his son's sons and his daughter's sons—nay even when the son's sons and their daughter's sons of the father's and mother's maternal grandfather—are acknowledged as such? How, again, are we to reconcile the proposition that the maternal uncle, or, in other words, the uterine brother of the mother, is to be excluded from the line of inheritance, when her cousins, namely, the sons of her father's sisters and the sons of her mother's sisters, are to be included in it? Startling anomalies like these, to use an expression of the Lords of the Judicial Committee, cannot be imputed to an author without there being some tangible ground upon which such an imputation can rest. It is perfectly true that, in the particular case before us, we are bound to administer the Hindoo law as it has been expounded by the author of the Mitakshara; but we can hardly be justified in ascribing such gross absurdities to him at the very time when he was really trying to extend the category of bandhus by introducing the three-fold classification before alluded to.

The word *bandhu* has been sometimes interpreted as "distant kindred," but we can hardly suppose that the author of the Mitakshara seriously intended to authorize the succession of the most distant bandhus by sacrificing the right of those who are the nearest.

The following passages of the Mitakshara will remove all possible doubts on this point:—

(1.) "'When one dies in a foreign country, let the descendants (bandhus), cognates, gentiles, or his companions take the goods, or, in their default, the king.' When he who goes to a foreign country of those who are associated in trade dies, then his share should be inherited by his heirs, that is, the son and other descendants (*bandhus*), *cognates, i.e., the maternal-side relatives, maternal uncle, and others*, the gentiles, that is, the sapindas, besides the son and other descendants; and those who are come, that is, those among the associates who are come from a foreign country; or, in their default, that is, of the heirs, &c., the king shall take. The word *ba* shows that the heirs, &c., are entitled in alternation. *The rule as to this order is contained in the text: 'The wife, the daughter, &c.'* So it should be understood here. *The necessity for the text is to exclude the pupil, the fellow-student, and the Brahmin, and to include the trader.*" (Mitakshara.)

(2.) The sage extends the rule to the spiritual guide thus—

"To the spiritual guide, the pupil, the learned Brahmin, *the maternal uncle*, and the learned in the Vedas also." The spiritual guide means he who teaches the Vedas; pupil means he who is taught the Vedas; learned Brahmin means he who recites the Vedangos. "*By taking the maternal uncle, the cognates of one's self, the cognates of the father, and the cognates of the mother who are connected by origin are also employed. They are shown in the commentary on the text: 'The wife, the daughter, &c.'*"

The first of these two verses relates to the law of succession applicable to the estate of a foreign trader; and this law is contained in the text of Yajnavalkya, which stands between inverted commas at the top of it, the rest being a mere commentary upon the text itself. It will be seen that the word *bandhava* is expressly stated to include the maternal uncle, whoever else might be entitled to come in within the

word "others" which follows immediately afterwards. In the case of a foreign trader, therefore, it is perfectly clear that the maternal uncle is an heir; but before we can apply this argument to the general case, it is necessary to meet two objections that have been raised against such an application. The objections are, first, that the word used in this passage is *bandhava*, whereas the word used in the general text is *bandhu*; and, second, that the passage in question refers to an "exceptional state of things," and cannot, therefore, be accepted as a guide for the general case.

Both these objections are conclusively met by the express words of the author himself. It is distinctly stated by him that the order of succession applicable to this case is exactly the same as that laid down in the general text, and further that the only necessity for making a separate text for the exceptional case arose from that of excluding the fellow-pupil and the Brahmin, and of substituting the fellow trader in their place. It is perfectly clear, therefore, that the words *bandhu* and *bandhava* are of identical import, or, in other words, that the two texts are identical in every respect except as to the slight modification which relates to the fellow-pupil and the Brahmin. The second passage, too, is equally decisive on this point. It is distinctly pointed out therein that the word maternal uncle used in the text of Yajnavalkya stands for all the three classes of bandhus described by the author in his commentary upon the general text.

The Viramitrodaya which is a work of high repute in the Benares School concurrently with the Mitakshara, is also clear on this point: "Cognates are of three kinds, related to the "person himself, to his father, and to his "mother, according to the following text: "'The sons of the father's sister, the sons "of the mother's sister, &c.' Here, by reason "of near affinity, the cognate kindred, of the "deceased himself in the first instance, then "the father's cognate kindred, and next his "mother's cognate kindred, succeed. This is "the order of succession. In the text of Menu, "'then the distant kinsman shall be the heir "or the spiritual preceptor or the pupil,' the "term *soculya* comprehends the persons de-"scended from the same family (sagotra), and "the kinsmen allied by common libations of "water (samanodoca), *the maternal uncle, and* "*the rest, and the three kinds of cognates.* "*The term bandhu in the text of Yajneswar* "(*Yajnavalkya*) must *comprehend also the* "*maternal uncle and the rest*, otherwise "maternal uncles and the rest would be enti-"tled to succeed, and not they themselves, "though nearer in affinity—a doctrine high-"ly objectionable." (Viramitrodaya, page 209.)

The Vivada Chintamonee, which is a work of paramount authority in the sister School which goes by the name of the Mithila School, is also of the same opinion, "the maternal uncle, and the rest" being expressly recognized in the category of heirs laid down in page 299 of Baboo Prosunno Coomar Tagore's translation of the work.

In the face of all these concurrent authorities, it seems impossible to contend that an exhaustive enumeration of bandhus was made in verse 1, Section 6, Chapter 2 of the Mitakshara. It has been said that the sister's son is not entitled to inherit, because he has been nowhere mentioned as an heir specially by name; but this objection can be scarcely maintained if the doctrine of exhaustive enumeration falls to the ground. Apart from this last consideration, however, we do not see any reason why a specific enumeration by name should be insisted upon in every case. An enumeration by a general name, accompanied by a suitable definition sufficiently illustrated, is as good as any other kind of enumeration, particularly when the general name in question is applicable to a large number of persons whose individual names it would be very inconvenient to specify in detail; and we do not see any reason why in this particular case we should insist upon anything more than what we have already got before us. The great-grandson, for instance, is nowhere mentioned as an heir distinctly by name; and yet it would be simply absurd to contend that the estate of a deceased Hindoo is to go to the fellow-pupil, or to the king even, if his own great grandson is living. Similarly, when we come to the gotrajas, we find that no one below the descendants of the paternal great-grandfather is expressly recognized by name in any part of the Mitakshara, and yet it is a fact admitted on all sides that the descendants of the remotest ancestors in the agnatic line, at least of those who stand within the fourteenth degree, are entitled to inherit in the Benares School. Why then are we to introduce this novel principle of interpretation when we come to deal with the bandhus? There might have been some foundation for such an argument if the claimant had been a female relative, females as a class being generally supposed as having no right to inherit in consequence of their inability

to perform religious rites; but in the case of male relatives, no restriction of any kind whatsoever can be cited to defeat their rights, if they are in a position to establish their status as sapindas. We have shown that "the maternal uncle and others" are entitled to inherit in addition to those who are admitted as bandhus; and those who would take in the maternal uncle only, are bound to show who were the persons included in the words "and others." As far as the purposes of the present case are concerned, it is almost self-evident that if the maternal uncle is entitled to succeed as a bandhu, the right of the sister's son would follow as a matter of course. We have seen that there is but one definition of the word *bandhu*, and the very nature of that definition conclusively proves that if the maternal uncle is a kinsman from a different family and allied by funeral oblations, the sister's son must necessarily be a kinsman of the same description.

It remains for us to meet the last objection. No doubt, if there were a uniform course of decisions establishing the doctrine that the sister's son is not entitled to succeed, we would have been scarcely justified in holding otherwise, however much we might have been disposed to do so, for the reasons set forth above. The fact, however, is that there is no such uniform course of rulings as has been erroneously contended for before us. The following are all the cases that might be referred to on the point :—

(1).—Rajendro Narain *versus* Gocool Chand, *1st* Select Reports, page 43.

(2).—Ilias Koonwaree *versus* Agund Roy, *2nd* Select Reports, page 37.

(3).—Sheo Suhaye Singh *versus* Omed Koonwar, *6th* Select Reports, page 301.

(4).—Case No. XI. Macnaghten's Hindoo Law, Volume II., page 91.

(5).—A decision of the Madras Sudder Court reported in page 247 of the printed cases for 1860.

(6).—Stokes's Reports, Volume I., page 1, page 85.

(7).—Chootee Lall *versus* Gooroodyal, Agra Select Reports, Volume V., page 198.

(8).—Mohun Lall *versus* Thacooranee Sahaba, Agra Law Journal, 1864, page 17.

(9).—Johari Raoot *versus* Mussamut Kylaso, Volume I., page 75, Weekly Reporter.

(10).—Sola Dey, 4 Legal Remembrancer, page 168.

(11).—Gridharee Lall *versus* The Secretary of State, 4 Weekly Reporter, p. 13.

The *first* case has nothing to do with the particular point before us, and we would not have alluded to it at all if Sir Thomas Strange had not stated upon the authority of that case that the sister's son is not entitled to inherit in the Benares School. The contest in that case, however, was between the sister's son on the one side, and a gotraja sapinda on the other. The Pundits who were consulted in it very properly declared that if the Bengal law were applicable to the case, the sister's son would be entitled to preference, but that the reverse would be the case according to the Mithila law. The case was ultimately disposed of in favor of the sister's son, the Bengal law being held to be applicable; but there is not a single word either in the decision itself or in the Vyavasta referred to, from which it can be gathered that the sister's son would not have succeeded as a bondhu if the Mithila law had been adopted, if there were no gotraja relatives in his way.

The *second* case has been already referred to in an earlier part of this judgment. It related to the daughter's son of the brother, and, as we have already seen, the only ground that was put forward for excluding him from the inheritance was the erroneous one of his not being a *sagotra sapinda*.

The *third* case is directly in favor of our interpretation. The question was whether a daughter's son's son is entitled to inherit, and this question was determined in the affirmative upon the unanimous Vyavasta of the Pundits consulted on the occasion, including those of the Benares Patshala.

The *fourth* case clearly shows that the sister's son is entitled to succeed as a bandhu, both according to the Benares Law and according to the Mithila. This case is of particular importance, inasmuch as it appears to have met with the approbation of Sir W. Macnaghten himself, who has evidently cited it as a leading authority on the point. We might also add that Sir W. Macnaghten had expressly stated in his note to case No. 5, reported in page 87 of the same Volume, that the Vyavasta given by the Pundit of Zillah Behar in which the sister's son is ranked as a bandhu is conformable to the law as current in Benares, Mithila, and other provinces.

The *fifth* case is a mere dictum; but it is to be observed that the Pundit who was

consulted on the occasion distinctly stated that the sister's son was entitled to inherit as a bandhu, and no authority of any kind was cited or referred to to contradict this opinion.

The *sixth* case is also a dictum; and the same remarks that have been made with reference to the preceding case apply to this case also.

The *seventh* case has nothing to do with the point before us. The dispute was between a brother's daughter's son and a gotraja, and it was very properly held that the latter is entitled to succeed in preference to the former.

The *eighth* case is a mere dictum; but in this instance the dictum is in favor of the sister's son.

The *ninth* case arose from a dispute between the sister's son and an agnatic relation, and it was correctly held in that case that the latter is entitled to succeed. The learned Judges, however, who decided the case, went on to say that the sister's son is not entitled to inherit either according to the Benares law or according to the Mithila law. In the absence, however, of any further explanation on the point, we are rather disposed to think that all that was intended to be said is that he is not entitled to inherit in preference to the gotraja; but at any rate it is clear that this opinion cannot be treated as any thing more than a mere dictum.

The next case, however, is directly to the point, and with all deference to the learned Judges who decided it, we are of opinion that it is based upon erroneous grounds. These grounds have been too fully examined by us in the preceding part of our judgment to require any further notice. We wish, however, to make one remark in this place, and that is that the learned Judges appear to have been mainly influenced by the idea that the sister's son has never been recognized as an heir. With all deference to the learned Judges, we are bound to state that this was by no means the actual state of things at the time when their decision was pronounced, whatever it might be in this day. It is perfectly true that there is a paucity of decisions on the other side, but this fact appears to have mainly arisen from the peculiar doctrine of the Benares School by which the remotest relative in the agnatic line has been placed above the highest of the cognates. It might be added that very few cases indeed, if any, can be pointed out in which the daughter's son of the paternal grandfather has been expressly recognized as an heir.

The last case relates to the maternal uncle of the father, and the grounds of the decision in this case being nearly the same as those in the one next above, no special remarks with reference to it are necessary.

Upon the whole, then, it must be admitted that the majority of the earlier cases at least are in support of our view; and of the more recent, there are two cases at most that are directly opposed to it. The last objection, therefore, must also be overruled.

For the reasons set forth above, I am of opinion that the question put to us by the Division Bench must be answered in the affirmative, or, in other words, that the sister's son is entitled to inherit under the Hindoo law administered in the Benares School.

Peacock, C. J.—I am of opinion that in the absence of nearer relatives, a man may be heir to his mother's brother as regards property subject to the Mitakshara. The question has substantially been decided by the Privy Council (17th July 1868) in the case of Gridharee Lall Roy against the Government of Bengal,* in which it was held that the maternal uncle of the father of the deceased was not excluded from the class of bandhus capable of inheriting, and that the text contained in Article 1, Section 6, Chapter II. of the Mitakshara does not purport to be an exhaustive enumeration of all bandhus who are capable of inheriting, and that it is not cited as such or for that purpose by the author of the Mitakshara.

The judgment of Mr. Justice Dwarkanath Mitter, which he has just read, and in which he has displayed great learning, ability, and research, was written before the decision of the Privy Council of Gridharee Lall *versus* The Government of Bengal was published here. My hon'ble colleague has entered so fully into the reasons and exhausted the arguments in support of the view which he has taken, that it is unnecessary for me to do more than to say that I concur in the reasons which he has given in support of the conclusion at which he has arrived; and it is extremely satisfactory to find that it is entirely in concurrence with the view taken in the judgment of the Privy Council.

The case must be sent back to the Judges who referred it.

* See 10, W. R., Privy Council, p. 31.

Jackson, J.—I am of the same opinion.

It is very satisfactory to feel that a conclusion so entirely consistent with reason is also in full conformity with the Hindoo Law, as is conclusively shown in the exhaustive judgment which has been prepared by Mr. Justice Mitter, and also that the view which we had taken of the subject has been, it may be said, simultaneously adopted by the highest tribunal which deals with questions of Hindoo Law.

Phear, J.—In referring this case to a Full Bench, I expressed the inclination of the opinion which I then held. Mr. Justice Mitter's very complete argument, in which I concur, has, I think, demonstrated that opinion to be correct. I would, therefore, answer the question in the words which have been used by the Chief Justice.

Macpherson, J.—I am of the same opinion.

The 10th September 1868.

Present:

The Hon'ble H. V. Bayley, J. P. Norman, L. S. Jackson, J. B. Phear, E. Jackson, F. A. Glover, and C. Hobhouse, *Judges.*

Hindoo Law—Maintenance—Son's widow—Father-in-law.

Case No. 21 of 1868.

Appeal under Section 15 of the Letters Patent of the 28th December 1865, from the decision of the Hon'ble Sir Barnes Peacock, Kt., Chief Justice, and the Hon'ble A. G. Macpherson, dated the 31st of March 1868, differing in opinion from the Hon'ble G. Loch and the Hon'ble F. B. Kemp, the other Judges of a Full Bench on Regular Appeal No. 308 of 1866.*

Khettur Monee Dossee (Plaintiff), *Appellant,*

versus

Kasheenath Doss (Defendant), *Respondent.*

Baboos Unnoda Pershad Banerjee, Khettur Mohun Mookerjee, and *Umbica Churn Bose* for Appellant.

Baboos Kalee Mohun Doss and *Bhyrub Chunder Banerjee* for Respondent.

HELD, confirming the judgment appealed from, that according to the law in Lower Bengal the widow of a son who left no property cannot compel her father-in-law to make her a pecuniary allowance in lieu of maintenance if she refuses to reside in his house a member of his family.

Bayley, J.—THIS was a suit for maintenance brought by the plaintiff as son's widow against her father-in-law.

The defendant pleaded that he was willing to maintain the plaintiff in his own house, but that she had left it without any just cause, and, with the exception of two or three occasions, resided altogether with her father.

To this the plaintiff rejoined that she had been obliged to leave her father-in-law's house owing to the ill-treatment she received there; and that, under all circumstances, so long as she led a chaste life, she had a right to be maintained by her father-in-law.

The Principal Sudder Ameen has held that a son's widow, as long as she leads a chaste life, is entitled to maintenance, whether she chooses to remain with her father-in-law or with her father. The Principal Sudder Ameen also says that the object of the selection of the father-in-law's house for the residence of the son's widow is to secure "her morals from being corrupted "or her character tainted with unchastity, "and that the plaintiff here in that respect "would be as secure in her own father's "house as in her father-in-law's."

In regard to the ill-treatment which the plaintiff alleged she had received at her father-in-law's, the Principal Sudder Ameen states that, according to the views and customs of the Hindoos, son's widows are more or less liable to ill-treatment; that they are called husband-eaters, and so regarded as bringing misfortune, and thus seldom find kind treatment. With the exception of the incidental remark that one of the witnesses gave a graphic and true description of the ill-treatment, the Principal Sudder Ameen does not come to any very clear finding on this point. "Be that as it may," the Principal Sudder Ameen says, "since she is admittedly a chaste woman and lives a virtuous life she is legally entitled to maintenance from her father-in-law, and as to her living either in the house of her parents or of her father-in-law, she can elect; but I must say she has a just cause not to live with her father-in-law." The Principal Sudder Ameen then proceeds to consider the position of the father-in-law on the one hand, and the status and customary requirements of a Hindoo widow on the other hand,

* For judgment of the Full Bench, from which this appeal was preferred, see 9 W. R., p. 413.

and concludes by giving a decree for maintenance at eight rupees per mensem, and for religious ceremonies at two rupees.

The defendant appealed to this Court, and Mr. Justice Norman and Mr. Justice Seton-Karr referred the case for the decision of a Full Bench on the ground that the case of Raj Monee Dossee and Seeb Chunder Mullick (2 Hyde's Reports, page 103), in which it was held that the widow of a Hindoo refusing to live in the house of her father-in-law could not maintain a suit against him for a pecuniary allowance by way of maintenance, was at variance with the Sudder Dewanny Adawlut decision of 1852, page 796, and a decision of Mr. Justice Norman and Mr. Justice Kemp, and perhaps "one or two other cases."

Of the Judges comprising the Full Bench, the Chief Justice held that he could not find anything to satisfy him that a son's widow was entitled to sue to compel her father-in-law to maintain her, where he had no ancestral property and nothing beyond his separate estate acquired by himself.

The Chief Justice remarks also: "The right of a wife or of a widow and that of a son's widow to maintenance, appears to me to be governed by very different principles. A son's widow has not the same legal rights against her father-in-law as a wife has against her husband, or as a widow has against the heirs of her husband who take his estate by inheritance; the father is not heir to the son in preference to the son's widow." The Chief Justice concludes with these words: "I am of opinion that in the present case the plaintiff has no legal right to be maintained by her father-in-law, so long as she elects to live with her own father, and the decree of the Lower Court must be reversed with costs, and the plaintiff's suit dismissed."

Mr. Justice Macpherson concurs with the Chief Justice, and states his opinion "that when a son dies in his father's lifetime leaving no estate whatever, his widow has not such rights to maintenance as can be enforced at law."

On the other hand, Mr. Justice Loch and Mr. Justice Kemp were of opinion that the plaintiff could legally sue to be maintained by her father-in-law. Mr. Justice Loch states: "The text-writers on Hindoo law and commentators sufficiently establish the fact that the maintenance of a Hindoo widow is not merely a moral obligation, but a charge on inheritance," and that "a widow is entitled to maintenance so long as she is chaste, even though she voluntarily leaves her father-in-law's house and resides with her father after her husband's death, if there be good cause shown for her so leaving her father-in-law's house." Mr. Justice Loch thought that the case should be remanded to the Lower Court to determine whether any sufficient ground for leaving the protection of her father-in-law had been made out by the plaintiff, and, if this were proved, that the Court might award to her maintenance, calculating it according to the circumstances of the husband's family.

Mr. Justice Kemp concurred generally in the view of Mr. Justice Loch, but instead of remanding the suit he would have dismissed the appeal, being of opinion that a Hindoo widow is "entitled to maintenance so "long as she lives a chaste life, whether she "lives with her father or her husband's re-"lations. The maintenance of the female "members of the family, and amongst them "ranks the daughter-in-law, is obligatory on "a Hindoo."

The Chief Justice's voice, as that of the Senior Judge, prevailing, the appeal of the defendant was decreed and the order of the Principal Sudder Ameen reversed with costs, and the plaintiff's suit dismissed.

Upon this the plaintiff appealed, under Section 15 of the Letters Patent, and a Bench of seven Judges has heard that appeal.

The grounds of the appeal are set forth in these words:

Firstly.—"Under the Hindoo Law, as cur-"rent in Bengal, the son's widow is entitled "to maintenance from the estate of her "father-in-law, whether the same estate be "self-acquired or ancestral, provided she "lives a chaste life."

Secondly.—"Under the circumstances of "the present case, the appellant is entitled "to maintenance, inasmuch as her husband, "at the time of his death, lived under the "guardianship of, and in commensality with, "his father."

Having heard the Counsel for the appellant we were unanimous in thinking it unnecessary to call upon the respondent, and in affirming the decision of the Chief Justice and Mr. Justice Macpherson, but it was determined to deliver written judgments separately. I accordingly now proceed to give my separate judgment.

b

I would premise by stating that I consider that no question comes before us now as to whether there was or not any ill-treatment or any sufficient cause for the plaintiff to leave her father-in-law's house, and it is further admitted for the purpose of our decision that the plaintiff is the widow of a son who left no estate for his surviving father to inherit, and that the widow, and not the father, would have been the heir to the estate, had the son left any. Moreover, this is a case admittedly to be governed by the Bengal law, and one of a chaste Hindoo widow.

Baboo Unnoda Pershad Banerjee has opened his argument in this appeal by urging upon us that the legal, moral, and religious precepts and customs of Hindoo society are so intermixed that it is most difficult to separate the one from the other, and that, in fact, where the Hindoo legislators have laid down moral precepts for observance, those precepts were, by the custom and religion of the Hindoos, binding as legal maxims.

Although there is undoubtedly much truth in this plea, still I think the distinction is, in fact, recognized by the Hindoo law itself. Passages are to be found in Colebrooke's Digest and in Shama Churn Sircar's compilation of Hindoo texts, which show a distinction between the moral obligation which involves a sin (পাপ or মহাপাপ) to be expiated by religious penance of some kind in this life or else by punishment of hell (পুত) after this life, and others where a civil remedy or a penalty is indicated.

As one instance, I quote the following words from Book 2, Chapter IV., Section 1, Colebrooke's Digest. Catyayana says: "Neither the husband, nor the son, nor the father, nor the brothers, have power to use or alienate the legal property of a woman. If any one shall consume the property of a woman against her consent, he shall be *compelled* to pay *interest to her, and shall also pay a price to the king.*"

Baboo Unnoda Pershad then quotes text of the same Book and Chapter and Section, and also the notes to Section 10, page 112, of Colebrooke's Digest, Vol. II., London edition of 1801, to show that in these texts, which refer to the prohibition of giving away property, the one thing to be looked to is that the subsistence of the family which must necessarily be maintained should not be jeopardized by such gift. The pleader next quotes the following passages from Menu, text 11, and Narada, text 12. Text 11 runs thus: "The ample support of those who are entitled to maintenance is rewarded with *bliss in heaven, but hell is the portion of that man whose family is afflicted with pain by his neglect, therefore let him maintain his family with the utmost care.*" Text 12 says: "Even those who are born or yet unborn, and they who exist in the womb, require funds for subsistence; the deprivation of the means of subsistence is *reprehended.*"

But both the texts and the notes here clearly indicate that heaven or hell, as the portion of man in a future state, or moral censure in this life, are alone set forth by the legislators, and this cannot be said to constitute the *legal penalties*, or to look to the institution of a suit for declaration of the right to maintenance which a Hindoo may neglect to provide for his son's widow.

Text 15 refers mainly to the maintenance of a *wife* (not a son's widow), and in one part of the notes it is stated "the donor commits a sin, and *therefore* he should be *fined*, unless he performs strict *expiation.*" The finding, however, seems to be the lesser and secondary penalty looked to, and the religious expiation by penance the primary one.

Further, text 331 of Book V. of Colebrooke's Digest, page 321 of the above London edition of 1801, is cited by Baboo Unnoda Pershad in support of his case. That text lays down that outcasts and their sons, eunuchs, madmen, and other disqualified persons, must be maintained without any allotment of shares upon the partition of ancestral property.

This text, however, does not support the pleader's views, because it is a maxim of the Hindoo Law, that the disqualified members of a Hindoo family cannot inherit but are more or less incapacitated. But as they are members of a family, it is held that, while, on the one hand, they are not to share in an estate, still, on the other, their maintenance is to be a *charge on the estate* of which *but for* the *disqualification* they would be entitled to a share with the other qualified members. In our case, however, as there is *no* estate, this text has no application. I may add that the same remark applies to text 19, page 106, Chapter V. of the Dayabhaga.

I now turn to the Dyabhaga, the admitted book for Bengal, and therefore the book which specially governs the present (Bengal) case.

The first passage cited by Baboo Unnoda Pershad from the Dayabhaga is Chapter II., page 29, which refers to a prohibition against the gift or other alienation of the property, "*because* immoveable and similar posses-"sions are means of supporting the family. "For the maintenance of the family is an "*indispensable obligation*, as Menu posi-"tively declares—'The support of persons "who shall be maintained is the approved "means of *attaining heaven*. But *hell* is "the man's portion if they suffer. There-"fore, let a master of a family carefully "maintain them.'"

But this text conveys clearly a moral obligation, and the word "*indispensable*" applies as much to a moral as to a legal obligation. Further, the text must be read in connection with the rest of the passage, where the penalty is clearly the loss of the "*approved means*" *of attaining heaven*, and not a penalty in *this* life from the king.

Further, if there were any doubt about this, the following text from page 32 of the same Chapter of the Dayabhaga removes it: "But the texts of Vyasa exhibiting a pro-"hibition are intended to show a *moral* "*offence*, since the family is distressed by "a sale, gift, or other transfer, which "argues *a disposition* in the person to "make an *ill use* of his power as owner. "*They are not meant to invalidate the* "*sale or other transfer*."

The Vyavastha 160, page 319 of Shama Churn's compilation of Vyavasthas, is relied upon by the Principal Sudder Ameen, and apparently by Loch and Kemp, Justices. It is this: "Should a woman, "without unchaste purposes, quit the family-"house, and live with her parents or own "relations, yet still she is entitled to main-"tenance;" but the pleader for the appellant has not been able to show us any passage which provides a civil remedy or a penalty for a breach of the obligation laid down in this passage.

In regard to the cases cited from 2nd Macnaghten, pages 104, 111, 113, 116, 117, and 198, I would remark that all the passages refer to cases where there were ancestral estates left by the deceased parties, upon which maintenance might be a charge.

Cases are also cited from 3 Select Reports, Sudder Dewanny Adawlut, page 323, and from 4 Select Reports, page 19. Those two cases were clearly cases where ancestral property was to provide for the charge of maintenance.

The case cited from the Sudder Dewanny Adawlut decisions of 1848, page 491, is one of contract and stipulation, and that from page 1220 of 1858 is solely upon the right of maintenance of a wife not residing with her husband's family, whereas, as has been before stated, the case with which we have to deal is one exclusively of a son dying *without* any ancestral property, and leaving a widow, who sues her father-in-law for maintenance.

It may be well, too, here to remark that all the cases are cited in support of the pleas of the Counsel for their respective parties, but we, sitting in a Full Bench of seven Judges, are fully competent to re-consider whether any and which of the decisions are in themselves correct, and we are not actually bound in the present occasion to follow any of them as precedents.

After full consideration I can come to no other conclusion than that the Hindoo Law does not lay down that, if maintenance is withheld by a father-in-law from the widow of his son, that father-in-law having inherited no property from the son which can be a charge for the maintenance of the widow, and the son himself having left no ancestral estate, a civil remedy, or a penalty, or compensation, is to be ordered of the king, or can be the subject of suit. My own view is that the Hindoo Law looked to its moral obligations being capable of being sufficiently enforced from those people for whom the texts were provided, by the overwhelming force of the religious influences which prevailed under the then Hindoo system of society, and that it is only in exceptional cases, noted by the provision of fines and amercements and other remedies, that the religious and patriarchal power may not be expected directly to operate to secure the object of the Legislature.

I concur with the Chief Justice and Mr. Justice Macpherson, and would dismiss this appeal with costs.

Norman, J.—The question is whether, under the Hindoo Law as current in Bengal, when a Hindoo dies leaving no property and a widow unprovided for, such widow can maintain an action in a Court of law to compel the father of her deceased husband to give her a pecuniary allowance by way of maintenance.

d

I am of opinion she cannot. The following texts were cited in support of the argument by the appellant's Counsel from Colebrooke's Digest, Book 2, Chapter 4, Section 1, Para XI., *Menu* : "The ample support of "those who are entitled to maintenance is "rewarded with bliss in heaven, but hell "is the portion of that man whose family "is afflicted with pain by his neglect; there-"fore let him maintain his family with the "utmost care." Para. XII., *Narada* : "Even "they who are born, or yet unborn, and "they who exist in the womb, require funds "for subsistence; the deprivation of the "means of subsistence is reprehended."

If these texts are carefully considered, it will appear clearly that the duty there prescribed is treated as of divine ordinance; a breach of it as a sin or offence against divine law; not as a crime or offence against human law. The penalties under which such duty is enjoined are the displeasure of heaven, the pains of hell, and the reprehension of mankind. Men are urged to the performance of such duty by Menu by the promise of bliss in heaven; and by Narada, by an argument addressed to their reason, pointing out the necessity of securing a due provision for the helpless.

Hindoo commentators, and especially those of the Bengal School, have distinguished duties of moral obligation, such as those above mentioned, from breaches of Municipal law. In the Smriti Sara it is said : "The "gift of a man's whole estate is valid, for it "is made by the owner; but the donor com-"mits a moral offence, because he observes "not the prohibition." So in the Dayabhaga, Jimuta Vahana, commenting on the above text of Menu, says : "Since it is denied that "a gift or sale should be made, the precept "is infringed by making one; but the gift "or transfer is not null." Very different language is used when the law given is dealing with a breach of duties prescribed by Municipal law. In Colebrooke's Digest, Book 2, Chapter 4, Section 1, Clause 10, a passage from Catyayana is cited : "Neither the hus-"band, nor the son, nor the father, nor the "brother have power to use or alien the legal "property of women. If any one of them "shall consume the property of a woman "against her consent, he shall be *compelled* "*to pay interest to her, and shall also pay a* "*fine to the king.*"

In this case, which points to a breach of Municipal law, an infraction of the law of property, the legislator treats it as an offence against human law, or the law prescribed by the supreme power in the State, and indicates a civil remedy. So Menu (speaking of cases which are to be decided by the king), amongst the eighteen principal titles of law, speaks of *Sales without ownership.* There is nothing which tends to show that he ever contemplated that the king was to interfere with the government, conduct, and management of the affairs of a Hindoo family by its head.

A passage from Sancha is cited, 2 Macnaghten's Hindoo Law, page 116 : "To the "childless wives of brothers and sons strictly "observing the conduct prescribed, their "spiritual parent must allot mere food and "old garments which are not tattered." It looks like a mere injunction to perform such acts as of charity. Nothing can be more unlike a legal right than dependance on such an obligation.

When Hindoo legislators speak of the right of a deserted wife to maintenance, they express in clear language that such right is one of legal obligation which will be enforced in the Civil Courts. I had occasion to consider that question in the case of Rance Itchamoye Dasi against Rajah Opurva Krishna Bahadoor. The right of a father to maintenance by his sons stands on a footing of its own (*see* Vyavastha Darpana, 2nd edition, p. 375, and the passage from Menu cited in the note). As to other members of the Hindoo family, assuming that there is a legal obligation arising from the law of nature and Hindoo law upon the head of a family to provide subsistence for helpless members of it, such as infants who but for such provision might perish of want, it seems by Hindoo law to be left wholly in the discretion of the person under such obligation to provide such subsistence in the manner which may seem fit to him. With regard to any claim to maintenance by those who are not absolutely helpless, it may fairly be presumed that the head of the family is the proper person to judge whether the resources and position of the family are such that they ought to be supported without labor, or whether they ought to work and either contribute their earnings to the general stock or maintain themselves.

There is a large class of cases where, according to Hindoo law, an heir succeeding to property takes it subject to the duty of maintaining those whom the late proprietor was bound to support.

A case of that kind from the Patna Court of appeal is reported in 2 Macnaghten's Hindoo Law, page 111 :

"A widow was in possession of some property which devolved on her at the death of her husband. The widow of her son, who died before his father, sued her for alimony to a specific amount; and, on referring the case to a Pundit, the following Vyavastha was given: 'If a widow live in the house of her mother-in-law, the latter should afford her food and raiment; but no rules as to a specific portion of alimony had been laid down in the law, and this should be determined by extent of means.' "Is it then necessary, supposing that a disagreement should subsist between the mother and daughter-in-law, that the latter should live with the former? If there should be any established rule making it incumbent to give alimony to the family of the person in possession of the estate, and the person in possession should not give alimony in proportion to the extent of the means, in such case is it competent to any authority to fix the amount that may be given?

Answer :— "While the father and other relatives of the husband exist, the residence of a widow in their house is declared to be obligatory on her; and the law does not contemplate any opposition to this rule, as in the following text: 'The father-in-law and the rest are bound to maintain a virtuous and childless widow;' but there is no provision for a case in which alimony may be sued for, not having been given in proportion to the means."

The Hindoo law on this subject may be compared with that of Scotland.

According to that law, a child is entitled to maintenance in the father's house, or elsewhere if the father's conduct endanger the child's safety, or if the father chooses to give him separate maintenance. The amount above bare subsistence according to his condition in life is at the father's discretion.

This is a more extensive obligation than exists under English law.

In the case of Maule and Maule in I. Wilson and Shaw's Reports, p. 266, which Lord Eldon described as one of the most important cases that ever came before the House of Lords, the Court of Session in Scotland had found that a son who had a commission in the army as ensign with £90 of pay, and an allowance of £100 a year from his father, was entitled to a maintenance of £800 a year from his father, who was in possession of an entailed estate yielding an income of £10,000 a year. The House of Lords reversed the judgment, and dismissed the suit. Lord Eldon, in delivering judgment—after pointing out the number of circumstances to be taken into consideration, the debts and charges on the estate and other obligations of the proprietors, possible losses, the necessity of providing for other children or dependent members of the family to an extent which might vary from year to year, and the harassing inquiries which would be rendered necessary—proceeds to say: "The question comes to this, whether the Court of Session has a jurisdiction, on the application of a son, to take into its hands as between the father and that son, and the father and his family, all the duties of a father of a family; and to state that, upon application once made to them, the whole administration of the family may be placed under their hands, and may continue there so long as the natural obligation of the father and son exist." Again: "The father must, as it seems to me, be a much better judge of what is proper to be done for his son when he becomes of age, than any Court on earth can be." Again: "The real question is, whether, under the particular circumstances of such a case as this, the *jus patriæ potestates* in the family no longer belongs to the father, but belongs to the Court of Session." He concludes: "I cannot think that, under the law of Scotland, the judgment and discretion of the father no longer belongs to him, but that that judgment and discretion, so long as he lives, is to be exercised by a Court of Justice." * * "That your Lordships are to place in a Court of Justice the right to decide upon the manner in which a father shall administer his estate and property between his eldest son, his creditors, his younger children, and all others to whom he owes a natural and moral obligation, during the rest of their joint lives, is a proposition I cannot hold; and if I found it decided in any case that had a direct application to the present, I do not think there is anything that compels us to adopt that decision. I think, if such a law existed, it ought not to be suffered to endure a moment longer, but it must be corrected by the Legislature." Lord Redesdale says: "The consequence of the decision of the Court of Session would be to give a ground for every child in Scotland to call his father to account for

"not making him a sufficient allowance. "If this is the law of Scotland, I should be "sorry to be under the dominion of the law "of Scotland. But I take it not to be so."

I refer to this case because it shows the immense mischief that would result if we were to disregard the distinctions which Hindoo lawyers have drawn on the subject under consideration.

In my opinion according to Hindoo law as current in Bengal, the obligation of a father-in-law to maintain out of his own resources the widow of his deceased son, is a mere moral obligation. If she resides in the house of her father-in-law and is an infant, and for that or other reasons is unable to maintain herself, there may be and probably is—both according to Hindoo Law and according to natural law, equity, and good conscience—a legal obligation on the part of the father-in-law, who has taken upon himself the care of her person and the charge of entertaining her as a member of his family, and on whose protection she is dependent, to provide her with food and the actual necessaries of life.*

But in my opinion the father-in-law has a right to determine for himself as to the manner in which that obligation shall be discharged; and the Civil Courts not only ought not to have, but have no jurisdiction to interfere with his discretion.

Even if we assume that the father-in-law is under any legal obligation to maintain a son's widow and provide her with food and raiment if she resides in his house, if she will not accept what he is willing to give, he is not bound, in lieu of maintenance, to make her a money allowance so as to enable her to reside in another family.

In my opinion the appeal must be dismissed with costs.

Phear J. (L. S. Jackson, and Hobhouse, JJ., concurring.)—The plaintiff alleges in her plaint that in the year 1260 she was married to Durponarain Doss, deceased, the youngest son of the defendant, her father-in-law; that, subsequently, owing to the plaintiff's ill-luck, her husband departed this life of the 13th Assin 1266, and that, after this sad event, she began to receive at the hands of the defendant and of his wife and daughters, various ill-treatment and reproaches, so much so that, unable to stay in the house any longer, she went to reside at her father's house; that she more than once sent word to her father-in-law, asking him to settle on her, according to his circumstances in life, a sum for her maintenance and for the performance of her religious rites, but her request was not complied with by him; that at last, on the 23rd Srabun of the current year, when a similar request was repeated to him through the plaintiff's father, he dismissed it with an angry refusal. The plaintiff says that this is her cause of action, and upon the basis of it she sues for arrears due to her for maintenance and religious rites; and she also prays the Court to make an order for the receipt by her in future of a monthly sum of Rupees 35 from the defendant and his estate for the same object.

The defendant answers that he is not legally liable to the plaintiff for anything; that her age at the time of marriage with his son was only five years, and since the celebration of that event she has been in his (the defendant's) house only on two occasions, namely, once on the day of her husband's death to perform his funeral obsequies; and, secondly, on the day of his shradh to perform that ceremony; that, excepting on those two occasions, the plaintiff never came to the defendant's house even for a day, although he repeatedly requested her to do so; that she has, without his consent and in disregard of his orders, neglected to render him the service due to his old age, and chosen to take up her abode under another's roof; and that, consequently, he is by no means bound to make her any cash payment for her maintenance.

The plaintiff does not pretend that the defendant will not maintain her at his own house, nor does she go so far as to seriously contend that the conduct of the defendant, or of the members of his family, towards her has been such as to entitle her to refuse to reside under his roof.

In truth no issue is raised on the facts of the case, and the sole question for the Court is, "whether the plaintiff, not finding it "agreeable to live in her father-in-law's "house, can legally claim from him a money "allowance by way of maintenance to enable "her to live elsewhere."

The argument of the plaintiff's pleader may be concisely summarized as follows:—

That all the injunctions of the old Hindoo sages constitute positive law, except so far only as Jimuta Vahana for the School of

* Compare The King *v.* Friend, Russell and Ryan's Reports, p. 20.

Bengal sets apart some few precepts as laying down merely a moral duty and not a legal obligation. That the duty of maintaining the different members of the family is everywhere throughout the Shastras inculcated upon the head of the family, and does not fall among Jimuta Vahana's exceptions; it has therefore the force of law, and as such has been recognized by the leading English text-writers, Macnaghten, Strange, &c. That the Vyavastas of the Pundits and the decisions of the late Sudder Court have always supported the legal character of the duty; and, finally, that the son's widow is admittedly a member of the father's family.

This argument is very plausible at first sight, but does not bear being very closely looked into. Indeed, I think that it fails fatally for the plaintiff at its very root. It seems to me that it cannot be doubted there are plenty of instances, other than those by Jimuta Vahana, in which the old writers clearly intended to enjoin a moral duty as distinguished from a legal obligation; and in my opinion, the subject of maintenance affords some of the most conspicuous examples of this.

Of the texts relied upon by Baboo Unnoda Pershad, the strongest are perhaps the following: "The ample support of those "who are entitled to maintenance is rewarded with bliss in heaven, but hell is the "portion of that man whose family is afflicted with pain by his neglect; therefore let "him maintain his family with the utmost "care"—*(Menu).*

"Even they who are born or yet unborn "and they who exist in the womb require "funds for subsistence; the deprivation "of the means of subsistence is reprehended"—*(Narada).*

"A man may give what remains after "the food and clothing of his family; the "giver of more, who leaves his family "naked and unfed, may taste honey at first, "but shall afterwards find it poison"—*(Vrihaspati).*

Many more of a similar tenor might be cited, which reiterate in words more or less emphatic the doctrine, that it is incumbent upon every man to maintain the dependent members of his family.

There are also, no doubt, other passages to be found where certain specified members of the family are declared to have a legal claim upon the family property upon a disposition of it taking place, but these are not applicable to the present case for reasons which I shall presently mention, and therefore I omit for the moment to notice them.

Now it seems to me very plain that the writers who enunciated the foregoing precepts, and their like, only desired in them to lay down moral principles for the guidance of the head of the family. The only sanction appealed to is of a religious and prospective character.

The civil power is in no way brought under notice, although it may be remarked the same authors knew well enough how to use that power, if necessary, for the enforcement of their commands. Indeed it often enough happens that precepts of a general character uttered by the Rishis are accompanied by directions that the King or Sovereign power should punish the infraction of them. But nothing of the sort occurs here. In these places the authors are not dealing with rights of individuals; they do not pretend to define anything of the nature of a right, and they give no hint of a remedy by which any right could be asserted. I repeat that it seems to me clear, they were here simply prescribing to the head of the family principles which he should observe in his government, and were not intending to give a foot-hold for the intrusion of the civil power within those inner limits from which it has been undoubtedly for ages the policy of the Hindoo social system to exclude it.

It may well be, on the other hand, that the head of the family cannot lawfully eject a dependent member from his circle without reasonable cause. Possibly the defendant is legally bound to afford the plaintiff subsistence under his roof; she on her part conforming to his orders and working for the common fund, if he should think this necessary. If so, no doubt the Civil Court would, in the event of default on his part, find the means of compelling him to perform his duty. But this is not the plaintiff's case. She claims simply by way of maintenance and on the bare right to be maintained without other consideration, an annuity to be paid out of the father's property in which her husband, had he been alive, would have had no interest whatever.

If then her suit be well founded, it follows that a son's widow has a legal right to a share in the father's property during his lifetime, while her husband before his death had not such a right.

Every Hindoo lawyer will feel that it needs very strong authority to support such a distinction as this!

It appears to me, however, that the matter is altogether bare of authority, except so far as the texts which I have quoted or referred to afford any, and I have already said that in my opinion they do not. I am not speaking regardless of the additional texts which are appealed to by Mr. Justice Loch in his elaborate judgment, but it seems to me a mistake to treat them as having application to the claim put forward by the plaintiff in this suit. Without perusing them in detail, I think I may without error say that they all have reference to the terms upon which *partition* or *inheritance* of property is to take place.

Mr. Justice Loch concludes from the passages quoted by him (particularly, as I gather, a text of Catyana and the commentary of Jaganatha upon it in page 600 Stokes's edition of Colebrooke's Digest, Vol. 2) "that the maintenance of a Hindoo "widow is not merely a moral obligation, "but a charge on the inheritance." This is no doubt true if the word *inheritance* means the inheritance of her husband; but even then it does not, I apprehend, so much flow from the texts quoted, as from other portions of positive law laid down by the old law-givers. Yajnavalkya, for instance, commanded that a husband should maintain his wife, and that, if he did not keep her in his own house, he should give her a third part of his wealth, or, being poor, should provide her with maintenance. And, on the death of the husband, no one will question that she becomes entitled by the Hindoo Law which is current in Bengal to the whole inheritance in the event of there being no issue, or otherwise to a share by way of maintenance. Nothing can be clearer than the rights of a Hindoo widow by positive law as against the inheritance of her husband. But I know of no authority which *specifically* gives her the like rights or any other rights as against the property of her father-in-law.

So, again, sons and others who by reason of infirmity, &c., are disqualified from taking the share in an inheritance which would otherwise come to them, are directed to be maintained by those to whom their shares thus go over, and a direction of this kind, given by the law-giver when prescribing the mode and condition of inheriting, is, I think, rightly construed as amounting to the creation of a charge upon the inheritance. No circumstances of this nature are attendant upon the general texts, which alone can be made to bear upon the question of maintenance by the father of the son's widow. It seems to me that the two classes of cases are quite distinct, namely, those in which the claimants of maintenance have expressly given to them the right of recourse to a particular fund, and those in which no such rights have been expressly given. It cannot be logically inferred that because *some* dependent members of a family, whom the head is declared morally bound to maintain, are entitled by *express* provisions of the law to make good their claims against his estate as so many charges upon it, therefore *all* dependent members, whom he is declared morally bound to maintain, have the same rights, even in those instances where such express provisions are absent. But this, it appears to me, is exactly the mistake in reasoning which has been committed in this case; and, without it, the plaintiff's claim cannot get any real support from the old Hindoo law-givers.

The English text-writers, as Macnaghten and Strange, naturally do not carry the matter further, for they only profess to exhibit a compilation of the law made from the old Sanscrit authorities as expounded by the Pundits.

Sir T. Strange's words are most general, and seem to me in no way calculated to support the conclusion which Mr. Justice Loch draws from them. Undoubtedly they express very emphatically that "maintenance "by a man of his dependents is with the "Hindoo a primary duty."

The question before us is, whether the obligation to maintain is of such a character as to give the dependent, who is the object of it, a legal claim to be paid an annual sum out of the supporter's estate. Mr. Justice Loch's quotation from Strange is in the text preceded by the sentence, "the obligation to maintenance as "between parent and child is eventually "mutual."

If, therefore, the obligation amounts to a pecuniary charge in the one case, it must in the other; but I have never yet heard it argued that by Hindoo Law a father in indigent circumstances is entitled to a money-allowance from the son payable out of the

latter's self-acquired property. I cannot myself think that Sir Thomas Strange intended to do more than to give the doctrine of the Hindoo moral law on a social and domestic duty of high importance; and I am unable to construe his words into an enunciation of a legal right of recourse to a specified property. Macnaghten's text scarcely bears upon the point under discussion, and has not been appealed to; but several of the cases given by him in his Hindoo Law have been cited by Mr. Justice Loch in his judgment, and by the pleader of the appellant before us. I will not treat these in detail now. It is sufficient, I think, to say of them that in each the claim put forward for determination was a claim by a widow to be held a co-sharer with her deceased husband's brothers or others in property in their hands *after* the death of the father. This claim was in every instance negatived, but at the same time it was said that she was entitled to proper "maintenance."

The widow was in fact told: "You have "mistaken your rights. You are not entitled "to any share of the property. The utmost "you can ask is to be maintained," and in this view those precedents are really adverse to the present plaintiff's claim, for they impliedly declare that the son's widow has no proprietary rights whatever against the deceased father's property. Indeed, it is expressly said in one of Macnaghten's precedents (one not quoted before us or by Mr. Justice Loch) that the widow is only entitled to be maintatned in the joint family of her late husband, and cannot by law claim a money-payment of the nature of alimony (2 Macnaghten's Hindoo Law, p. 111, Case 4).

Of the seven decisions of the Sudder Dewanny Adawlut which have been brought to our notice in the argument, only one appears to me in any way to favor the plaintiff's case.

This is the decision reported in 1848, Sudder Dewanny Adawlut, page 491. It appears that in that case the Principal Sudder Ameen had taken a bywasta from the Pundit of the division, which declared the widow of a son dying before his father entitled to a maintenance proportionate to the amount of the father-in-law's property. The Sudder Dewanny Adawlut did not actually decide whether this was good law or not; its judgment was sought upon other points only, and in giving it Mr. W. Jackson said: "The "plaintiff's widow is admitted by the Pun-"dit's bywasta to have a legal right to "maintenance under the Hindoo Law from "the family estate." Seemingly, the only question brought before the Court was whether this assumed right had been displaced by a special agreement, and, if not, at what amount should the maintenance be assessed.

In 3 Select Reports, page 33, it is reported that *three* sons took the inheritance on the death of their father, continued to live jointly, and with them lived the widow of a brother who had pre-deceased his father. The three brothers having died, a suit for partition took place, and the property was divided among their respective sets of heirs, one-third going to each set. The widow, who was a party, was declared entitled to nothing but *food and raiment*. Her claim was accordingly dismissed, and no charge of any kind in her favor was established against the estate.

In the same volume, page 223, two brothers are represented as having lived together in joint enjoyment of property under the Mitakshara Law. One died leaving a widow, and his share of course went to the surviving brother. The Court held (no doubt rightly) that the brother, thus taking by survivorship the share of the property from which the widow was legally entitled to obtain maintenance at the hands of her husband during his life, was also bound to maintain the widow. In other words, he took the property with its burden. The Court does not support its judgment by the statement of this reason, but I think it affords the true explanation of the decision.

In 4 Select Reports, page 19, the widow's claim to share in the deceased father's estate was *dismissed*, because her husband had died in his father's lifetime. She was at the same time told that her claim should have taken the form of a claim for maintenance, and she was left the option of suing for it in another action. So that here no decision was judicially come to as to her right to maintenance, and still less was there any declaration either that she was originally entitled to make a money-claim against the father, or that she was now entitled to proceed against his estate.

In 1850, Sudder Dewanny Adawlut, page 422, the report is so scanty that no conclusion either way can be drawn from it. Also nothing is said as to whether the deceased husband left property or not.

The like observation may be made with regard to the case reported in 1852, Sudder

Dewanny Adawlut, p. 796; and it may also be added that there the father-in-law *expelled* the widow from his family, and so refused to give her even *food and raiment* under his own roof.

In 1858, Sudder Dewanny Adawlut, 1220, no decision was delivered by the Court as to the right to maintenance or as to the circumstances under which it was put forward in that case. It was only determined that the widow did not forfeit the right which she had by residing away involuntarily, and to this effect only, do the decisions reported in 2 Weekly Reporter, p. 134, and 6 Weekly Reporter, p. 37, and the judgment of the Supreme Court in the case of Judomoni Dossee, as I read them, lay down the law. Probably at this date it would hardly be contended that, if the plaintiff is entitled to a charge upon the father-in-law's property at all, she loses the right to it merely by adopting such place of residence as is most agreeable to her.

I have now, I believe, reviewed all the authorities which have been put forward in support of the plaintiff's right to succeed in this suit. The result to my mind is that the claim which the plaintiff now sets up as a legal right has no basis in the precepts of the old Hindoo law-givers, and has not been shown to have been ever judicially affirmed by the Superior Courts of this country.

On the other hand, there is certainly one decision of this Court, *viz.*, the decision which is reported in 2 Hyde, p. 103, which declares that a right such as that which is now sought to be established has no foundation in Hindoo Law.

It seems to me, therefore, that the view taken by the Chief Justice and Mr. Justice Macpherson is entirely correct. I am quite of opinion, notwithstanding the earnest pleading of Baboo Annoda Persaud to the contrary, that the Hindoo law-givers did intentionally often enjoin moral duties as distinct from legal obligations, and I agree with the Chief Justice that we must not convert these moral duties to legal liabilities.

The mischief which one might do, as the Chief Justice remarks, by want of care in this respect is very great; for instance, if we upheld the right of *every* widow of *every* son who died during his father's lifetime to compel the father to pay her out of his property a money-allowance in lieu of maintenance, can any one fail to see that we should not only sap the very foundation of the Hindoo family system, but should impose upon the father a burden most unreasonable, if not impossible for him to bear.

I may add that the Privy Council in a late judgment has discountenanced the supposition that every thing uttered by the old law-givers remains to this day so much positive law. Their Lordships say (10 Weekly Reporter, Privy Council, 21): "The "duty, therefore, of a European Judge, "who is under the obligation to administer "the Hindoo Law, is not so much to inquire "whether a disputed doctrine is fairly dedu-"cible from the earliest authorities as to as-"certain whether it has been received by "the particular school which governs the "district with which he has to deal, and "has there been sanctioned by usage."

I express no opinion as to whether any one taking by inheritance property out of which a dependent member of the late owner's family had in fact been receiving maintenance up to the time of the deceased's death, would or would not take it charged with the continuance of that maintenance. I apprehend that a question of this kind would in every case depend upon the facts. I also say nothing as to the right of a dependent member of a family to compel the head to afford food and raiment within the family-house; or, in the case of forcible exclusion therefrom, to make a money-payment in lieu of such maintenance. I confine myself strictly to the issue which I mentioned at the outset as being the issue of law on which the plaintiff's suit depends; and on that issue I think the plaintiff fails to make out her right. Accordingly, it appears to me that the decision which is now appealed against should be affirmed with costs.

E. Jackson, J.—I also am of opinion that the plaintiff is not entitled to obtain maintenance from her father-in-law in the shape in which she claims it, *i. e.*, as a money-allowance. The plaintiff appears never to have resided with her father-in-law as a member of his family. Her husband died while she was very young, only 6 years of age; and with the exception of two or three days immediately after the death of her husband, she has always resided with her own parents. As to any ill-usage she alleges she may have received, it is difficult to credit the deposition of a girl of 11 years of age relating what occurred when she was only 6 years of age. The plaintiff having, therefore, always lived separately

from her father-in-law, and there being no ancestral property in the family, I cannot see how she can claim a money-allowance from her father-in-law. It may be that, if she had always lived as a member of her father-in-law's family, he could not turn her out of doors in a destitute condition, and, if he did do so, she might compel him to give her food and raiment and house-room. All the texts which have been quoted for the appellant seem to me to go no further than this. And it may even be that, if the plaintiff had, after living as a member of her father-in-law's family, been obliged by ill-usage to leave it, that then she would be entitled to a money-allowance in lieu of the food and raiment which the father-in-law was bound to give to her. But it is quite clear to me, upon the statement of the plaintiff herself, that she never has been a member of her father-in-law's family, and that even the treatment she alleges she received contains no sufficient ground for her leaving her father-in-law's house. The plaintiff has always been in fact a member of her own father's family, and has always been maintained by her own father, and is still being maintained by him. I am not satisfied that she is in any way in want of actual maintenance. Indeed, she does not ask for it. She asks that, while she is being maintained by her own father, her father-in-law may be required to pay her a monthly allowance in money. No text has been quoted which in my opinion supports any such claim, and I would therefore dismiss the plaintiff's suit with all costs.

Glover, J.—I also am of opinion that this appeal should be dismissed. It appears to me that all the authorities quoted have reference to cases where an estate is taken by inheritance, and not where an estate is made by individual exertion. An estate descends *cum onere*, and, amongst its obligations, is the maintenance of those who are by Hindoo Law excluded from the inheritance; but there is a vast difference between an estate that comes to a person by the mere accident of birth, and one that is acquired by his own skill and labor; and no precept of Hindoo Law has been quoted to show that the founder of his own fortune is under the same obligations as he who inherits an estate.

It is admitted in the present case that the respondent succeeded to no ancestral property, and that whatever means he has have been self-acquired.

And, as it cannot be doubted that by Hindoo * Law he might give that property away absolutely at his pleasure, he is not bound to share it with his sons, and *à fortiori* not with his sons' widows.

* Menu, Jugnavulkya, Vyavas. Durp. 363.

But, if it were conceded that there was an obligation on a father-in-law to maintain the childless widow of his son, that obligation would not, I think, be binding in law, nor give the widow a right to maintain an action against her father-in-law.

In all the Sections of the Dyabhaga, where the maintenance of those excluded from inheritance is set forth, the nature of the penalty for non-performance is spiritual, rather than temporal. The offender is threatened with condign punishment in "Hell," but no mention is made of secular interference or of an appeal to the king on behalf of the family.

† Dyabhaga, Chapter 2, Section 23.

And this is the more remarkable, as in many other cases a distinct temporal penalty is prescribed, and, if the non-performance of the duty of maintaining those who were excluded from inheritance had been a wrong punishable by law, doubtless the fact would have been so stated: instead of that, the offender is left to receive his punishment in the other world.

The case reported in 2 Weekly Reporter, p. 134, did not (as appears to be supposed) decide the widow's right to maintenance from her father-in-law. That point had already been decided by the Lower Courts, and the only question before the High Court in special appeal was, whether the widow could demand that maintenance, without living with her husband's family—a question which there is now no necessity for deciding.

I would dismiss this appeal with costs.

d

RULINGS OF THE HIGH COURT IN CRIMINAL CASES.

The 2nd June 1868.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Breach of the peace—Sections 62 and 318, Code of Criminal Procedure.

Reference to the High Court, under Section 434, Code of Criminal Procedure, by the Sessions Judge of Patna.

Luteef Hossein, *Prisoner.*

It is not necessary that an order issued by a Magistrate under Section 62 of the Code of Criminal Procedure, whereby a breach of the peace was prevented, should be supplemented by a proceeding under Section 318 of the same Code.

Glover, J.— In this case it appears that the Deputy Magistrate of Behar, acting under Section 62 of the Criminal Procedure Code, directed one Luteef Hossein to abstain from building a certain house, on the ground that, by so forbidding Luteef Hossein to build, he (the Deputy Magistrate) prevented an affray between Luteef and his zemindar.

The Judge admits that this order was within the Deputy Magistrate's power, and was not illegal; but he considers that he ought to have supplemented it by a proceeding under Section 318 of the Code, and that his omission to do so makes his original order incomplete and improper, he being bound to do as much as the law allowed him "to determine the right to the use and enjoyment of the property."

It appears to me that we have no power to interfere in this matter. Section 62 of the Procedure Code gave the Deputy Magistrate authority to restrain the petitioner from building until the right to the land had been determined by a Civil Court; and there is nothing in the act which enjoins further proceedings under Section 318.

Indeed, it is not easy to see to what purpose proceedings could have been taken under that Section, for the Deputy Magistrate would then have had to determine, not, as the Judge says, "the right to the use and enjoyment of the property," but the question, "which party was actually in possession," and this is a matter which has never been, and is not now, disputed.

The petitioner is in undoubted *possession* of the land on which he is erecting the house, and it is clear, therefore, that, under Section 318, the person claiming to be the owner of the soil could have no remedy, but would have been forced into the Civil Court.

It is not denied that the land on which the petitioner seeks to build forms part of the zemindar's estate.

It appears to me, therefore, that there is nothing illegal in the Deputy Magistrate's order, and that he was not bound to go beyond the scope of Section 62.

Kemp, J.—I entirely concur.

The 2nd June 1868.

Present:

The Hon'ble J. B. Phear and C. Hobhouse, *Judges.*

Procedure—Credible information—Summons to keep the peace—Bond to keep the peace—Section 282, Code of Criminal Procedure.

Reference to the High Court, under Section 434 of the Code of Criminal Procedure, by the Sessions Judge of Tirhoot.

Nursingh Narain, *Prisoner.*

A summons, under Section 282 of the Code of Criminal Procedure, to show cause why the person summoned should not enter into a bond to keep the peace, can

legally issue on information, if it be credible, contained in a case which was brought against the person summoned for illegal assembly, of which he was acquitted. The order directing that the defendant should enter into the bond cannot, however, be made until the Magistrate has taken fresh evidence, properly given, on the appearance of the accused before him (or of his agent), and before he has adjudicated judicially on such evidence that it is necessary for the preservation of the peace that a bond should be taken.

Phear, J.—THIS is a reference made to this Court by the Sessions Judge of Tirhoot under Section 434 of the Criminal Procedure Code, in which he says that he transmits to this Court the record of the case of Government against Baboo Nursingh Narain, with the recommendation that the final order upon the defendant in that case to give recognizance to the extent of 5,000 rupees should be quashed. The Judge thus states the case: "Upon a memorial of the Assistant Magistrate of Tajpore, dated the 18th of October 1867, stating that, though the charge of illegal assembly brought against Baboo Nursingh Narain possibly had broken down, and he had had to acquit the defendant, he was of opinion that Baboo Nursingh Narain ought to be bound down to keep the peace. Accordingly a summons was issued on the Baboo under Section 282 of the Criminal Procedure Code, and he was eventually bound down to keep the peace." The Judge further says: "I find that the summons served upon Baboo Nursingh under Section 282 of the Criminal Procedure Code sets forth as the credible information received by the Magistrate, &c., &c., the record of a case of complaint of one Mool Chund Pandey in the Court of the Assistant Magistrate, Tajpore, *versus* Baboo Nursingh Narain, and also the Assistant Magistrate's opinion that the Baboo should be bound down. But upon this I observe that Mool Chund's case has been dismissed as not proved. Therefore, this would be no ground for calling upon the Baboo to enter into a recognizance either under Section 280 or 282, and obviously the Assistant Magistrate's opinion cannot be called credible information. I consider, therefore, that the Baboo ought to be released from his recognizance."

We think that the Judge is in error in thinking that the record in the case of Mool Chund Pandey *versus* Baboo Nursingh Narain does not afford credible information within the meaning of the Legislature, quite sufficient to justify the Magistrate in issuing a summons under Section 283. That record contains the depositions on oath of several witnesses in the case who appear to state as facts matter which would certainly, if credible, lead to a conclusion that a breach of the peace might be likely; and we think that information so conveyed to the Magistrate is credible information. Consequently, we are of opinion that the recognizances are not void for the reasons which the Judge suggests in his reference. However, it has been brought to our notice by the Advocate who has argued the case before us on behalf of the accused, that, after the issuing of the summons, and on the appearance of Nursingh Narain in answer to the summons, there was no further evidence taken bearing upon the subject of the summons. Now, although Section 282 of the Criminal Procedure Act authorizes the Magistrate to issue a summons, that is, to call the party before him upon the foundation of any information that can be called credible information, still he cannot make the order that the defendant should enter into a bond to keep the peace until he has adjudicated judicially that he is satisfied that it is necessary for the preservation of the peace to take such a bond from the defendant. This is provided by Section 288, and, taking that Section in connection with the one immediately preceding 287, it is perfectly clear that this adjudication must be come to upon evidence properly given on the appearance before the Magistrate of the person who has been summoned, or of his agent in the case where he is permitted to appear by agent. Two or three decisions upon the analogous enactment, Section 318, namely, Vol. 5, Weekly Reporter, Criminal Rulings, page 14, and 6 Weekly Reporter, Criminal Rulings, page 61, and others, have laid down that an adjudication by a Magistrate of his being satisfied that a breach of the peace is likely to occur must be based upon legal evidence, and be duly recorded. I may say that it is obvious, and unless this be so the result of the provisions of Section 282 and Section 288 would be that the Magistrate might really inflict a very heavy fine, and commit to prison for default of payment thereof without the observance of the ordinary procedure, and the taking of evidence in the manner which is considered by the legislature to be necessary, and is therefore strictly provided for all other cases where an accused person is made liable to a penalty, and without there being even the security afforded by the opportunity of appeal.

On the whole, I think there cannot be any doubt, even though the words of this Section with those of the one I have last

referred to do not expressly so provide, that the adjudication of a breach of the peace being likely to occur, which must be made by the Magistrate under Section 288 of the Criminal Procedure Act before he can take a bond from the person accused, must be based upon legal evidence, and must be distinctly stated as a judicial finding of the Magistrate as in all other criminal cases. I have already said that the learned Advocate who has argued the case for the prisoner has pointed out to us that there does not appear in the papers before us any trace of evidence having been given when the accused appeared before the Magistrate in obedience to the summons. Nor is there evidence in the *quasi* record sent up to us, which can be properly said to be the taking place of an adjudication by the Magistrate that he was satisfied upon the evidence that a breach of the peace was likely to occur. This being so, I think that the order directing the accused Baboo Nursingh Narain to enter into a bond to keep the peace was illegal as not having been duly made, and therefore that it ought to be quashed, and the accused released from his recognizance, if he has entered into them, or discharged from custody, if he has been put into prison.

The 2nd June 1868.

Present:

The Hon'ble F. B. Kemp and F. A. Glover, *Judges.*

Appeal.

Reference to the High Court under Section 404, Code of Criminal Procedure, by the Sessions Judge of Rajshahye.

Nuggurdi Paramanick, *Accused.*

Having regard to Sections 46 and 411 of the Code of Criminal Procedure, it was held that, where the sentences passed on an accused by a Magistrate are awarded for separate offences committed on different occasions, there is no appeal to the Sessions Judge by reason of the two sentences, each of which was within a limit of one month, having been passed at the same time, and being together in excess of that limit.

Glover, J.—In this case one Nuggurdi Phatuk was charged with being a member of an unlawful assembly and with criminal trespass under Sections 143 and 447 of the Penal Code; and, whilst the case against him was pending, he brought a counter-charge of criminal trespass against his accuser.

Both cases were disposed of on the 29th of February 1868. The charges under Sections 143 and 447 were held to be proved against Nuggurdi, whilst his counter-charge was dismissed as false, and he was further convicted of bringing a false complaint under Section 211, Penal Code. Nuggurdi was punished in each case with one month's imprisonment; and the question is whether these two sentences are to be taken as forming one and the same sentence, and, as such, appealable to the Sessions Judge.

The Magistrate at whose instance this case has been referred to us under Section 404, Code of Criminal Procedure, holds that, as the two convictions were for offences committed on entirely different dates and in different places, the punishments awarded necessarily formed separate and distinct sentences, and being each within the limit of one month were not appealable.

The Sessions Judge, on the other hand, following a precedent of the Agra High Court, holds that the two sentences form together one ground of appeal, and being beyond the limit are appealable to his Court.

The Judge has not referred us to the precedent on which he relies, nor have we been able to find it; but we do find one of this Court, dated the 6th August 1866, 6 Weekly Reporter 51, the Queen *versus* Morullee Sheikh, in which the contrary principle is distinctly laid down.

In support of the Judge's ruling it is contended that the words of Section 46, Code of Criminal Procedue, suppose that any number of different penalties imposed for different offences tried at the same time make up only one sentence; but there is nothing in the Section to bear out such a construction. On the contrary, the Court convicting a prisoner of several offences is bound to sentence such prisoner to the *several* penalties prescribed by law, the one penalty commencing after the expiry of the other; and the only limit (under a certain proviso) is the extent of punishment which the particular

Court before which the cases are tried is competent to inflict. The object of the Section is to award a specific punishment for each offence of which an accused person may be proved guilty when all the charges against him are tried together; so that, in case some one or other of the charges breaks down on appeal, the amount of punishment to be remitted may be known.

Section 411, Code of Criminal Procedure, lays it down most clearly that in all cases a sentence of one month's imprisonment passed by a Magistrate exercising full powers is not appealable; and if it had been the intention of the Legislature to circumscribe a Magistrate's power in this respect, and by lumping together two sentences, each within the limit (because they happened to be passed at the same time) to make up one whole sentence, which would be beyond the limit, and therefore appealable, it would no doubt have said so. The principle laid down by the Judge would be applicable to cases where an accused person has been punished separately for what are really parts of one and the same offence, and not to cases like the present, where the offences are essentially different and were committed at different times and places.

We think, therefore, that the Magistrate was right, and that no appeal lay to the Judge. The accused should be committed to jail to undergo the remaining portion of his sentence.

The 2nd June 1868.

Present:

The Hon'ble J. B. Phear and C. Hobhouse, *Judges.*

Jurisdiction—Absconding—Bail—Surety—Punishment.

Reference to the High Court under Section 434, Code of Criminal Procedure, by the Magistrate of Backergunge through the Sessions Judge of the District.

Tajvomuddy Lahoree, *Prisoner.*

A Deputy Mngistrate not in charge of a division of a district has no jurisdiction to try a case under Section 174, Penal Code, which originated under Section 68, Code of Criminal Procedure, and which was not referred to him by the Magistrate of the district.

There is nothing in Section 219, Code of Criminal Procedure, which prevents an accused person who has forfeited his bail-bond by default of appearance, from being proceeded against under Section 179 of the Penal Code, notwithstanding that his surety has paid the penalty mentioned in the recognizance.

Case.—One Tajvomuddy Lahoree, defendant in a case under trial by Deputy Magistrate Dino Bundho Moulick, forfeited his bail-bond by reason of default of appearance. The surety was compelled to make payment of the penalty mentioned in the recognizance, and the Deputy Magistrate applied to, and received the permission of, the Magistrate to try Tajvomuddy Lahoree under Section 174, Indian Penal Code, on a charge of "absconding from the Court while ordered to attend it." The Deputy Magistrate has found him guilty, and sentenced him to simple imprisonment for one month.

I apply that this sentence may be set aside on two grounds:—

1st.—That the Deputy Magistrate acted without jurisdiction. The case was not referred to him by the Magistrate "on complaint preferred directly to the Magistrate, or on the report of a Police Officer." It originated under Section 68, Criminal Procedure Code, and it could not, therefore, be judicially enquired into or determined by him, as he was not the Magistrate of the district or a Magistrate in charge of a division of a district.

2nd.—The sentence is illegal, and the law, Section 219, Criminal Procedure Code, provides a specific punishment for default of appearance of the person executing a personal recognizance, *viz.*, forfeiture of the bail-bond. Any additional punishment for the same offence is apparently not contemplated.

Judgment of the High Court.

Phear, J.—We think that the *first* objection made by the Magistrate in his report to the conviction of the Deputy Magistrate is good. We think that the Deputy Magistrate had no jurisdiction to entertain and decide the case for the reasons which the Magistrate has given in his report. We think, however, that the *second* objection put forward by the Magistrate is not tenable. In our opinion, there is nothing to prevent the accused person himself from being proceeded against under Section 179 of the Indian Penal Code, notwithstanding that his surety had been already made to pay in consequence of the default of appearance of the accused person; but, as the first objection is good, the conviction must be quashed, the sentence set aside, and the prisoner, if still in custody, must be discharged.

The 6th June 1868.

Present:

The Hon'ble G. Loch and F. A. Glover, *Judges.*

Charge—Registration Act—Civil Court—Section 170, Code of Criminal Procedure.

Criminal Appellate Jurisdiction.

Queen *versus* Ramdharry Singh and another.

Committed by the Magistrate, and tried by the Sessions Judge of Bhaugulpore, on a charge of abetment of forgery, &c.

A Registrar under Act XX. of 1866 is competent under Section 95 to institute a prosecution for any offence under that Act.

Section 170, Code of Criminal Procedure, refers only to cases where a forged document has been put in evidence in a Civil or Criminal Court; in other cases, a Magistrate in competent *proprio motu* to enquire into allegations of forgery, and no sanction under Section 170, Code of Criminal Procedure, is necessary.

Glover, J.—THE points taken in this appeal are:—

(1.)—That there has been a grave irregularity in the trial of the case, which has prejudiced the prisoner Ramdharry Singh.

(2.)—That the Registrar had no power to order the institution of proceedings against the prisoners.

(3.)—That the institution of the present charges by order of the Registrar was illegal, the Registrar having no power to make, and not having made, such charges; and that the Magistrate could only take action upon such charges as the Registrar was competent to make.

(4.)—That the Magistrate, not having committed on such charges as the Registrar was competent to make, could not interfere further in the matter, except under the provisions of Section 170, Code of Criminal Procedure, he having no power to enquire into cases of forgery; and, lastly, that the evidence for the Crown is discrepant and unreliable.

The irregularity complained of in the first ground of appeal is that, although Ramdharry Singh was accused and convicted of abetting the forgery of six separate deeds, only one general charge was made, instead of six separate ones.

The prisoner was accused of abetting six different forgeries, no doubt; but as all the forged documents were attempted to be made use of at one and the same time; as they were all of a similar description, and were all put forward for a similar purpose; and as, moreover, the prisoner was in no way prejudiced at his trial by the way in which the charge was framed, inasmuch as his defence in all six cases was one and the same, there appears to us no reason for interference.

With regard to the 2nd point, I observe that the Registrar was perfectly competent, under Section 95 of Act XX. of 1866, to institute a prosecution for any offence under that Act; and, although there is no specific notice in the Registrar's order as to what offence the commitment was made, there can be no doubt, from the Sub-Registrar's report, on which the Registrar acted, that the accused were held to come under Sections 93 and 94 of the Act, the abetment of false personation that is to say.

It is, however, of little importance to fix exactly upon the Sections under which the Registrar sent the case to the Magistrate, as that official did not commit the accused to the Sessions on any charge cognizable under Act XX. of 1866.

It may perhaps have been an irregularity of procedure that both Magistrate and Sessions Judge should have treated the case as one sent up by the Registrar, whereas the trial proceeded on charges which the Registrar was not competent to make. The error, however, if it were one, is of no importance, for it did not prejudice the accused in any way.

With regard to the 3rd and 4th points taken by the appellant's pleader, it is argued that, if the charge on which the Registrar committed the accused to the Magistrate fell through, or were not taken up, the Magistrate had no further power to move in the matter, unless with the sanction of a Civil

Court, under Section 170, Code of Criminal Procedure, which sanction was not given.

This last argument is founded on a mistake. Section 170, Code of Criminal Procedure, refers only to cases in which a supposed forged document has been put in evidence in some proceedings in a Civil or Criminal Court, and is altogether inapplicable to a case like the present. If the Magistrate had no power to go on with the case *proprio motu*, Section 170, Code of Criminal Procedure, would not give him that power.

And I do not know of anything in the law, which in cases of forgery, other than where the forged deeds have been produced in evidence in a Civil or Criminal Court, does or ought to prevent a Magistrate from making a preliminary enquiry, and afterwards committing to the Sessions persons accused of these offences on such particular charges as he may deem capable of proof, even if he omits the particular one on which the case was originally sent to him. Were it otherwise, there could be no such thing as a private prosecution for forgery.

In the present case there was no reason, apparently, why the accused should not have been charged with abetment of false personation as well as with the other offences—a charge which would have come under Sections 94 and 95 of the Registration Act. But it was in the discretion of the Magistrate to do as he thought proper, and omit such charge if he thought it necessary.

On the merits of the case I have heard the evidence, and have fully considered the arguments of the prisoner's Counsel, and I think that the conviction should stand.

Nor can I consider favorably the appellant Ramdharee's application *ad misericordiam* for a remission of some part of his punishment. The sentence passed upon him (10 years' rigorous imprisonment) is undoubtedly very severe, but his crime was of a very serious nature, and, had he succeeded in getting the bonds through the Registry office undiscovered, he would have held both the property and the persons of his six alleged debtors at his mercy, without the possibility of any further enquiry being made into the justice of his claim against them.

The appeals must be rejected.

Loch, J.—The only point which requires particular notice is, as urged by the prisoner, that the Magistrate had no authority to commit him upon grounds other than those indicated by the Registrar, and the case of Dwarkanath Bose, February 3rd, 1865,* has been quoted in support of this argument, but the two cases are widely different. The Registrar's power for prosecuting charges is limited to one or two offences, as per Sections 93 and 94 of Act XX. of 1866; but the Magistrate found the prisoner guilty of other offences, regarding which the Registrar could not act as prosecutor. In the case quoted, the Civil Court had authority to direct the Magistrate to enquire into certain points, and this Court held that a Magistrate's proceedings were in error, because he had not applied to the Civil Court before making an investigation in points other than directed by the Civil Court. I concur in rejecting the appeal.

The 9th June 1868.

Present:

The Hon'ble J. B. Phear, *Judge.*

European British subject—Sessions Court.

Reference to the High Court, under Section 434, Code of Criminal Procedure, by the Sessions Judge of Bhagulpore.

Joseph Parks, *Prisoner.*

Whether or not an accused is an European British subject is a matter of fact to be determined judicially by the Court of Session on the evidence, in the event of the prisoner raising that question.

It seems to me that there is no reason to cancel the commitment of Parks to take his trial at the Court of Session. Whether or not the accused is a European British subject is a matter of fact to be determined judicially by the Court of Session on the evidence before it, in the event of the prisoner calling in question the power of the Court to try the charge made against him.

* *See* 2 W. R., Crim., p. 31.

The 15th June 1868.

Present:

The Hon'ble G. Loch and F. A. Glover, *Judges.*

Procedure— Charge— Irregularity— Witness for defence—Sections 250 and 439, Code of Criminal Procedure.

Reference to the High Court, under Section 434 of the Code of Criminal Procedure, by the Sessions Judge of Bhaugulpore.

Bhugwan and others *versus* Doyal Gope: and other cases.

Where a Deputy Magistrate did not draw up a charge in accordance with Section 250 of the Code of Criminal Procedure, but gave the accused clearly to understand the nature of the charges made against them, the irregularity was held to fall within Section 403 of that Code.

The Court quashed the evidence which was passed upon a prisoner who had not been asked if he had any witnesses to call, although he was tried at the same time with others who had been so asked.

Glover, J.—The cases of these parties have been referred to the High Court by the Sessions Judge on two grounds: *1st*, because the Deputy Magistrate did not draw up a charge in accordance with Section 250 of the Code of Criminal Procedure; and, *2nd*, because the accused were not called upon to produce witnesses in their defence.

No doubt, the Deputy Magistrate did not draw up a charge as he ought to have done under the Section above quoted, but he gave the accused clearly to understand the nature of the charges made against them; and, this being so, the irregularity did not occasion a failure of justice, and Section 439 of the Procedure Code would apply.

With regard to the 2nd objection, we find, on perusing the record, that of the accused whose cases have been sent up, all, save Bhekaree, were distinctly asked whether they had any witnesses to call in their defence, and they all answered in the negative.

Bhekaree was tried at the same time apparently, and the omission to ask him the same question was caused probably by inadvertence: still he had the right to be so asked, and the sentence in his case must be quashed.

The cases of Duljeet, Khedoo, and Phool Singh, have not came up with the record.

The 23rd June 1868.

Present:

The Hon'ble J. B. Phear and C. Hobhouse *Judges.*

Forgery—Making a false document—Summing up to Jury.

Criminal Appellate Jurisdiction.

Queen *versus* Ramgopal Dhur.

Committed by the Deputy Commissioner, and tried by the Judicial Commissioner of Assam, on a charge of forgery with intent to cheat.

A conviction for forgery under the Penal Code cannot be had unless it is proved that the accused *himself* made a document or part of a document with the intention of causing it to be believed that such document or part of a document was made by the authority of a person by whose authority he knew that it was not made.

A summing up to the Jury, in which the Sessions Judge gave no aid to the Jury in the arrangement of the facts which were spoken to by the witnesses, and himself found facts which he should have put to the Jury, was pronounced defective, and a verdict founded thereon was set aside, and the prisoner ordered to be released.

Phear, J.—In this case it seems to me that there has been a complete miscarriage of justice, mainly owing to the conduct of the trial by the presiding officer. The prisoner was tried upon a charge consisting of one head only, namely, that he, on or about the 24th of December 1867, at Nowgong, committed forgery, intending that the document forged should be used for the purpose of cheating. The evidence upon which the prisoner has been convicted of this charge, if it is to be believed, shows that the forgery was not committed by his own hand, but by the hand of a person who was a witness in the case. By the definition of forgery in the Penal Code, it was necessary, under the circumstances of this case, that the forger should have "made "a part of document, with the intention "of causing it to be believed that such "part of a document was made by the "authority of Zahir Bepari, by whose "authority he knew that it was not made." The prisoner could only have been properly convicted of forgery by the Jury coming to the conclusion, on legal evidence, that he had made a part of a document in the way in which I have just said. But the principal witness, Shome Nath, stated that it was he who had made the part of the document alleged to have been made without the authority of Zahir Bepari, though he said at the same time that he had done so at the instigation of the prisoner. There is absolutely no evidence whatever that the prison-

er himself made such document or part of a document. The prisoner then, if he is guilty of any crime, is guilty of abetment of forgery, and not of the offence of forgery, for which he was tried. In my opinion, therefore, there is no legal evidence in this case upon which the finding of the Jury can be supported, and I think we are bound to set their verdict aside.

But I desire further to add that, even if there had been evidence before the Court of Session which went to support the charge of forgery, the direction of the Judge to the Jury was so insufficient, incomplete, and erroneous as to render the trial in this case a mistrial. The Judicial Commissioner commences by telling the Jury that there is "no "doubt whatever that the bill presented "to the Assistant Executive Engineer is a "false document, made for the purpose of "cheating, that is to say, after payment to "Zahir Bepari of rupees 4 and 14 annas; "and, after getting his signature to a blank "form, that form was filled up as a bill for "rupees 19 and 8 annas, instead of for "rupees 4 and 14 annas, and that it was "presented by the accused as a voucher in "support of the charge that he made in his "cash account to the former amount. It is "further proved that the items were passed "in his cash account as *bond-fide* expenses "incurred by him, and the question for you "to decide is whether or not it was the "accused who prepared the false bill, and "profited by the fraud."

Now, I have no hesitation in saying that every one of the facts which the Judicial Commissioner says there is "no doubt" about, were facts solely within the province of the Jury to decide upon. They lay at the very foundation of the charge which was made against the prisoner. Unless the document was, as the Commissioner says it was, a false document, the prisoner was not guilty of the crime of forgery. Unless the document was a false document, made for the purpose of cheating, the prisoner was not guilty of the charge which was laid against him; and whether the document was false, or whether it was made for the purpose of cheating, turned entirely upon whether the receipts of Zahir Bepari had been got to a blank form under pretence that it should be filled up with 4 rupees and 14 annas, and that it was afterwards filled up with 19 rupees and 8 annas. It was for the Jury, and not for the Judge, to decide upon these matters; and in my opinion the Judge erred grievously when he took them out of the hands of the Jury, and told them that they were already ascertained facts. Indeed, upon the evidence as it stands upon the record, so far from there being no doubt as to these facts, it seems to me that there is the greatest doubt. They depend entirely upon the evidence of the witnesses, both of whom speak of having taken such a part in the matter as rendered their evidence open to suspicion. Zahir Bepari not only says that he signed a blank receipt, but says that he was aware at the time that he was doing something either risky or wrong; for, according to his testimony, he was not at the first willing to do it, and only did it eventually upon the persuasion of Bepari. It is, I think, impossible to say that a witness who makes a statement of this kind, in substance admitting that he gave an opening for the fraud which was charged against the prisoner, with the knowledge that the fraud might be effected, was not a character with regard to which the Jury ought to have been cautioned, yet so far was the Judicial Commissioner from cautioning the Jury that he in effect tells them there is nothing for them to consider on this point, because, in his opinion, the facts which he draws from that evidence rest upon a foundation of certainty. Moreover, Zahir, when by his own account he signed a blank receipt and handed it to Bepari, impliedly gave authority to some one to fill up the blank. Was that authority limited to the sum of rupees 4-14, or was it intentionally or from indifference made general? If the latter, clearly no forgery at all was committed, although the cheating might remain. This question, therefore, should have been put to, and determined by, the Jury, instead of being summarily disposed of by the authoritative statement of facts made by the Judge.

Then the next witness, whose evidence, it must be remembered, is absolutely necessary to connect the prisoner with the transaction at all, is Sham Nath, who tells the Court that he filled up the blank form by the direction of the prisoner, and then added his own name as a witness to the signature of Zahir Bepari, which he never saw made. Again, it seems to me impossible to say that the testimony of a witness like this could with propriety be put before a Jury as that which is implicitly to be believed by them. It occurs to me that it is open to the very gravest suspicion, and I think that the Judicial Commissioner was entirely wrong in not warning the Jury that in depending upon

and believing the evidence of Sham Nath, they would be giving credence to a man whose conduct in the matter, if it was not the conduct of an accomplice, was certainly such as rendered it necessary that they should weigh his testimony with the greatest care.

But more than this, it seems to me, upon reading the charge of the Judicial Commissioner to the Jury in the form in which he has sent it up to this Court, that it does not any where bear the character of a summing up of the evidence on the one side and the other. Indeed, the Commissioner makes no reference to the testimony of individual witnesses at all. He says that, while there are "witnesses for the prosecution, who "positively affirm that the accused himself "bought the articles charged for, and "caused the false bill to be prepared, there "are others on the part of the defence who "declare as positively that the blacksmith "bought the things, and dictated the price "to the writer of the bill. It will be for you, "therefore, to determine which side speaks "the truth, it being merely my duty to tell "you that I do not see any reason for Zahir "to make a false accusation against the de-"ceased, and to support it with false evidence. "If you believe his statement and that of the "witnesses, Sham Nath," and others, whom he mentions, "it will be your duty "to find the accused guilty; but, if you are "not thoroughly persuaded of his guilt, you "must acquit him." I need not say that this is no summing up at all. It gives no aid to the Jury either in the way of arrangement of the facts which are spoken to by the witnesses, or by directing their attention to the points of law, which it was necessary for them to bear in mind in order to judge between the prisoner and the Crown upon the issue which was before them, and, as I have already said, it states that the man whose testimony was imperatively deserving of the most careful scrutiny and consideration on account of the suspicious part which the witness admitted that he took in the transaction, was such as the Jury might implicitly depend upon. It seems to me, I repeat, that, even had there been evidence in this case, legally sufficient to support the charge made against the prisoner, it should have been our duty to have set aside the decision which the Jury have come to, merely in consequence of the insufficiency and incorrectness of the directions given by the Judicial Commissioner to the Jury, that insufficiency and incorrectness being so great as, in my opinion, to have withdrawn from the Jury matter which they alone could entertain, to have misled them with regard to the evidence, and to have caused a miscarriage of justice.

The decision of the Court of Session is set aside, and the prisoner, so far as regards this charge, must be released from imprisonment.

The 3rd July 1868.

Present:

The Hon'ble F. A. Glover, *Judge.*

Culpable Homicide and murder—House-trespass—Right of private defence of property—Clause 5, Section 105, Penal Code.

Criminal Appellate Jurisdiction.

Queen *versus* Balakee Jolahed.

Committed by the Magistrate, and tried by the Sessions Judge of Shahabad, on a charge of culpable homicide not amounting to murder.

HELD that a case in which the accused pursued after a thief, and killed him after the house-trespass had ceased, did not fall within the 2nd exception to Section 300 of the Penal Code, the right of private defence of property continuing under Clause 5, Section 105 of that Code, only so long as the house-trespass continues.

IT is, I consider, sufficiently proved by the evidence that the prisoner killed the deceased. His appeal therefore must be rejected.

But I am at a loss to understand how the Sessions Judge has brought the case under the 2nd Exception to Section 300 of the Penal Code.

The Sessions Judge finds "that the prisoner caused the death of Byjnath in the exercise in good faith of the right of private defence of his property, and in endeavouring to secure the person of an escaping thief, without any intention of doing more harm than was necessary for the purpose."

Now, taking that part of the prisoner's account of the matter to be the true one (and so far it has not been contradicted by the witnesses for the Crown), it is clear that an attempt at theft only was made, and that no property was carried off. The thief ran off at once and empty-handed.

The right of private defence of property against house-breaking by night (taking this to be a case of house-breaking) continues only so long as the house-trespass which has been begun by such house-breaking continues (Clause 5, Section 105, Penal Code).

The prisoner, that is to say, would have been justified in using his spear against the house-breaker so long as he remained on his premises, but was not justified in running after the thief, and killing him in the open long after the house-trespass had ceased.

As to the degree of violence, Section 183 would have justified the causing of death to a house-breaker whilst on the premises, but in no other case.

The Sessions Judge observes, as a reason apparently for acquitting the prisoner of murder, that Balakee "intended to do no more harm than was necessary for the purpose of capturing the thief." A person's intentions must be judged of from his acts, and it cannot be said that the driving of a spear several inches deep into the body of a half-naked and unarmed man evinces an intention of doing no more harm than was necessary to effect his capture.

It appears to me that the prisoner was not entitled to the benefit of the exception, and that the conviction should have been under Section 300 of the Penal Code. However, as the prisoner has been acquitted on this head of the charge, this Court, as a Court of Appeal, has no power to interfere, or to order a fresh trial.

The 6th July 1868.

Present:

The Hon'ble G. Loch and F. A. Glover, *Judges.*

Punishment—Attempt to commit rape—Sections 57, 59, 376, and 511, Penal Code.

Criminal Appellate Jurisdiction.

Queen *versus* Joseph Merian.

Committed by the Magistrate, and tried by the Sessions Judge of Shahabad, on a charge of attempt to commit rape.

Under Sections 57, 376, and 511 of the Penal Code, a sentence of 10 years' *transportation* or of 5 years' *rigorous imprisonment* may be passed for the offence of attempt to commit rape; but a sentence of 7 years' *rigorous imprisonment* commutable under Section 59 of the Penal Code to 7 years' transportation is illegal.

Glover, J.—I SEE no reason to interfere with the finding of the Sessions Judge and Assessors in this case.

The evidence clearly proves the prisoner's guilt, and his appeal must be rejected.

But the sentence appears to me illegal. Section 376 of the Penal Code makes the offence of rape punishable with transportation for life or imprisonment of either description for 10 years with fine. Attempt at rape (there being no express provision made by the Penal Code for its punishment) would be punishable under Section 511 "with transportation or imprisonment of any description provided for the offence for a term of transportation or imprisonment which may extend to one-half of the longest term provided for that offence."

Now, had the Sessions Judge sentenced the prisoner under Section 511 to transportation, he could, by Section 57 of the Code, in calculating the half of the punishment for the substantive offence of rape, have taken that punishment as a sentence of 20 years' transportation, and in that case his present sentence of 7 years would have been less than the half of the full punishment awardable, and would in consequence have been legal.

But the Sessions Judge has sentenced the prisoner to rigorous imprisonment commuted under Section 59 to 7 years' transportation. The commutation does not change the nature of the punishment, for there is no such substantive punishment in the Penal Code as transportation for any period short of life. Rigorous imprisonment, although afterwards commuted to transportation, is still, in the terms of the Code, rigorous imprisonment; and if this be so, then by Section 511 only one-half of the maximum rigorous imprisonment awardable under Section 376 could be inflicted. The maximum imprisonment for rape is 10 years, and therefore the sentence upon the prisoner in this case cannot exceed 5 years' rigorous imprisonment.

I regret very much that this should be so, for a more atrocious case I have never met with, but the meaning of the law appears to me quite clear.

Loch, J.—I concur.

The 8th July 1868.

Present :

The Hon'ble J. B. Phear and C. Hobhouse,

Judges.

Evidence—Dying declaration—Motives for committing crimie—Section 371, Code of Criminal Procedure.

Criminal Appellate Jurisdiction.

Queen *versus* Zuhir and Jullud Mollah.

Committed by the Magistrate, and tried by the Sessions Judge of Backergunge, on a charge of murder.

In determining whether a declaration alleged to have been made by a deceased person is admissible as a dying declaration under Section 371, Code of Criminal Procedure, a Sessions Judge ought to direct his attention to the point whether the declarant believed himself to be in danger of approaching death. The evidence of persons who cannot speak of their own personal knowledge to such declaration should not be admitted ; and in deciding whether the accused is guilty of the charge of murdering the deceased declarant, the Court should confine itself to enquiring into the facts which occurred on the day of the murder.

The evidence as to the motives with which a prisoner commits an offence should be of the strictest kind.

Phear, J.—THE prisoners were tried by the Sessions Judge and two Assessors on the 23rd of March last. They were convicted of murder, and sentenced to transportation for life. The judgment delivered by the Judge, in the presence of the Assessors, gives such a very complete and clear analysis of the evidence in the case, that in the remarks which I am about to make I shall mainly refer to it.

The evidence upon which the prisoners have been convicted may be distinguished as consisting of two classes : the *first* being certain statements alleged to have been made by the deceased person at the time that he was dying ; and the *second* being the testimony of witnesses who spoke to circumstances of facts occurring within their observation on the night when the deceased met with his death. The first question that has been raised in this case is, whether or not the statements made by the deceased are of that kind which the law calls dying declarations, and makes admissible as evidence against accused persons in a criminal trial.

Section 371 of the Code of Criminal Procedure says that "the declaration of a "deceased person, whether it be made in "the presence of the accused person or not, "may be given in evidence if the deceased "person at the time of making such declara-"tion believed himself to be in danger of "approaching death, although he entertain-"ed, at the time of making it, hopes of "recovery."

When the Judge is called upon to determine whether a declaration alleged to have been made by a deceased person is admissible under this enactment or not, he ought, in the first place, to direct his attention to this point, namely, whether the deceased at the time of making the declaration believed himself to be in danger of approaching death. In the present case the statements supposed to have been made by the deceased are deposed to by various witnesses, and it is, I think, convenient to consider them separately according as the witnesses say that they were in the immediate presence of the deceased himself when the statements were made by him, or (as is the case with the greater number of the witnesses) represent that they heard the words of the deceased from a distance. I make this division, because I think those witnesses who speak of the cries of the deceased as having been heard by them from a distance do not in any way sufficiently mark the time at which they heard those cries to render any conclusion possible from the remainder of the evidence as to the state of mind the deceased was in at the time when the cries were uttered. It is distinctly possible, even if every word that the witnesses used in this case can be believed, that the cries to which those at a distance spoke may have been uttered before any of the other wit-

nesses in the case ever got up to the place where the deceased was ultimately found lying, and even before he had received the wound which eventually caused his death, so that, with regard to the statements embodied in those cries, even, as I have already said, supposing the evidence upon which they rest to be entirely trustworthy, it is impossible to arrive at a conclusion whether or not the deceased, in giving utterance to them, was impressed with the belief that he was in danger of approaching death. In my judgment, therefore, those alleged declarations of the deceased to which the distant witnesses, as I may term them, testified, were not shown by the evidence to be admissible under the provisions of the Criminal Procedure Act, and, consequently, they ought none of them to have been received in evidence and considered at all in this case. Indeed, the witnesses ought not to have been allowed to detail them. No doubt, it might well be an important fact in the case, supposing the witnesses are believed on this point, that they heard cries of distress of some kind or another proceeding from the direction of the place where the deceased was, on the night in question, found lying dead or mortally injured, but they ought not to have been permitted to say more than this. It follows that the only declarations as to which there is any evidence to show that they fall within Section 371 are the declarations said to have been made directly by the deceased to persons who were immediately in his presence. These are spoken to by witnesses Nos. 12 and 30, who alone depose to the deceased having made in their presence statements with regard to the persons who had inflicted the injury upon him.

The first witness says that, on getting up to the spot where he found the deceased lying, Meah Jan said to him: "Zalin Chow-"keedar, Abool Hossein, Kummerudin, "and Chand, seized me, and Jullad Moollah "struck me with a knife or spear on the "left breast." That is all the account which the witness gives either of the statement itself or of the circumstances under which the statement was made. From any thing that this witness says I think no inference can be drawn as to whether the declarant thought that he was dying or not. The second witness, who came up to the spot almost simultaneously with the first, said that in consequence of a request from the first witness he asked the deceased who murdered him, and that he then with great difficulty heard the deceased answer that "Zalin Chowkeedar and Jullad Moollah had killed him." It perhaps may be presumed, if the strict accuracy of these words can be relied upon, that the deceased, when he said that the two persons mentioned had killed him, labored under the belief that he was a dying man, and, if that were so, I think that this statement deposed to by the second witness would fall within the provisions of Section 371. However, it is to be observed that the question, as the witness says he put it, led to the use of the word "kill" in the answer; and it is further remarkable that the third witness, the only other person who is, I believe, alleged to have been present at the time that the deceased made a statement of this kind, gives a slightly different version of it, and does not employ words which would imply that the deceased considered himself to be mortally wounded. This last witness says that the words of the deceased were—"Zalin Chowkeedar, Jullad Moollah, "Abool Hossein, Chand, and Kummerudin, "have wounded me with a spear." So that of the three persons who alone depose to statements having been actually made to them by the deceased himself, only one attributes to him phraseology, from which it could naturally be inferred that he was speaking under the sense of impending death. It

would, I think, be somewhat dangerous, considering the vast importance of the point, when there is such a diversity between the witnesses, to presume from the exceptional words of the one out of the three that the mind of the deceased person was in the condition which is contemplated by the Legislature in the words which it has used in Section 371. The Sessions Judge has, however, undoubtedly, although he has not perhaps in express terms so adjudicated, come to the conclusion that the deceased man, at the time that he made a statement to the three first witnesses in the manner they depose to, did believe himself to be in a dying state, and I am not prepared now to say that that conclusion is one that cannot be legally supported by the evidence, if credence be given to it. But in my opinion, after the best consideration that I have been able to give to the case, not one of these three witnesses is sufficiently trustworthy to justify the belief upon their testimony that the alleged statements were, as a matter of fact, made by the deceased.

* * * * * * *
* * * * * * *

But, I desire further to say, I regret very much that a certain matter to which I am about to allude was allowed by the Sessions Judge to be introduced into the enquiry. The evidence of witness No. 11, who is supposed to give a clue to a motive for the crime on the part of the prisoners, is, in my opinion, not only entirely irrelevant to the case, but is such that its admission could only tend to a mischievous result. It is in its character such that it ought not to have been admitted on any occasion in any Court which had to investigate facts—least of all in a Court of criminal jurisdiction. It is from beginning to end hearsay, and it is hearsay as to the conduct of the prisoners on matters which had nothing whatever to do with the issue before the Court. It in effect charges them with fraud and forgery in former occasions. It represents that they did away with and destroyed a certain original pottah, and that they forged another in its place, and it makes out that they did this with feelings of animosity and malice towards the unfortunate man who was killed. The witness who gave evidence as to conduct of this kind did not and could not speak to facts from personal knowledge, but merely gave utterance to his opinion and belief derived at best from family talk and repute, necessarily from evidence which is too hearsay. I think that it was incumbent on the Judge to have carefully excluded testimony of this kind from the consideration of a Court whose sole duty was to enquire into the facts which had occurred on the night of the 7th of Aughran. If it became necessary in the course of this trial to seek for motives on the part of the prisoners or other persons, then those motives should never have been inferred from any other than direct evidence of the strictest character. Scarcely one word which the witness No. 11 uttered would have been receivable as evidence against the prisoners had they been standing before the Court on trial for the conduct of which he accused them. It is monstrous, then, that his tale should be listened to as a supplement to the evidence brought against them on a charge of murder. It is obvious that it is very dangerous at all times to jump to conclusions as to the motives of persons standing in the position of the prisoners at the bar, and the judgment of the Court ought always to be carefully guarded from influence arising from any other source than that of evidence which is unimpeachable in its character.

Again, I think that the Sessions Judge was most wrong in admitting the evidence of Mr. Owen. Nothing that this gentleman said from first to last bears upon the occurrences of the night in question. What he said solely amounted to a description of the steps he had taken in investigating the case, and to giving his conclusions and his opinion as to the extent to which the various witnesses might be believed. In truth, the Judge, when he refers to the evidence of this witness, does so for the purpose of justifying the evidence of the witnesses in the case by the addition of matter which is furnished by what he terms the suspicions of Mr. Owen, which are likely, as he says, to be true, because "on this "head his opinion as the opinion of an "officer of great experience is entitled to "weight." I must say that it is the most extraordinary thing that I have come across for some time, that a Sessions Judge should not only have allowed irrelevant evidence of this kind to be given in Court, but that he should actually have made it a part of the foundation of his judgment, and have used it to justify the conclusions at which he had himself arrived by saying that these coincided with the opinion (for this is in effect what he says) of the police-officer who had charge of, and who had followed out the

investigations of the case. The duty of the Court, as I have already said, was to take care that its judgment was based solely upon such legal evidence as bore upon the occurrences of that night so far as it went to show that the prisoners at the bar and then under trial were concerned in them. It ought most carefully to have excluded all evidence which, if it had any tendency at all, had a tendency to bias the judgment of the Court and prejudice the minds of the Assessors against the prisoners apart from any thing properly inferential and deducible from the evidence of the witnesses who were sworn in Court to tell the truth, the whole truth, and nothing but the truth, with regard to what they saw on the night in question.

The appeal is dismissed.

The 13th July 1868.

Present:

The Hon'ble G. Loch and F. A. Glover, *Judges.*

Jury—Privileged communication—Mooktear—Section 24 Act II. of 1855—High Court as Court of Revision—Verdict of acquittal by Jury owing to misdirection by Judge.

Revision of proceedings under Section 404, Code of Criminal Procedure.

Queen *versus* Chunder Kant Chuckerbutty.

A Judge should not leave it to the Jury to find whether a communication is privileged or not, but should himself decide it as a point of law.

Under Section 24, Act II. of 1855, there is no privilege as to communications between mooktears and their principals, the word "attorney" in that law being confined to attorneys of the High Court.

The High Court, as a Court of Revision, has no power to interfere with or set aside a verdict of acquittal come to by a Jury, notwithstanding that such verdict has been come to in consequence of misdirection on the part of a Judge. The case of Gora Chand Gope (5 Weekly Reporter 48) refers only to cases tried by Assessors.

Glover, J.—THIS case was called for by the High Court under Section 404 of the Procedure Code.

It was a case of forgery in the matter of a receipt, and the main proof against the accused (I quote the Sessions Judge's words) was "the evidence of a witness who "declared that, on the day previous to that "on which the document was filed in Court, "he had seen the same in the hand of the "prisoner who had showed it to him."

The Judge, on the prisoner's objection that the substance of the above statement was privileged, the deponent having been at the time of the alleged occurrence the prisoner's mooktear, put it to the Jury to say whether the communication between the two was as between mooktear and client; and, on the Jury finding that it was, he directed the Jury to find a verdict of acquittal, on the ground that there was no evidence to support the case for the Crown.

It appears to me that the Judge in this direction to the Jury made two grave mistakes.

In the *first* place, the question as to whether the communication, which was alleged to have taken place between the accused and the witness, was one as between mooktear and client, was not a matter for the Jury's consideration at all; it was a point of law for the Judge to decide.

And, *secondly*, if he had decided, instead of letting the Jury do so, that it was such a communication, he was wrong in telling the Jury that the communication was privileged. Section 24, Act II. of 1855, recites that barristers, attorneys, and vakeels, shall not disclose any communication, &c., &c. Form the position of the word "attorney" in the sentence it is clear that attorneys of the High Court only are meant, and not mooktears, who, if included in the privilege, would naturally follow in their proper order after vakeels. There is, therefore, by law no privilege as to communications between mooktears and their principles, and the witness's testimony ought to have been received and laid before the Jury. The Jury might, of course, have given what weight they pleased to it, but it was wrongly kept back from them.

The question remains as to whether this Court can interfere in cases when a verdict of acquittal has been recorded, and order a new trial on the ground of misdirection; and in support of the proposition we have been referred to the case of the Queen *versus* Gorachand Gope, V. Weekly Reporter, 48.

As it appears to me, the utmost which this decision lays down is that this Court, as a Court of Revision, can interfere with, and set aside, a verdict of acquittal illegally come to by a Sessions Judge and Assessors, and either pass such order as may be legally proper, or order a new trial.

The case in question came before the High Court from the Judge of Mymensing, a non-jury district; and the decision seems to have reference solely to cases tried with the aid of Assessors. At all events, the only mention therein of a Jury is to be found in page 48, where the Court say: "As a Court of Revision the Court cannot reverse the finding of a Jury."

I take the precedent of Gorachand Gope's case, therefore, to refer solely to non-jury trials, and I do not see that this Court has any power to interfere with, or to set aside, verdicts of acquittal come to by a Jury, notwithstanding that such verdicts have been come to in consequence of misdirection on the part of the Judge.

Loch, J.—The question raised in this case is of much importance. The question is this, if a prisoner be acquitted by a Jury, owing to a misdirection in his charge by the Judge, can the High Court, as a Court of Revision, quash the proceedings and order a new trial? The judgment in Gorachand Gope's case is pressed upon our attention as supporting the view that this Court can interfere. That case was tried with Assessors, and the Court, as a Court of Revision, held that even when a party had been acquitted, the Court might set aside the judgment of acquittal for error in point of law. There is, however, one passage in that judgment which appears to draw a distinction between cases tried by Assessors and by a Jury, and it is in the following words: "As a Court of revision the Court cannot reverse the finding of a Jury." In these words, reference appears to be made to the proviso in Section 406, which lays down that the Sudder Court, in any case revised under Chapter XXIX. of the Criminal Procedure Code, shall not be competent to reverse the verdict of the Jury. This appears to be conclusive that the High Court, as a *Court of Revision*, cannot reverse the verdict of a Jury, and the fact that the verdict has been come to through the misdirection of the Judge to the Jury does not, in my opinion, give the Court any power of interference. I concur with my colleague in thinking that the Judge was in error in his summing up, and that, owing to that error, the prisoner was acquitted by the Jury. The papers of the case will be returned.

The 13th July 1868.

Present :

The Hon'ble G. Loch and F. A. Glover, *Judges.*

Land Disputes—Proceedings under Section 318, Code of Criminal Procedure.

Reference to the High Court under Section 434, Code of Criminal Procedure, by the Sessions Judge of Tirhoot.

Joyram Sing and others *versus* Jugnarain Doobey and others.

It is not necessary that the proceeding required by Section 318, Code of Criminal Procedure, should be recorded in a particular form or on a separate sheet : it is sufficient if it be recorded.

Glover, J.—There does not appear to be any reason for interfering with the Assistant Magistrate's order.

That officer, as is clear from the proceedings sent up with this reference, *did* record a proceeding, and *did* call upon both parties, under Section 318 of the Criminal Procedure Code, to give in written statements of their respective claims to actual possession of the subject of dispute. The law does not require the proceeding under this Section to be recorded in any particular form or on a separate paper : it is sufficient if the proceeding be recorded. As to the question of possession, we find that the Assistant Magistrate used the Civil Court's decision as a piece of evidence only, and did not *restore* the Shikarpore zemindar to possession of the disputed land at all ; he found them in possession, and retained them in it ; and this being so, he was justified in taking recognizances from the opposite party only.

The proceedings of the Assistant Magistrate seem to have been perfectly regular, and we think that no ground has been shewn for the Sessions Judge's reference.

The 13th July 1868.

Present :

The Hon'ble G. Loch and F. A. Glover, *Judges.*

Witnesses—Procedure—Chapter XV., Code of Criminal Procedure—Accused person—Sections 411 & 436, Penal Code.

Reference to the High Court under Section 434, Code of Criminal Procedure, by the Sessions Judge of West Burdwan.

Bagdee Manjee *versus* Mohindro Narain and others.

In a case under Chapter XV. of the Code of Criminal Procedure, it is expected that parties will bring their own witnesses with them. If they require the attendance of any witness, they should apply to the Magistrate to cause his attendance ; and where they do not so apply, it is sufficient if the Magistrate record in his judgment the substance of the defendant's answer.

The words "accused person" in Section 436 do not apply to a party who has been convicted by the Magistrate under Section 411, from whose sentence there is no appeal.

We think there are no grounds for interfering with the proceedings of the Joint-Magistrate, as we do not find that he has acted contrary to law. He has recorded in his judgment the substance of the answer given by the defendant, and this was sufficient in a case tried under Chapter XV. of the Code of Criminal Procedure. In cases tried under that Chapter, it is expected that the parties will produce their own witnesses. If a party requires the attendance of any one to give evidence on his behalf, he should apply to the Magistrate to cause his attendance on the day fixed for trial. In the present case, we do not find that the defendant either brought witnesses or asked the Magistrate to summon any one to give evidence on his behalf. Whether mischief were done or not was a question of fact for the Magistrate to determine on the evidence, and the Magistrate found on the evidence that the defendant had ploughed up the complainant's ground, and thereby committed mischief ; there was nothing contrary to law in this finding.

With regard to the question asked by the Sessions Judge in his letter to the Court of 23rd June, No. 98, we think that the words "accused person" used in Section 436 do not apply to a party who has been convicted by the Magistrate under Section 411, and from whose sentence there is no appeal.

The 14th July 1868.

Present:

The Hon'ble J. B. Phear and C. Hobhouse, *Judges.*

Approver—Corroboration—Evidence as to prisoner's previous character.

Criminal Appellate Jurisdiction.

Queen *versus* Bykunt Nath Banerjee.

Committed by the Magistrate, and tried by the Additional Sessions Judge of the 24-Pergunnahs, on a charge of abetment of forgery under Sections 109 and 467 of the Penal Code.

In a case in which the principal evidence against an accused is the evidence of an approver, a Sessions Judge should carefully warn the Jury of the infirmity which attaches to that evidence, and he should also tell them (if the fact be so) that the approver is speaking under the influence of any offer of conditional pardon.

The corroboration of the evidence of an approver should arise from other evidence relative to facts which implicate the prisoner in the same way as the story of the approver does.

Evidence of character and previous conduct of a prisoner being matters of prejudice, and not direct evidence of facts relevant to the charge against the prisoner, ought not to be allowed to go to the Jury.

Phear, J.—We think that there has been a mistrial in this case. The whole of the charge against the prisoner depended upon the evidence of the two approvers. It is undoubted that a Judge, in cases when the material supporting the charge against the prisoner is afforded by the evidence of an approver. is bound very carefully to warn the Jury of the infirmity which necessarily attached to that evidence. He is bound also to call to their attention the circumstance, if it be in fact the case, that the approver is speaking under the influence of a conditional pardon, that is, a pardon conditional upon his telling the truth to the satisfaction of the Crown, who is the prosecutor. We think that in this case the Judge had a desire to warn the Jury of the suspicious character of an approver's evidence, although he possibly was not altogether happy in the language which he used for the purpose. But it is clear that he omitted entirely to point out to them that the two principal witnesses were speaking under the influence of a promise of pardon. He was further bound to tell the Jury that, although the testimony of persons so situated as these two men were was legally receivable and might be believed by them, if, in all the facts of the case, they, in their judicial discretion, thought fit to do so, yet that they ought not to act solely upon their testimony, unless it was corroborated, that is, corroborated so far as regards the charge against the prisoner at the bar. In this case the Judge has not very distinctly given the Jury this warning, although he has more than once told them that the evidence of the approvers was corroborated; but I think it is apparent that he has, in regard to this point, laboured under considerable misapprehension. In one place he said that it was certain that many of the facts spoken to by the approvers were true. This, of course, might well be, and yet their testimony, so far as it affected the prisoner at the bar, might be entirely uncorroborated and valueless. It has often been observed by Judges that in the nature of things no one knows so well the actual facts of the case as the approver who by his own admission has taken a part in them. And, as he has confessed his own guilt, there is generally no reason why he should misrepresent them, except so far as it may be possible for him thereby to shift a measure of culpability from his own shoulders to those of some one else, *viz.*, of course, to those of the prisoner against whom he is giving testimony. Hence, the question always is in any given case—is the approver speaking the truth, not merely when he details the general facts, but when he says that the prisoners participated in the transaction, and did that which it was necessary that he should have done in order for him to become criminally liable to the charge made against him? In saying, then, that, before the evidence of an accomplice can be safely depended upon, so far as it affects the prisoner, it ought to be *corroborated,* I understand that other evidence from sources independent of the approver should be forthcoming relative to facts which im-

plicate the prisoner in the same way as the story of the approver does.

Now, if we look at this case by the light of this explanation, it seems that the corroboration of the approver's testimony against the prisoner centres in one single fact. For it is not true, as the Judge said, that Taruck Kooer deposed that the notes were unendorsed at the time of Kali Kant's death. It is quite clear from the evidence of Taruck Kooer that there was a possibility of these notes having been endorsed before Kali Kant died. That witness merely says this, namely, that the notes were not endorsed when he last saw them, but then he says also that he had not seen them since some point of time two or three months antecedent to Kali Kant's death. It may possibly be immaterial as a fact in the case whether the notes were endorsed before or after Kali Kant's death, but it is most important, in considering whether the evidence of the two approvers is corroborated or not, that, while they swear the notes were not endorsed until *after* the death, there should be a possibility, on the evidence of the person who is supposed to have corroborated them, that they were endorsed *before* the death.

But, even if the Judge's statement to the Jury on this head were strictly correct, he would have been mistaken in thinking that Taruck Kooer thus afforded any corroboration of the approvers' testimony against the prisoner. Obviously the bare confirmation of the statement made by the approvers that the endorsing took place after Kali Kant's death is no confirmation of their statement.

The only other corroboration which the Judge alludes to in his address to the Jury is to be inferred from the fact that a 500 rupees note, accompanied by a slip of paper covered with copies of the forged endorsement, was found in a pot sunk in the floor of a room which formed part of the prisoner's house. Probably the corroboration which the Judge sees in the finding of the 500 rupees note, under these circumstances, is very much less than he supposes. But, no doubt, the corroboration which is traceable to the copy of the endorsement is strong indeed, if only one thing is made out, namely, that the pot and its contents was placed in its position of concealment either by the prisoner himself or by some one with his cognizance and by his direction. Now, as I read the evidence, the fact that the pot was found in a portion of the prisoner's premises is the one single link which connects the prisoner, if I may say so, with the contents of this pot. The pointing out by the wife is, I think, no evidence against the husband. But certainly, if it is evidence against the husband, it never ought to have been allowed by the Judge to go to the Jury, because it is hearsay evidence. And the same observation applies to the remark the wife is said to have made as to her husband having put something away in the place where the pot was found. Clearly, if the wife could give evidence which was material to the charge against the prisoner, she should have been called as a witness. It was not proper to allow hearsay evidence afforded by her conduct and her words to get under the attention of the Jury. It seems to me that, inasmuch as the corroboration of the approvers, so far as their story makes the prisoner a participator in their crime, depends entirely upon the fact that this pot was found in the prisoner's house. This cardinal point, upon which the whole case hinges, has not been properly singled out and brought before the Jury. They ought to have been told that there, in fact, hinged every thing which was in the nature of corroboration of the approvers' evidence. It was for them to say, in view of the evidence which bore upon this particular point, whether they, as Judges of facts in the case, considered the 500-rupees note and the copy slip sufficiently brought home to the prisoner to make the story of the approvers credible and trustworthy; and the Judge ought to have aided them to a conclusion by carefully summing up that evidence.

If the apparent concealment of the pot with the enclosed papers in the prisoner's house taken alone told against him, on the other hand there certainly were facts in evidence which tended to lessen the force of the adverse presumption, and not a little to suggest that the whole affair was a trap laid by the approvers. If so, of course all shadow of corroboration vanished. The Judge should have taken care that this side of the case did not escape the Jury's notice. I think he certainly ought to have called their attention to the circumstance that the place where the pot was found was not a portion of the interior of the house so far as can be gathered from the evidence, and also that at least Dinonath, one of the approvers, had access to it. This follows, I think, from the evidence of Tewaree,

who says he found Dinonath with the wife in another part of the house. That means, I suppose, the inner apartments; and, if he could get there, it can hardly be doubted that he could have got to this comparatively public portion of the building. And, indeed, there is nothing in the evidence to show that, considering the unfinished state of the room where the pot was discovered, other persons as well as Dinonath might not readily have entered it, or that it is in any way necessary to infer that anything which was found buried there was buried by the act or with the knowledge of the master of the house. Then, again, the evidence as to what led to the discovery should have been received, and in particular the absence of the particular witness should have been commented upon. Without going further through all those portions of the evidence which tend o throw suspicion upon this matter, and to suggest difficulty as to the value properly attributable to the apparent concealment of the pot in the prisoner's house, it seems to me clear that there was so much of importance hanging upon this point that the Judge was wrong in omitting to carefully bring it under the notice of the Jury, and to tell them their duty in regard to coming to a conclusion on the facts which surround it.

Finally, there is no doubt that the Judge was wrong in allowing any matter of prejudice not being direct evidence of fact relevant to the charge against the prisoner to go to the Jury while they were trying the accused. All evidence of character and previous conduct of the prisoner ought to have been excluded; and, if by accident any such had come out in open Court, then the Judge ought most distinctly to have told the Jury that they were carefully to guard themselves from being influenced by it. But, unfortunately, the Judge has taken exactly the opposite course. He has not only allowed statements as to the prisoner's character for forgery to be made in Court, but he has founded upon it a portion of his charge to the Jury. He has in effect told the Jury that they would not be right if they allowed their judgment of the value of the evidence before them to be uninfluenced by a consideration of the prisoner's previous character for forgery. And this is the more unfortunate, because this evidence of the prisoner's previous character comes from no one but from the approver.

For all these reasons I think that the Judge has not conducted the trial in the way in which it ought to have been conducted. He has not directed the Jury upon points with regard to which it was essential that they should receive instructions from the Judge in order to their coming to a proper verdict. He has allowed matter to come in as part of the evidence in the case, and has indeed pressed it upon their attention, which ought to have been studiously kept away from them altogether. And he has certainly misinformed them with regard to the question of corroboration and the existence of corroborative evidence in this case. I think that the verdict which has been arrived at under the guidance of a direction like this must be set aside, and of course the sentence which was passed thereon quashed. The prisoner must be discharged from custody.

We think it desirable to add, although, perhaps, it may be superfluous to do so, that this decision has not the effect of an acquittal so as to protect the prisoner from being tried again. At the same time we do not think it necessary to order a new trial.

The 17th July 1868.

Present:

The Hon'ble G. Loch and F. A. Glover,

Judges.

Police-officer—General exception—Arrest without warrant in good faith—Sections 79 and 339, Penal Code—Clause 5, Section 100, Code of Criminal Procedure.

Reference to the High Courts under Section 434, Code of Criminal Procedure, by the Judicial Commissioner of Chota Nagpore.

Sheo Surun Sahai *versus* Mohomed Fazil Khan.

The general exception provided by Section 79 of the Penal Code and the power conferred by Clause 5, Section 100, of the Code of Criminal Procedure, was held not to protect a police-officer who did not act in good faith, that is, with due care and attention. The Clause 5, Section 100, Codeof Criminal Procedure, refers to property which is proved to have been stolen, and not to anything which a police-officer may choose to imagine has been stolen.

Where a police-officer refused to let a person go home until he had given bail, he was held to have been guilty of wrongful restraint under Section 339 of the Penal Code.

Glover, J.—It appears to us that the Deputy Magistrate of Palamow was right, and that no cause has been shown for this Court's interference.

No doubt, as stated by the Deputy Commissioner, by Section 79, Penal Code, nothing is an offence which is done by any person who is justified by law, or who, by reason of a mistake of fact, and not of law, in good faith believes himself to be justified by law in doing it.

And it is also true that by Clause 5, Section 100, Code of Criminal Procedure, a police-officer would be justified in arresting without warrant a person in whose possession stolen property had been found.

But these acts must be done, and these powers exercised, *in good faith*, which is defined by the Penal Code to be with "due care and attention;" and can it be said that in this case the Sub-Inspector exercised any care or attention at all?

What are the facts? He sees a horse tied up, without any attempt at concealment, in Bookoo's premises; and because the animal happens to resemble one which his father had lost a short time previously, he jumps at once to the conclusion that Bookoo has either stolen the horse himself, or has purchased it from the thief, and he compels Bookoo to account for his possession accordingly. He finds that Bookoo bought the animal from one Sheo Surun Sahai; so he sends for that individual, charges him with the theft, and compels him to give bail for his appearance whilst an investigation is pending.

The Sub-Inspector never sent for the supposed owner of the horse, or took the trouble of getting any credible information as to whether it was his father's horse or not. Had he done so, he would have found that that horse had already been found in another place; but without waiting for such information, and without making any further enquiry, he at once held Sheo Surun to bail as a person suspected of having come by the animal dishonestly.

Clause 5, Section 100 of the Procedure Code, refers to property which is proved to have been stolen, and not to any thing which a police-officer may choose to imagine has been stolen.

With regard to the Deputy Commissioner's remark that there is no proof that the Sub-Inspector kept Sheo Surun in custody at all, we observe that wrongful restraint is by Section 339, Penal Code, defined to be a voluntary obstruction so as to prevent a person's proceeding in any direction in which that person has a right to proceed, and as the Sub-Inspector refused to let Sheo Surun proceed to his house until he had given bail, and would, had he not given bail, have retained him at the thanah, it is clear that he prevented Sheo Surun from proceeding in a direction (*i. e.*, his own house) in which he had a right to proceed, and did, therefore (not having acted in good faith), "wrongfully restrain" him.

The 21st July 1868.

Present:

The Hon'ble J. B. Phear and C. Hobhouse, *Judges.*

Complaint—Jurisdiction—Institution of criminal charge—Registrar under Act XX. of 1866—Procedure in cases of charge under Registration Act.

Revision of proceedings in the case of Ashanoollah and others, Petitioners.

Under the Code of Criminal Procedure, a Magistrate has only jurisdiction to entertain a criminal charge either when a complaint is made before him by a person properly qualified to complain and prosecute, or when he himself of his own knowledge and discretion starts the proceedings in cases in which he has such power given him. Where, therefore, a Registrar, under Act XX. of 1866, transferred a complaint made before him to the Magistrate's Court, and afterwards himself sitting as Magistrate ordered the matter to be made over to the police, it was held that this did not amount to the institution of a criminal charge under the Criminal Procedure Code.

In the case of a prosecution under Act XX. of 1866, a Magistrate has full power to entertain and finally adjudicate on the charge, and is not bound to commit to the Sessions; the words in Section 95 of that Act, "all prosecutions under this Act shall be instituted before a person exercising the powers of a Magistrate," being interpreted to mean that the whole of a criminal trial from complaint to adjudication shall be carried out before and by the same person.

Phear, J.—It appears to me in this case that, if we accept the account of it which has been given by the Deputy Magistrate of Rungpore, a great deal of irregularity and impropriety is manifest in the course of the proceedings. Mr. Perry reports as follows: "It appears the plaintiff Meah Jan had "complained before Mr. James Anderson on "the 15th of February last, praying for a "criminal prosecution in the matter, and Mr. "Anderson as Registrar drew up a roobookaree consigning the case to the Magistrate's Court. Then, afterwards, on the "same day, whilst sitting in Mr. Glazier's "Bench as Joint Magistrate in charge, "during Mr. Glazier's absence on duty in "the interior of the district, he passed "orders for the police-investigation into "the matter. The case was subsequently, on Mr. Glazier's return, made over "for trial to me by him on the 23rd "of March. Thus it was Mr. Anderson "embodied in his officiating capacity the "powers of a District Magistrate and Registrar to direct the criminal trial of the "case."

Now, I think it is clear from the Criminal Procedure Code that a Magistrate has only jurisdiction to entertain a criminal charge upon one of two contingencies, namely, either that the complaint is made before him by a person properly qualified to complain and prosecute, or that he himself of his own knowledge and discretion starts the proceedings, supposing the case to be one of those in which the Code gives him authority to do so. Now, here the Registrar of the district might very well have acted the part of prosecutor, and made the complaint; but the Sub-Registrar of himself could not. Consequently, Mr. Anderson's roobookaree was of no effect either as a complaint under the Procedure Code, or in any other way. It was, I think I may almost venture to say, something approaching to a farce that Mr. Anderson, as Sub-Registrar in the Registrar's Cutcherry, should draw up a roobookaree for the information of Mr. Anderson, officiating as Joint Magistrate in the Magistrate's Cutcherry; but whether it is right to designate this inefficacious proceeding by this term or not, it is, I think, certain, even on the meagre facts of the case which the record exhibits, that nothing whatever did really come of it.

Mr. Anderson, upon perusing his own roobookaree, referred the matter to the police. I need not say that this does not amount to the institution of a prosecution in any sense under the Criminal Procedure Code. We are not concerned with the report of the police; but it appears that, upon its being gone into, the Magistrate, Mr. Glazier, after his return to his Cutcherry, issued a warrant for the arrest of the prisoners, or a summons for them to appear and answer some charge, and then handed the matter over to the Deputy Magistrate. In truth, we cannot make out from the record very precisely what happened, but undoubtedly the Magistrate seems at that time to have acted as if there was actually a matter of complaint before him. If we take literally the account given by the Deputy Magistrate in his report, it would seem as if there was in fact no matter of complaint at all before him. However, upon looking closely into the record, although we cannot discover that there was any complaint filed as by a private prosecutor, we have learnt that there is a mooktearnamah signed by Meah Jan, in which he authorises a mooktear to appear for him, and recites that he has made a complaint before the Magistrate, and it is in the matter of that complaint that he desires to be represented by the mooktear. Had it not been for this indication of something like a legal commencement of the criminal proceedings which were continued before the Deputy Magistrate, I should have felt myself obliged to conclude that the

charge against the prisoner originated in the action of Mr. Glazier himself, in the exercise of the powers vested in him by the provisions of Section 68 of the Criminal Procedure Code ; and, had this been the case, I should have considered that the legality of the subsequent proceeding before Mr. Perry were, under the circumstances of the case, open to much question. As, however, the mookhtearnamah to which I have referred is actually on the record, and has been sent up to us as part of the record by the Joint Magistrate, I cannot resist the inference that there was a complaint properly made by Meah Jan either before the Deputy Magistrate or the Magistrate himself, which could form a proper foundation for these proceedings. If there were not, there would be no meaning in the mookhtearnamah itself. And further, as the Deputy Magistrate in his report speaks of Meah Jan as plaintiff, by which word I suppose he means prosecutor, I feel obliged to assume that there really was something in the shape of a legitimate initiation of a prosecution before the one Magistrate or the other. This being so, I come indirectly by process of reasoning only, unaided by any express statement on the record, to the conclusion that the criminal proceedings in this case were properly instituted ; and there can be, I think, no doubt that, after the point of time when the prisoner under a warrant or summons appeared before the Deputy Magistrate to answer the charge, every thing was regular and unimpeachable. I regret very much that a want of attention to the provisions of the Criminal Procedure Code should have left in this case so much opening for the prisoner to contend that the earlier conduct of the prosecution was irregular and informal to the extent of rendering the whole proceedings void for want of jurisdiction. I have given my reasons for thinking that that contention cannot even in the imperfect state of the record be supported.

The prisoners' pleader has further argued that, even supposing the prosecution was rightly instituted before the Magistrate or the Deputy Magistrate, still that this was a case in which the Magistrate had no power to proceed to a conviction, and that he ought, instead of so doing, to have committed the accused for trial to the Sessions. In support of this position he has pointed to the universale practice of Magistrates in this respect, to the provisions of the Criminal Procedure Code in analogous cases of personation, and to the inadequacy of the Magistrate's powers relative to inflicting the full amount of punishment given by Section 94 of Act XX. of 1866; and on these grounds he has asked us to infer that the words "as to the institution of prosecutions" in Section 95 of Act XX. of 1866 do not authorize the Magistrate to finally hear and determine the matter of the charge.

I think this argument is not substantial. It seems to me that the word "prosecution," as used by the Legislature in this place, means the entire proceedings in trial of a person who is accused of a criminal charge. It is, in short, employed to designate a criminal trial with all its proceedings from beginning to end, and this contradistinction appears in many places, both of the Penal Code and the Criminal Procedure Code. I will refer to Section 205 of the Penal Code as an instance. Now, when the Legislature enacts that a suit of the specified character shall be instituted in a particular Court, say in the Principal Sudder Ameen's Court, it is undoubtedly taken to mean that the suit shall be tried out in that Court. So it seems to me here that the natural meaning of the words in Section 95 of Act XX. of 1866, namely, "all prosecutions under this Act shall be instituted before a person exercising the powers of a Magistrate," &c., is that the whole of the criminal trial from complaint to adjudication on the charge shall be carried out before and by that person. There is not in this or in any subsequent Act any limitation put upon the operation of these words, and the limitation of the Magistrate's jurisdiction as to trial, which is given by the Criminal Procedure Code, applies only to the particular offences therein mentioned; and consequently does not include within its scope the offence in question which was first created by Act XX. of 1866. I think, therefore, that the Deputy Magistrate had full power under the provisions of Section 95 of Act XX. of 1866 to entertain and to finally adjudicate on the charge made against the prisoners in the present case. The sentence passed by him did not exceed in amount of punishment that which the ordinary powers of a Subordinate Magistrate of the first class authorises him to pass, and therefore it is not necessary to decide whether Act XX. of 1866 would enable him to go beyond that limit, in cases to which Section 94 of that Act applies.

On the whole, I am of opinion that this application should be rejected.

Hobhouse, J.—I agree in rejecting this application.

b

The 25th July 1868.

Present:

The Hon'ble G. Loch and F. A. Glover, *Judges.*

Antedating a document—Forgery—License-tax—Section 463 and Clause1, Section 464, Penal Code.

Criminal Appellate Jurisdiction.

Queen *versus* Sookmoy Ghose.

Committed by the Magistrate, and tried by the Sessions Judge of Jessore, on a charge of abetment of forgery.

Where a prisoner, who appealed to the Commissioner from an order of an Assessor under Act XXI. of 1867, filed stamp-paper for a copy of the Assessor's decision after the period of appeal had elapsed, but on appeal averred that he filed the stamp-paper before the time for appealing had elapsed, and fraudulently obtained a certificate to that effect which was antedated, it was held that he was guilty of having abetted the commission of forgery of a document within Section 463 and Clause 1, Section 464 of the Penal Code.

The evidence of a prisoner taken by a Collector cannot be used against him on his trial before a Magistrate.

Loch, J.—THE facts of the case are shortly as follow:—

The prisoner was the agent of Rajah Buroda Kant Roy, who was required to take out a license under the provisions of Act XXI. of 1867. He appealed to the Assessor, Baboo Hurnul Coomar Ghose, who rejected the application on the 10th September 1867, on the ground that, as it related to two different kinds of property, separate petitions of appeal should be preferred. On the 29th September, application was made by the prisoner for a copy of this order to enable him to file an appeal before the Commissioner. He was directed to file the proper stamp-paper; and, on his doing so on the next day, the 25th September, a copy was supplied to him on the 26th idem. The result of his appeal to the Commissioner was that the order of the Assessor was reversed, and the Commissioner held that the appeal was in time, allowance being made for the time required to take a copy of the order appealed against. When the papers were received back by the Assessor, he informed the Commissioner that the application for a copy of his order had not been made till the 25th, by which date the period of appeal from his order of the 10th had expired; and that the date (22nd September) on which the stamp for a copy of his order of 10th September was said to have been put in, and endorsed on the back of the copy submitted with the appeal to the Commissioner, was erroneous, for the stamp-paper had not been deposited till the 25th idem. The Commissioner (*i. e.*, the Collector of Jessore) sent for the prisoner and examined him, and he then admitted that he had put in the stamp-papers marked A and B with four other pieces of stamp-paper at Taragunge, where the Assessor was holding his Cutcherry, on the 25th September. The result of the inquiry was that the prisoner Sookmoy was made over to the Magistrate for committal to the Sessions, and he and one Oopendro Lall, an officer on the Assessor's establishment, who wrote the endorsements on the stamp-paper A, were committed for trial. Oopendro Lall was acquitted, but Sookmoy was convicted under Sections 466 and 114 of the Indian Penal Code, and sentenced to rigorous imprisonment for three years.

The stamp-paper A is a copy of the order of the Assessor passed on the 10th September 1867. On the back are two notes. The first is to the following effect: "This day, "for the purpose of taking a copy, petitioner "deposited the papers, 22nd September "1867;" and the second is: "This day, the "copy being read has been made over to the "petitioner's mooktear, 26th September "1867." The stamp-paper was purchased on 20th September 1867 (5th Assin 1274). The stamp-paper marked B is the application for

the copy, &c. It bears an order on the back, dated 25th September 1867, directing a copy to be given. It also was purchased on the 26th September (5th Assin 1274), and the petition bears the same date.

The evidence of the Assessor (and his is the most important and direct against the prisoner) is, that, after passing his order of the 10th September 1867 at Nuggur Chupprail, he proceeded to Tarajgunge, where the prisoner came to him on the 24th, and, having learnt from him that the period of appeal had expired, asked for a copy of the order. The Assessor told him to put in the stamp for the copy A, which he did on the 25th, with his application B, and received it on the same day. If this evidence is true, it is clear that the defendant's allegation that the stamp-paper for the copy was put in on 22nd September is untrue, and that the endorsement to the effect that it was put in on that date is also untrue. Looking at the two endorsements, dated 22nd and 26th September, there can be little doubt that they were written at the same time and by the same hand, and the party who made both endorsements was Oopendro Lall, who has been acquitted.

The prisoner has been convicted of having abetted the commission of forgery of a certificate purporting to be made by a public servant in his official capacity, and in his finding the Sessions Judge says that it was made for the purpose of supporting a claim to get the Rajah's tax reduced.

The objections taken in appeal are, *first*, of law, and, *second*, of fact—that the evidence is insufficient to support the charge. *First*, it is urged that the offence, if offence there be, does not amount to forgery. Looking, however, to the latter part of Section 464, Clause 1, the offence of antedating a document, if attended with the accompanying circumstances described in that and the preceding Section, does amount to forgery. Forgery is described in Section 463 of the Indian Penal Code to be the making a false document with intent to cause damage or injury to the public or to any person *to support any claim* or title, &c., &c.; and Section 464 defines what it is to make a false document. Whoever dishonestly or fraudulently makes a document with the intention of causing it to be believed that such document was made at a time at which he knows that it was not made, is said to make a false document. Now, as the document (and the endorsement is admitted to be a document) purports to have been made on the 22nd September, if, as shewn by the evidence, it was not made till the 25th of that month, the offence of making a false document has been commited, provided it be also shewn that it was dishonestly or fraudulently made with the intention of causing it to be believed that it was made; and the offence of forgery has been committed if it be shewn that the false document was made with the intent mentioned in Section 463, or, as the Judge has found, with the intent to support a claim.

We think there can be no doubt that the document was made to support a claim, *viz.*, a right to be heard in appeal, in order to get rid of or to have reduced the amount of the license-tax imposed on the prisoner's master, Rajah Buroda Kant Roy. Then, as to its being made dishonestly or fraudulently must depend on the credibility of the evidence of the witnesses to the fact. If their evidence is believed, there can be no doubt that, if not made dishonestly according to the definition given of that term in the 2nd Chapter of the Penal Code, yet it was made fraudulently, *i. e.*, with the intent to deceive; it was made with the intent to deceive the Commissioner into a belief that the appeal was filed within time, allowing for the period required for taking a copy of the order. If, then, the evidence for the prosecution is believed, it is clear that the document was antedated; that it was done with a fraudulent intent to cause it to be believed that it was made at a time at which it was not made; that it was done with the knowledge of the prisoner, and it was made with the intent of supporting a claim.

Another objection on a point of law is raised, *viz.*, that the Collector proceeded as if he were a Magistrate and competent to examine the prisoner, and the Sessions Judge, looking at the proceedings in that light, has considered himself entitled to make use of his answer before the Collector as if it had been a defence made by a prisoner before a Magistrate; whereas it cannot take a higher position than that of a contention before a police-officer, and cannot be admitted as evidence. We think the contention of the learned Counsel is right, that any examination of the prisoner by the Collector cannot be used against him at the trial.

Then, as regards the direct evidence, * *

* * * * * * *

* * * * * * *

Under this view of the evidence, I would reject the appeal.

Glover, J.—I am of the same opinion.

d

The 27th July 1868.

Present:

The Hon'ble G. Loch and F. A. Glover, *Judges.*

Criminal Misappropriation—Section 403, Penal Code.

Criminal Appellate Jurisdiction.

Queen *versus* Abdool.

Committed by the Magistrate, and tried by the Sessions Judge of Tipperah, on a charge of dishonest misappropriation of moveable property.

To bring a prisoner within Section 403 of the Penal Code, there must be actual conversion of the thing appropriated to the prisoner's own use. Where, therefore, the accused found a thing, and merely retained it in his possession, he was acquitted of criminal misappropriation under the Section referred to.

Glover, J.—I HAVE strong doubts as to the legality of this conviction.

If the evidence for the prosecution be admitted to be trustworthy so far as regards the finding of the bond in the prisoner's house, I do not see that this would be enough for a conviction under Section 403 of the Penal Code.

In the first place, as the bond is said to have been paid, I doubt whether the paper on which the engagement was written, and which is now valueless, can be said to be "moveable property" at all in the sense of the Section; and, *secondly*, if it be so considered, I doubt whether there has been any conversion of it to the prisoner's own use.

As the Sessions Judge, in concurrence with the Assessors, has acquitted the prisioner of the charges brought under Sections 391 and 412 of the Penal Code, the prisoner is now entitled to the position of a person finding an article of moveable property, and retaining it in his possession without making any effort to discover the owner; and does that position make him guilty of misappropriation?

All the illustrations to the Sections refer to cases where the possession, at first lawful, has been made unlawful by the finder's converting the property to his own use, and not to cases where the utmost he has done has been to retain the property by him.

It appears to me that there must be an actual conversion to bring a case under Section 403, and that as there was no conversion in this case, the prisoner was not guilty of dishonest misappropriation, and should therefore have been acquitted.

I would acquit him now.

Loch, J.—It appears to me that this conviction of misappropriation cannot stand. A box and two bonds were found in the prisoner's house, who was sent in to the Magistrate charged with the offence of dacoity. The Sessions Judge, concurring with the Assessors, finds the prisoner not guilty of dacoity or of having stolen property acquired by dacoity in his possession,

* Misprint in Original Edition.

but guilty on an amended charge drawn up by the Judge himself, *viz.*, misappropriation.

The prisoner persistently denies that the property was found in his house, but the evidence to the finding it there is, in the Sessions Judge's opinion, sufficient. If so, how did it come there? Some of the witnesses say that, when the property was discovered, the prisoner told the police that he had picked up the bonds at the ferry-ghât. The complainant deposes that these were robbed at the time of the dacoity from his house, though he made no mention of them in the list of property robbed which he gave to the police. Admitting the prisoner's statement to the police to be true, yet there is nothing to show that he had misappropriated the property. He had certainly picked up the papers, and they had apparently lain in his house without any effort on his part to find out the owner; but he had made no attempt to realise the amount of the bond, or done any act which might be construed into a conversion of the property to his own use. I concur in acquitting the prisoner.

The 4th August 1868.

Present:

The Hon'ble J. B. Phear and C. Hobhouse, *Judges.*

Procedure—Sanction to prosecution—Section 169, Code of Criminal Procedure.

Reference to the High Court by the Sessions Judge of Gya.

The Queen *versus* Woodurnul Singh and Gungoo Singh.

Where the sanction to a prosecution accorded under Section 169, Code of Criminal Procedure, extended only to one of the persons charged, the High Court quashed the commitment, and directed the discharge of the persons to whom the sanction did not apply.

Case.—I HAVE the honor to forward the record of this case, and request that, as regards the prisoner Woodurnul Singh, the commitment may be cancelled. The grounds of this application are briefly these. The prisoner Gungoo Singh made a complaint before the Magistrate, charging one Gugadhur Singh and others with having plundered a large quantity of grain belonging to Woodurnul Singh, the employer of Gungoo Singh. The case was referred for disposal to a Deputy Magistrate, who pronounced the charge to be false, dismissed it, and accorded sanction under Section 169, Criminal Procedure Code, to the parties against whom it was brought to prosecute the complainant Gungoo Singh under Section 211, Indian Penal Code; but it does not appear from the record that similar sanction was ever granted in the case of Woodurnul Singh, and therefore, in my opinion, the commitment of this person was irregular, and should be cancelled.

Judgment of the High Court.

Hobhouse, J.—WE think that the Judge is right in this case, and we direct that the commitment in question be quashed, and that the accused be discharged from custody.

* *Misprint in Original Edition.*

The 4th August 1868.

Present:

The Hon'ble J. B. Phear and C. Hobhouse, *Judges.*

Procedure—Court of Session—Commitment—Discretion—Preliminary enquiry—Cross-examination by accused—Examination of accused—Sections 226 and 435, Code of Criminal Procedure.

Criminal Appellate Jurisdiction.

Queen *versus* Shama Sunker Biswas and Shama Churn Bose.

Committed by the Magistrate, and tried by the Sessions Judge of Bhaugulpore, on a charge of abetment of attempt at forgery.

The power of commitment given to a Court of Session by Section 435, Code of Criminal Procedure, must be exercised judicially upon the evidence before the Court, and such Court ought not to order a commitment unless the evidence appear to it sufficient for a conviction within the terms of Section 226.

Where such discretion has been exercised, the High Court cannot enquire into the evidence, to see if it justifies the exercise of the discretion.

An accused should be allowed, at preliminary enquiries before a Magistrate, to cross-examine the witnesses; but whether the accused himself shall be examined upon the matter of the charge by the Magistrate, is left entirely to the discretion of the Magistrate, and such discretion should not be exercised when the Magistrate thinks that the evidence for the prosecution does not disclose any proper subject of criminal charge against the prisoner.

Phear, J.—We think that we ought not to send for the record in this case. We are of opinion that the power which is given to the Court of Session by Section 435 of the Criminal Procedure Code, to order the commitment of any accused persons who may have been discharged by the Magistrate, must be exercised judicially upon the evidence before the Court; that is, generally upon the depositions which the Magistrate himself has taken and sent up, and the Court of Session ought not to order such a commitment, unless that evidence appears to it to be sufficient for the conviction of the accused within the terms of Section 226, which prescribe the conditions upon which the Magistrate is to commit. But it appears to us, upon the order of the Sessions Judge as it has been read to us from an official copy, that the Judge has exercised the judicial discretion to which we refer, and that he has found in his order of commitment that the evidence before him is sufficient to make out a *primâ facie* case. That being so, we think that we have no authority to interfere and to enquire whether or not the evidence justifies the exercise of discretion which the Judge has made. Consequently, we are of opinion that we cannot, upon the case made by the accused's Counsel, interfere with the commitment by the Judge, and that the trial must take its course.

But, while saying this, we wish also to remark that it has been made to appear to us from the copy of the order of the Judge that some of the instructions which he has in that order sent to the Joint Magistrate are erroneous. If, as that copy seems to convey, he directed the Joint Magistrate that he was wrong in allowing the accused to cross-examine the witnesses who were giving evidence against him on the matter of complaint, we think that he was decidedly wrong. It is not only accordant with the spirit of the Criminal Procedure Code that the accused should be allowed even at preliminary enquiries before the Magistrate to protect himself by cross-examination of the witnesses, but by the very express letter of the Statute it is enacted that he may do so. We feel sure that the Judge's words in this point must have been misrepresented to us.

Again, if the Judge did, as the copy of his order seems also to make out, censure the Joint Magistrate for not having examined the accused himself upon the matter of the charge, we think that he is wrong on this also; for it is in our opinion quite a matter of discretion for the Magistrate himself to judge whether, during the enquiry before him, it is right and proper that the accused should be examined or not. and we agree with the learned Counsel who has appeared here on behalf of the accused in the expression of opinion that it is very undesirable that the accused should be examined by the Magistrate under the power which he no doubt possesses for that purpose when the Magistrate is satisfied that the evidence

adduced by the prosecution does not disclose any proper subject of criminal charge against him.

Under these circumstances, we reject the petition which has been presented to us; but we direct that a copy of the remarks which this Court has made be sent down to the Sessions Judge.

The 7th August 1868.

Present:

The Hon'ble G. Loch and F. A. Glover, *Judges.*

Murder—Exception 1, Section 300, Penal Code.

Criminal Appellate Jurisdiction.

Queen *versus* Huri Giree.

Committed by the Magistrate, and tried by the Sessions Judge of Cuttack, on a charge of culpable homicide.

To give an accused the benefit of Exception 1, Section 300 of the Penal Code, it ought to be shewn distinctly, not only that the act was done under the influence of some feeling which took away from the person doing it all control over his action, but that that feeling had an adequate cause.

Glover, J.—We see no reason whatever to interfere in the prisoner's favor, and his appeal is rejected. Indeed, we are very decidedly of opinion that, on the evidence, the prisoner should have been convicted of murder.

The Sessions Judge has found that the prisoner killed the deceased with a sword, and that he (the prisoner) was not at the time acting in defence of either life or property.

But he has considered his case to come within Exception 1, Section 300 of the Indian Penal Code, on the ground of grave and sudden provocation.

No doubt, the question whether such provocation was sufficient to take the case out of the purview of Section 300 was a question of fact.

But the Sessions Judge has not given any tangible reasons for giving the prisoner the benefit of the exception. He thinks that the distraint was probably carried out without exact warrant of law, but how or in what point he does not say. He does not believe that the prisoner's field was plundered, although he thinks that some damage may have been done: in short, he gives the prisoner the benefit of various possibilities, the existence of which has only been surmised.

This does not seem to us the correct way of treating the case. To give an accused person the benefit of Exception 1, it ought to be shewn distinctly, not only that the act was done under the influence of some feeling which took away from the person doing it all control over his actions, but that that feeling had an adequate cause.

Now, taking the case in the most favorable light for the prisoner, we cannot find any thing that satisfies these conditions. It is clear that the prisoner was not taken unawares as to what was likely to happen, but had placed his sword in readiness for the emergency. However indignant he may have been at the wrong he supposed to have been done to him, it seems impossible to say that the provocation he received was of such a nature as would take away from him all power of self-control; in any case the provocation was certainly not sudden.

As the Judge and Assessors have found on the evidence that the prisoner is not guilty of murder, and have acquitted him thereof, this Court cannot interfere, no question of law being involved; but we think it right to express our dissent from that finding, and to say that, in our opinion, it was not justified by the evidence.

The 13th August 1868.

Present:

The Hon'ble G. Loch and F. A. Glover, *Judges.*

Procedure—Public nuisance—Magistrate's duty—Section 308, Code of Criminal Procedure.

Reference to the High Court, under Section 434 of the Code of Criminal Procedure, by the Sessions Judge of Beerbhoom.

Case of Bistoo Chunder Chuckerbutty.

HELD, that a Magistrate cannot proceed to pass an order for the removal of a nuisance, under Section 308 of the Code of Criminal Procedure, without calling on the party to show cause why the order should not be passed against him, and without hearing the objections, even if they are filed after the time fixed for their presentation, but before he takes up the case.

A Magistrate's power to fill up a tank is, by Section 308, limited to having it fenced in; but, where the tank is proved to be injurious to the community, he may, under that Section, treat it as a public nuisance, and cause it to be filled up.

Glover, J.—IT appears to me that the Magistrate's order in this case must be set aside without going into the merits of it, on the ground that the proprietor of the tank had no proper opportunity given him of preferring his objections to the Magistrate's order. That order was passed on the 2nd of May, and directed the petitioner to show cause within six days. It did not reach the petitioner's hands, however, till the 9th of the month. On the 19th the petitioner came forward and filed his objections. On the 23rd, the Magistrate, without taking any notice of the petition, treated the matter as an "*ex-parte one,*" in which no cause had been shown within the time allowed, and passed an order for filling up the tank.

I think that the Magistrate was not justified in treating the case in this way. To call upon the petitioner to show cause and then to refuse to hear him, because the petition of objection was not filed within the time fixed, although the case itself was not disposed of for some 10 days after, and although the delay was not attributable to the petitioner's negligence, but to the fault of the Court officer, was to defeat the object of the law, and practically to deny justice by refusing to hear both sides of the question.

The Sessions Judge, however, appears to be mistaken in his application of Section 308, Criminal Procedure Code, to this case. In the case of a tank considered merely as a reservoir of water, the Magistrate's powers under that Section no doubt extend only to having the tank fenced in, the object being to prevent accidents; but in the present case the tank was described as a half-dry excavation into which the town people were in the habit of throwing rubbish, and that it had from this cause become a public nuisance injurious to the health and comfort of the community. In fact, it was no longer a tank in the ordinary acceptation of the word, but a pestering rubbish hole. There can be no doubt, I think, that, if this were proved, and no cause shewn by the other side, the Magistrate would have been justified in treating the case as one of public nuisance, and in causing the tank to be filled up, if that were the only way of suppressing the nuisance. To fence in such an excavation, and to stop there, would be to make a dead letter of Section 308, and to take away from the community a relief which the law gives them.

Loch, J.—I concur with my colleague in thinking that the order passed by the Magistrate should be quashed, and that the petitioner should be allowed to show cause why the tank or hole should not be filled up. The attention of the Magistrate should be called to the wording of Section 308, Criminal Procedure Code.

satisfactory, and that there is no need for any order under Section 434.

Loch, J.—I concur in the view taken by my colleague that no cause of complaint was made out by the complainant in his statement to the Magistrate, and that the case does not call for the interference of this Court.

The 24th August 1868.

Present :

The Hon'ble G. Loch and F. A. Glover.
Judges.

Special Law—Punishment—Fine—Subordinate Magistrate of the first class.

Reference to the High Court, under Section 434, Code of Criminal Procedure, by the Judicial Commissioner of Chota Nagpore.

Chunder Pershad Singh.

Held, that a Subordinate Magistrate of the first class has power to deal with the case of an offence provided for by a special law (in this case, Act III. of 1863, B. C.), when the punishment awardable is six months' fine, and fine only ; Section 67, and not Section 65, of the Penal Code being applicable to such a case.

Loch, J.—THE offence does notcome under the Penal Code at all, but is specially provided for by a Special Act, III. of 1863, the thirteenth Section of which declares that a party committing the offence described in Section 3 of the Act shall be liable to a fine of Rupees 200, commutable to six months' imprisonment. The Extra Assistant Comissioner being a Sub-Magistrate of the 1st class can sentence to imprisonment for six months, and to fine not exceeding Rupees 200; and, therefore, he has not exceeded his power.

Glover, J.—This reference appears to have been unnecessary.

The case was one under Act III. of 1863, B. C., and by Section 13 of that Act, a party convicted would be liable to 200 rupees fine, or in default to six months' imprisonment.

The Extra Assistant Commissioner has, it appears, the power of a Subordinate Magistrate, 1st class, *i. e.*, he can, by Section 22, Criminal Procedure Code, award imprisonment up to six months, and a fine up to Rupees 200 ; he had, that is, the full powers necessary to deal with a case like the present.

Section 67 of the Penal Code lays "down "that when an offence is punishable with fine "only, the term for which the Court directs "the offender to be imprisoned in default of "payment of fine shall not exceed the following scale," and by this scale a fine of any thing beyond Rupees 100 would be commuted, in default of payment, to any term between four and six months' imprisonment.

The Judicial Commissioner says that a Subordinate Magistrate of the 1st class could not sentence to imprisonment in lieu of fine for more than six weeks. In this he is mistaken, I think, and has probably considered the case as coming under Section 65, Penal Code, where the offence was punishable with imprisonment *as well as* with fine.

Under Section 15, Act III. of 1863, B. C., the offence of which the accused was convicted was one punishable with fine only, and, therefore, Section 67, and not Section 65, applies to it.

The Extra Assistant Commissioner appears to have acted with full warrant of law, and there is no ground for interference under Section 434, Code of Criminal Procedure.

The 24th August 1868.

Present:

The Hon'ble G. Loch and F. A. Glover, *Judges.*

Procedure—Warrant—Summons—Dismissal of Charge—Chapter XIV., Code of Criminal Procedure.

Reference to the High Court, under Section 434 of the Code of Criminal Procedure, by the Sessions Judge of Beerbhoom.

Nund Lall Sootrodhor *versus* Bhagirutty Sootran and two others.

In a case falling under Chapter XIV. of the Code of Criminal Procedure, a Deputy Magistrate has no power to dismiss a complaint on account of the non-attendance of complainant, even if a summons, instead of a warrant, is issued in the first instance requiring the attendance of the complainant.

Glover, J.—The Deputy Magistrate's order of the 13th of May, dismissing the complaint under Section 259 of the Criminal Procedure Code, is clearly illegal.

The charge made was one of criminal misappropriation, in which the Deputy Magistrate exercised the discretion allowed him by Section 248 of the Code, and issued a summons in the first instance against the person complained against, instead of a warrant.

But the mere fact of a summons having been issued did not bring the case within the purview of Chapter XV. of the Code, or allow the Deputy Magistrate to dismiss the complaint under Section 259, because the complainant did not appear on the day appointed. The case remained subject to the rules laid down in Chapter XIV. of the Code, and there is no provision in that chapter for the dismissal of complaints on account of non-attendance of complainants. The Deputy Magistrate's order is therefore quashed, and the charge will be proceeded with in the usual course.

The 10th August 1868.

Present:

The Hon'ble G. Loch and F. A. Glover, *Judges.*

Fabricating false document—False statement—Section 192, Penal Code—Section 24, Act VIII., 1859.

Revision of Proceedings in the case of Haran Mundul.

The accused put in an application, which he verified, before a Judge of a Court of Small Causes, praying for a re-hearing of his case under Section 119, Act VIII. of 1859, and alleging that he was not aware that a suit had been instituted or a decree given against him, though he had authorised a pleader to defend the suit.

Held by *Loch, J.*—That the accused was not guilty of an offence under Section 192 of the Penal Code, nor liable to punishment under Section 24, Act VIII., 1859. The offence contemplated by the former law requires that the document containing the false statement should be made with the intention that it may appear in evidence. The latter law does not require that an application under Section 119, Act VIII., 1859, such as the accused made, should be verified.

Held by *Glover, J.—Contra.*

Loch, J.—The prisoner has clearly made a false statement which he has verified, though not required to do so by law. He has, as described in Section 29 of the Penal Code, made a document containing a false statement, and the document was intended to appear in a judicial proceeding that it might cause the Judge of the Small Cause Court to entertain an erroneous opinion touching a point material to the result of such proceeding. But all this does not quite make the offence defined in Section 192, Penal Code. That offence requires that the document containing the false statement should be made with the intention that it may appear *in evidence* in a judicial proceeding. A plaint, or written statement, filed in a suit cannot properly be called evidence, though any statements contained therein may be used as evidence against the party making them; but till the Code of Procedure required the plaint and written statement to be verified, the person filing them could not be punished criminally for any falsehood they might contain. Section 24 of Act VIII., 1859, declares that, if a plaint, written statement, or declaration in writing, required by that Act to be verified, shall contain any averment which the party making the verification knows or believes to be false, &c., such person shall be liable to the punishment

provided for the offence of giving or fabricating false evidence.

It appears to me that this is a case which does not come under the provisions of Section 192, Penal Code, and that the prisoner has not committed the offence specified in that Section, unless it can be said that the false statement which he made was intended to be used in the case. It was made with the intention of getting the case re-heard, but not to be used in evidence in the suit. It was intended to mislead the person who had to form an opinion upon the evidence in that suit, but it was not offered as evidence as regards the question at issue in that suit.

If the case does not come up to the offence defined in Section 192, Penal Code, has an offence been committed under Section 24, Act VIII., 1859, which will render the prisoner liable to punishment as if he had committed the offence described in Section 192 of the Penal Code? The prisoner put in an application before the Judge of the Small Cause Court, praying for a re-hearing of his case, alleging that he was not aware that a suit had been instituted or a decree given against him, though he had given a vakalutnamah to a pleader of the Court to defend the suit. By Section 47 of Act XI., 1865, the provisions of the Code of Civil Procedure were, as far as applicable, extended to all suits and proceedings in the Small Cause Courts, and consequently all plaints and written statements for suits tried in Small Cause Courts are required to be verified; and if any plaint or written statement contain an averment which the party making the verification knows or believes to be false, such party would, under the provisions of Section 24, Act VIII., 1859, be liable to the punishment prescribed for giving or fabricating false evidence.

The offence, however, is only committed when the written statement, of whatever kind it be, is *required by the Act* to be verified. Now, applications for a re-hearing made under Section 119, Act VIII. of 1859, are not required by the Act to be verified, and consequently applications of a similar nature presented to the Judge of the Small Cause Court do not require verification. If, therefore, a party has made a verification when it is not required by law, he cannot be said to have committed the offence defined in Section 24 of the Civil Procedure Code. That the prisoner has committed gross perjury, I have no doubt; but it does not appear to me that he can be legally convicted under the provisions of the Penal Code, and must be released.

Glover, J.—This case is not without difficulty; but, after the best consideration I have been able to give to it, it appears to me that the conviction ought to be allowed to stand.

I have considerable doubt, in the first place, whether the prisoner does not substantially come under the provisions of Section 191, Penal Code, because, although his application to the Small Cause Court for a re-hearing under Section 21, Act XI. of 1865, was not one which the law requires to be verified, and the prisoner was not, therefore, in the first instance, bound by any express provision of law to make that verification, still, he *did* make it, and by so doing "legally bound himself;" and a false statement made under such circumstances would, it appears to me, be false evidence under that Section, and would bind the person making it.

It has been found as a fact by the Sessions Judge and Assessors (and the prisoner has not appealed) that the memorandum in the petition for re-hearing contained a false statement, and that the prisoner made it knowing it to be false, and intending it to cause the Judge of the Small Cause Court to form an erroneous opinion upon the evidence.

Mr. Justice Loch thinks that the memorandum filed by Haran Mundul could not have been used as evidence in the case, and that Section 192, Penal Code, therefore, would not apply.

It appears to me that, under the circumstances, it might have been so used.. It would have had the same effect as a deposition on oath, and would have been *primâ facie* evidence of the truth of the statements therein contained. Indeed, if the Court had chosen to believe it, it would have been legally sufficient evidence by itself to prove the non-service of summons or any of the "sufficient causes" which had prevented the petitioner from appearing before the Small Cause Court when his case was first heard.

But, even if it were not "evidence" properly so called, it is quite clear that Haran Mundul "intended" it to appear in evidence, so that in any case the prisoner has in my judgment made himself liable.

The prisoner has not appealed, and the proceedings are before us as a Court of Revision only. For the reasons above given, I do not think any interference necessary.

f

The 3rd September 1868.

Present:

The Hon'ble G. Loch and F. A. Glover, *Judges.*

Kidnapping—Sections 361 and 363, Penal Code.

Criminal Appellate Jurisdiction.

Queen *versus* Neela Bebee and another.

Committed by the Magistrate, and tried by the Sessions Judge of Sylhet, on a charge of kidnapping.

To support a conviction for kidnapping under Sections 361 and 363 of the Penal Code, it must be shewn that the accused *took* or *enticed* away from lawful guardianship the person kidnapped.

Glover, J.—It appears to me that this conviction cannot stand.

The prisoners have been found guilty under Sections 361 and 363, Penal Code, and have been sentenced each to two years' rigorous imprisonment.

To support a conviction of kidnapping, it must be shewn that the prisoners "took" or "enticed" away the girl Chundun from lawful guardianship.

Now, the only evidence of what took place when Chundun left her husband's house to go to Sylhet is that of the girl herself, and she states most clearly that it was at her own request that the female prisoners took her to Sylhet, the object (which was afterwards carried out) being to present a petition to the Magistrate, complaining of her husband's conduct, and praying not to be compelled to live with him. It may be, as surmised by the Sessions Judge, that Chundun has been induced to give false evidence, but the fact is hardly probable, for she is now again living with her husband, and presumably under his influence. But, whether true or false, it is the only evidence as to the "taking" or "enticing," and there is nothing in the other recorded evidence to disprove the fact that the girl Chundun accompanied the prisoners otherwise than of her own free will. It may be that she was induced to present a petition against her husband in the Magistrate's Court for some ulterior purpose of the prisoners, but it is clear that she acted throughout like a free agent, and it is in evidence that, after the meeting with her husband in Sylhet, she still persisted in presenting her petition to the Magistrate.

So that, if it be admitted that the witnesses for the Crown are credible witnesses, their evidence does not prove more than that the girl accompanied the prisoners to Sylhet, and there presented a petition against her husband; whilst the presumption, that she, being a minor of some 13 years of age, was enticed away by those who had influence over her, is rebutted by the girl's own deposition. The affair took place in open day, and no concealment was practised from first to last, except as to the object of the journey; and this would be natural under the circumstances. Directly they reached Sylhet, all three went openly to the cutcherry, and averred the object of their going there.

Whatever offence the prisoners may be guilty of, it seems to me that they cannot be convicted under Sections 361 and 363, Penal Code, and I would direct their release.

Loch, J.—I concur.

The 8th September 1868.

Present:

The Hon'ble E. Jackson and C. Hobhouse, *Judges.*

Offence against Public Servant—Section 174, Penal Code.

Reference to the High Court, under Section 434 of the Code of Criminal Procedure, by the Sessions Judge of Jessore, in the case of Sreenath Ghose.

A conviction for non-attendance in obedience to an order from a public servant, under Section 174, Penal Code, cannot be had, unless the person summoned was legally bound to attend, and refused or intentionally omitted to attend.

Hobhouse, J.—The reference in this case may be divided into two parts. One Sreenath Ghose, an amlah of the Judge's Court, was summoned to attend the Judge of the Small Cause Court to give evidence on the 6th April. Subsequently, the Judge of the Small Cause Court postponed the hearing of that case until the 7th May, and gave notice of such postponement to the Civil and Sessions Judge of Jessore. But in this instance no summons was served upon Sreenath Ghose, directing him to attend on the 7th May. Accordingly, he did not attend on the 7th, and the Judge of the Small Cause Court made him over to the Deputy Magistrate of Narail to be tried for an offence under Section 174 of the Penal Code, and the Deputy Magistrate has found him guilty under that Section, and has sentenced him to pay a fine of 10 rupees. The Civil

and Sessions Judge has referred the case to us, in order that this sentence of the Deputy Magistrate may be set aside. We think that the Judge is right in stating that this sentence of the Deputy Magistrate is illegal. There was no summons served upon Sreenath Ghose, directing him to attend the Court of the Small Cause Court Judge on the 7th May; and consequently he was not legally bound, under the provisions of Section 174, to attend at that Court on that date, and he has not, therefore, committed any offence in not attending at that Court on that date. We direct, therefore, that the sentence and order of the Deputy Magistrate in this case be set aside, and the fine, if it has been paid, be remitted.

The second case is on this wise. When the Judge of the Small Cause Court directed Sreenath Ghose to be prosecuted before the Deputy Magistrate of Narail under Section 174 of the Penal Code, the Deputy Magistrate directed him to attend on a certain date at his Court to make his defence. He failed to attend on that day, and the Deputy Magistrate has again sentenced him under Section 174, Indian Penal Code, to a fine of 5 rupees. We concur with the Judge that this sentence also is illegal. Section 174 runs in this way: "Whoever, being legally bound to attend in person or by agent at a certain place and time in obedience to a summons, &c., proceeding from any public servant legally competent as such public servant to issue the same, intentionally omits to attend at that place or time, or departs from the place where he is bound to attend, &c., shall be punished with simple imprisonment for a term which may extend to 1 month, or with fine which may extend to 500 rupees," &c. The question, therefore, here was whether there was any evidence of an intentional omission to attend. The only evidence taken in the case is that of Sreenath Ghose himself. He states that he did not attend, because the Civil and Sessions Judge would not let him go. It is quite clear, therefore, that, upon this evidence, and this is the only evidence on the record, there was no intentional omission on the part of Sreenath Ghose to attend before the Deputy Magistrate of Narail. He simply obeyed, whether those orders were right or wrong, the orders of his superior, the Civil and Sessions Judge. We think, therefore, that in this case also the sentence of the Deputy Magistrate must be set aside, and the fine, if it has been paid, must be remitted.

The 9th September 1868.

Present:

The Hon'ble G. Loch and F. A. Glover, *Judges.*

Bail—Section 212, Code of Criminal Procedure.

Reference to the High Court, under Section 434 of the Code of Criminal Procedure, by the Sessions Judge of Gya, in the case of Ramlall Tewaree versus *Soopha Ram.*

Bail under Section 212 of the Criminal Procedure Code can be demanded only in cases where further enquiry is pending and the accused have not been discharged.

Glover, J.—I THINK that the Joint Magistrate was not justified in demanding bail in this case. The accused, after a lengthened enquiry, were discharged by the Joint Magistrate, he being of opinion, after hearing the witnesses for the defence, that the assault was not proved, and that in any case there had been no dacoity as alleged.

Section 212 of the Criminal Procedure Code authorizes Magistrates in certain cases to demand bail from accused persons, but this refers solely to cases where further enquiry is pending, and the accused have not been discharged.

In the present case, after hearing all the evidence, the Joint Magistrate arrived at the conclusion that there was no sufficient proof against the accused. No future enquiry is pending, but they have been called upon to give security for their attendance when required, in case, as the Joint Magistrate puts it, any other evidence should turn up.

From the nature of the case, as detailed in the Joint Magistrate's decision, it is absolutely impossible that any further evidence should turn up, and the accused ought not to have been unnecessarily harassed.

I would quash the order calling upon these men for security.

Loch, J.—I concur.

The 9th September 1868.

Present:

The Hon'ble E. Jackson and C. Hobhouse, *Judges.*

Wrongful restraint—Theft—Sections 341 and 378, Penal Code.

Reference to the High Court, under Section 434 of the Code of Criminal Procedure, by the Officiating Magistrate of Bhaugulpore, in the case of Jowahir Shah versus *Gridharee Chowdhry and others.*

Where the accused prevented the complainants from proceeding in a certain direction with their carts, and exacted from them a sum of money on a false plea—HELD that the accused were guilty of wrongful restraint, and not of theft.

Hobhouse, J.—THE facts of this case, as described by the Officiating Magistrate who refers it to this Court, are these. He states that the complainants were proceeding with their carts by a certain ghaut, when the prisoners prevented their proceeding on the plea that they were bound to pay them (the prisoners) a toll of 15 rupees. On this complaint, the Deputy Magistrate, Baboo Haran Chunder Neogi, convicted the prisoners, upon the evidence, of the offence of wrongful restraint, and sentenced them each to pay a fine of 5 rupees. The Officiating Magistrate considers that this conviction was illegal, and that the offence of which the prisoners should have been found guilty was theft, and he submits the case to this Court in order that we may quash the proceedings of the Deputy Magistrate.

We think, upon the Officiating Magistrate's own statement of the facts, that he is wrong, and that the Deputy Magistrate is right. Theft is defined under Section 378 of the Indian Penal Code as follows: "Whoever, "intending to take any moveable property "out of the possession of any person, without that person's consent, moves that property in order to such taking, is said to "commit theft." Now, the utmost that the prisoners did upon the evidence in this instance was to stop the complainants and their carts, and to knock a couple of bales of salt off the carts to the ground. But they did not take those bales, neither had they, as is evident upon the evidence, any intention dishonestly to take them. Their intention was to oblige the complainants to pay a certain sum which they alleged to be due in the shape of tolls, and for this purpose they stopped the complainants and their carts.

On the other hand, a person is said wrongfully to restrain another when he obstructs that person from proceeding in any direction in which he has a right to proceed. In this instance, we must take it upon the evidence that the complainants had a right to proceed across the ghaut in question, and that the prisoners illegally obstructed them from so proceeding. The prisoners were, therefore, rightly convicted under Section 341 of the Indian Penal Code, and we think that the Officiating Magistrate has taken a mistaken view of the case. No orders are therefore necessary in the case.

The 9th September 1868.

Present:

The Hon'ble G. Loch and F. A. Glover, *Judges.*

Commitment—Powers of High Court under Section 434, Code of Criminal Procedure.

Reference to the High Court, under Section 434 of the Code of Criminal Procedure, by the Additional Sessions Judge of the 24-Pergunnahs, in the case of Hakin Sirdar and another.

A Sessions Judge cannot alter a commitment in a case which falls within the cognizance of a Magistrate, even though the Sessions Judge thinks the evidence proves that the accused was guilty of an offence beyond the Magistrate's cognizance.

The High Court refused to interfere under Section 434, Code of Criminal Procedure, on a reference in which the Sessions Judge ordered a commitment in such a case, although they considered that there was evidence to prove that the offence was one triable by the Court of Session.

Glover, J.—THE case of the Queen *vs.* Ramtuhal Singh and others (5 Weekly Reporter 12) is exactly similar to that now referred to us by the Sessions Judge, and should, in my opinion, govern it.

The offence of which the accused were *convicted* by the Deputy Magistrate, namely, lurking house-trespass by night, &c. (Section 457, Penal Code), was one triable by that officer, and therefore Section 435 of the Criminal Procedure Code did not apply, and the Sessions Judge was wrong in directing the men to be committed to the Sessions.

But, looking to the record, I am equally clear that the Deputy Magistrate was wrong in trying the case under Section 457 of the Penal Code at all. The charge was rape, and the Deputy Magistrate admits that on the evidence it was proved that the accused entered the complainant's hut, and used criminal

force to her, and outraged her modesty. It is not very clear whether the Deputy Magistrate believed that any rape had been actually committed, but from the evidence it appears to me that at the least there was an attempt at rape: and that was an offence triable exclusively by the Court of Session.

As the Deputy Magistrae, however, did not believe the evidence that any rape or attempt at rape had been committed, it can hardly be said that he acted illegally in what he did, and there would, therefore, be no remedy so far under Section 434, Code of Criminal Procedure.

As the Sessions Judge's order directing the accused to be committed appears to me illegal, I would quash that order, and restore the order of the Deputy Magistrate passed when the case was originally tried.

Loch, J.—The Deputy Magistrate had to determine what offence was proved by the evidence. The parties were charged with committing rape. The Deputy Magistrate considered that the evidence did not prove this charge, but some minor offence which he had authority to punish under the Penal Code. Under the view of the evidence which he took, and of the offence established in his opinion by that evidence, the Deputy Magistrate's sentence was quite legal. It may be that the evidence might, in the estimation of another officer, prove the more heinous offence; but, as the Deputy Magistrate was the person to determine what the offence was, as proved by the evidence taken before him, he was not bound to commit the case when the evidence in his opinion proved a minor offence, which he was competent to dispose of. Sections 427 and 435 of the Code of Criminal Procedure do not apply to a case like the present. The order of the Sessions Judge directing commitment must be set aside, and the order of the Deputy Magistrate restored.

The 9th September 1868.

Present:

The Hon'ble G. Loch and F. A. Glover, *Judges.*

Procedure—Witnesses for defence—Chapter XV., Code of Criminal Procedure.

Reference to the High Court, under Section 434 of the Code of Criminal Procedure, by the Sessions Judge of Bhaugulpore, in the case of Bhikha Roy versus *Dhotun Roy.*

Section 266, and not Section 252, of the Code of Criminal Procedure, is applicable to a case under Chapter XV. of that Code; and under the former Section a Magistrate is not bound to summon the witnesses for the defence.

Reference.—THE Deputy Magistrate ought to have called upon the accused to produce witnesses in support of his defence (*vide* Section 252 of the Code of Criminal Procedure). As the accused has been prejudiced by the omission, the conviction is illegal, and should be quashed.

* * * * * *

* * * * * *

Loch, J.—The case appears to be one which comes under the provisions of Chapter 15 of the Code of Criminal Procedure, in which a summons on complaint ordinarily issues. Section 252 does not apply to cases which fall under Chapter 15, but Section 266, which requires the Magistrate, should the accused deny the charge, to hear the complainant and his witnesses, and also to hear the accused person and such witnesses as he shall produce in his defence. The form of summons attached to the Code does not require a party charged to bring his witnesses with him; but the terms of Section 266, read with Section 262, apparently suppose that the defendant's witnesses attend voluntarily and accompany the accused. We do not think there is any case for the interference of the Court.

The 10th September 1868.

Present:

The Hon'ble E. Jackson and C. Hobhouse, *Judges.*

Nuisance—Section 62, Code of Criminal Procedure.

Reference to the High Court, under Section 434 of the Code of Criminal Procedure, by the Sessions Judge of Nuddea, in the case of Gholam Durbesh.

Section 62 of the Code of Criminal Procedure does not authorize a Magistrate summarily to direct the owner of a tank in a dry bed of a river to destroy the

banks, on the ground that they are an obstruction to the public in the lawful enjoyment of the river, and that the stopping of the water interferes with the health of the public.

Jackson, J.—THIS is a reference made by the Sessions Judge of Nuddea, asking the Court to set aside an order of the Assistant Magistrate of Kooshtea, dated the 30th of June 1868, passed under Section 62, Act XXV. of 1861, by which he has ordered the owner of a certain tank in the dry bed of a river to destroy the banks of that tank, on the ground that they are an obstruction to the public in their lawful enjoyment of the river in the rainy season, and that, by stopping the water, the bunds interfere with the drainage of the country, and affect the health of the villagers in the surrounding places, and tend to injure the crops and lessen the value of land. This order has been passed specially under Section 62 of the Procedure Code.

We are of opinion that the Section does not authorise any such order. The Section allows the Magistrate to direct a person to abstain from a certain act, or to take certain order with certain property in his possession or under his management under certain circumstances. But in this case the Assistant Magistrate has ordered the owner of the tank, in effect, to destroy his tank. At the same time, in his decision, after hearing the evidence in the case, he finds that this tank has, in its present state, been in existence for more than six years. We are of opinion, under such circumstances, that Section 62 of the Criminal Procedure Act does not authorise a Magistrate to pass the summary orders which the Assistant Magistrate of Kooshtea has passed, and we, therefore, reverse those orders, and direct that the injunction issued by him be withdrawn.

The 10th September 1868.

Present:

The Hon'ble E. Jackson and C. Hobhouse, *Judges.*

Procedure—Lunatic.

Reference to the High Court, under Section 434 of the Code of Criminal Procedure, by the Officiating Magistrate of Furreedpore, in the case of Romon Audheekaree.

Where a prisoner was declared by the Civil Surgeon to be insane at the time he was called on to make his defence, it was held that it was irregular to acquit him. Proceedings should have been stayed, and the prisoner detained pending the orders of Government.

Reference.—THE prisoner was charged with theft before Baboo Bhugwan Chunder Bose, Deputy Magistrate, who took the evidence of the Civil Surgeon. That gentleman declared him to be insane. The Deputy Magistrate thereupon acquitted the prisoner on the ground that at the time of committing the offence he was not aware that he was doing an act contrary to law.

I think that the order of acquittal was not according to law. The Civil Surgeon certified that the prisoner was then insane, from which it followed that he was incapable of making a defence to the charge. He has, therefore, suffered an injustice; for, if he could have understood the charge, he might possibly have disproved it, in which case he could not have been sent to the asylum as a criminal lunatic.

I opine that proceedings should have been stayed as soon as the Deputy Magistrate was aware that the prisoner was then *non compos mentis*, and I believe the High Court's letter,* No. 476 of 1865, and divers rulings, support me.

In referring the case for the orders of Government, I have requested sanction to the detention of the accused person under Section 390 or Section 394, whichever may be appropriate under the eventual decision of the High Court.

Judgment of the High Court.

Jackson, J.—We agree with the Magistrate that the Deputy Magistrate could not legally acquit the accused. His orders are reversed. The Deputy Magistrate will act according to law.

The 10th September 1868.

Present:

The Hon'ble J. B. Phear and C. Hobhouse, *Judges.*

False evidence—Charge—Handwriting of Magistrate—Section 193, Penal Code.

Criminal Appellate Jurisdiction.

Queen *versus* Futteali Biswas.

Committed by the Magistrate, and tried by the Sessions Judge of Jessore, on a charge of giving false evidence in a judicial proceeding.

It is essential to a charge under Section 193 of the Penal Code that the prosecution should make out that there was on the day stated in the charge a judicial proceeding pending, and that the prisoner in the course of that proceeding made the statement alleged to be false. The particular stage of the proceeding should be mentioned in the charge.

* *See* 3 W. R., Crim. Letters, p. 5.

Evidence should be given that the accused reallymade the statement which he is charged to have made. The knowledge by the Sessions Judge of the handwriting of the presiding officer of the Court in which the statement was made is not legal evidence of such statement having been made.

Phear, J.—We think that the prisoner must be acquitted in this case. He was tried before the Sessions Court upon two charges.

The first one was "that he, on or about the "2nd day of April 1868, at Jessore, in the "Court of the Joint-Magistrate, being lawfully "bound on oath to state the truth, intentionally gave false evidence in a stage of a judicial proceeding by stating——;" and then follows the statement alleged to be false; and the second charge was "that he, on or about "the 2nd day of April 1868, at Jessore, in the "Court of the Joint-Magistrate, being lawfully "bound on oath to state the truth, intentionally gave false evidence in a stage of a judicial proceeding by stating——," and so on. It was essential to both these charges that the prosecution should make out that there was, on or about the 2nd of April, a judicial proceeding pending in the Joint-Magistrate's Court, and that the prisoner, in the course of that proceeding, made the statement which was alleged to be false. But we can find no evidence on the record that there was any such judicial proceeding pending in the Joint-Magistrate's Court at Jessore at any time. The proper mode of proving that fact would have been to produce the record of the proceeding which the prosecution referred to. If this was actually done, that record has become detached from the papers in this case, and has not come up to us as part of the Sessions record.

We think it right to remark here that, in our opinion, both the charges made against the prisoner are seriously defective in not specifying the judicial proceeding in a stage of which the prisoner is accused of having made the false statement. We even think that the particular stage of the proceeding ought to have been mentioned. It is only fair to the prisoner that the charge which is to stand for ever on record against him should be made as definite and specific as it reasonably can be. And, on the other hand, the prosecution too often needs to be definitely told what is the burden of proof which lies upon it. Had the charge in this case been properly specific, it could hardly have happened that the evidence which was most material to the issue to be tried should not be forthcoming.

We also cannot discover that there is any evidence in the Sessions record of the prisoner having made the statement in the Joint-Magistrate's Court which he is alleged to have made there. The Judge says: "The deposition he gave," that is, in the Joint-Magistrate's Court, "is marked *A*, and I know it to be in "the Joint-Magistrate's handwriting." It is scarcely necessary for us to remark that the knowledge of the handwriting possessed by the Judge did not of itself constitute evidence such as even he himself could have looked at, or considered that the prisoner made the statement which appeared in the deposition. The handwriting of the Magistrate did not afford legal evidence that the prisoner made the statement which was written down in that handwriting. There are one or two instances mentioned in the Code of Criminal Procedure when the attestation by the Magistrate and his signature is of itself sufficient proof of the document, such as that to be found in Section 366 relative to the examination of the accused person before the Magistrate. But there is nowhere any general provision, apart from these special instances, that the deposition of a witness, either written out or signed by a Magistrate, shall be evidence of itself, without more to the effect that the witness deposed before that Magistrate the words which appear in the deposition; and this case does not fall within the meaning of any of those instances. Moreover, even if the Judge's knowledge of the handwriting of the Joint-Magistrate could have been supposed to afford to himself any evidence in proof of the deposition, it obviously could not be such evidence to the Assessors. The only mode of conveying it to them would be by the Judge stating on oath before them what he actually knew upon the point.

It appears to us that in the absence of any evidence of there having been in fact a judicial proceeding pending in the Joint-Magistrate's Court on or about the 2nd April 1868, and further in the absence of any evidence of the prisoner having made the statement alleged against him in any such proceeding, the whole foundation of the two charges, upon which the prisoner was tried in the Sessions Court, breaks down. We have had some hesitation in our minds whether or not we should exercise the powers which are given to us, sitting here in appeal, by the provision of Section 422 of the Criminal Procedure Code, and send back the case to the Sessions Court, in order that any additional evidence on these two points might be produced by the prosecution. It is clear that evidence relevant thereto, either affirmative or negative, must exist. But upon a consideration of all the circumstances of the case, including even some of the collateral matter to which the Judge has referred, and bearing in mind that the prisoner has already undergone near-

d

ly two months' rigorous imprisonment, we do not think it necessary to exercise the discretion which is given to us by that Section; and we think it is proper to say that, on the evidence which appears on the record, the prisoner ought to be acquitted. He will therefore be discharged from custody, so far as this conviction is concerned.

The 10th September 1868.

Present:

The Hon'ble E. Jackson and C. Hobhouse, *Judges.*

Compensation—Section 44, Code of Criminal Procedure.

Revision of Proceedings in the case of Roop Lall Singh, Prisoner.

Compensation under Section 44 of the Code of Criminal Procedure cannot be awarded to any one excepting the person who has directly suffered by the offence. It cannot be given to the heirs of a person who has been killed.

Jackson, J.—In this case the Sessions Judge of Purneah, on the trial of one Roop Lall Singh for culpable homicide, and on his conviction, has sentenced him to imprisonment for one year, and to pay a fine of 100 rupees to the widow and heirs of the deceased as compensation, under Section 44, Act XXV. of 1861. The sole point before us is whether that portion of the order which awards compensation to the widow and heirs is according to law.

Section 44 states that the Court shall order the fine or any part thereof to be paid to the person who has suffered by the offence. We think that these words do not extend beyond the actual sufferer by the act which has been committed. In another portion of the Section, the same person is alluded to in the terms, "the person injured." If compensation can be awarded to all the heirs of any person who has been killed, it is impossible to say where such orders would stop. Looking to the precedents on the point, it does not appear that it has ever been held that such compensation can be awarded to any one excepting the person who has himself directly suffered by the offence, or been injured. On the contrary, there are precedents to the effect that the Section points to the compensation of the living rather than to any allowance to be paid to the heirs of the deceased person. Concurring in this view, we reverse so much of the order as directs that the 100 rupees shall be paid by way of compensation to the widow and heirs of the deceased.

The 10th September 1868.

Present:

The Hon'ble C. Hobhouse, *Judge.*

Jury (summing up)—Sentence.

Queen *versus* Kulum Sheikh and others.

Committed by the Magistrate, and tried by the Sessions Judge of East Burdwan, on a charge of dacoity.

In charging a Jury, a Sessions Judge should not tell them that the prisoners had previously been bad characters. That fact might be taken into consideration by a Sessions Judge in passing sentence when the prisoners are convicted.

The offence of which the prisoners are charged in this instance, and of which they have been found guilty, is that of dacoity. The Judge very properly charged the Jury upon the evidence; and according to that charge, the accuracy of which is not impeached, there was, as a matter of fact, evidence inculpating all the prisoners, the present appellants before this Court. The Jury, then, upon a matter of fact, having found the prisoners guilty, I cannot and I have no desire to interfere with that finding of the Court below. But I allude to the conviction simply to bring it to the Judge's notice that it was not right for him in charging the Jury to tell them, as a matter of fact, that several of the prisoners before him had previously been bad characters. The fact of their having been bad characters before had nothing whatever to do with the charge in question; and, on the other hand, it was likely to prejudice the Jury against them. That fact might have been and was very properly taken into consideration when the Judge came to inflict the penalty which the law permits; but it should not have been mentioned, for the reasons above stated, in his charge to the Jury.

The appeal is dismissed.

The 10th September 1868.

Present:

The Hon'ble E. Jackson and C. Hobhouse, *Judges.*

Criminal charge—Civil action.

Reference to the High Court, under Section 434 of the Code of Criminal Procedure, by the Sessions Judge of West Burdwan, in the case of Khosal Singh versus *Toolshee Chowdhry and others.*

A charge properly laid under the Penal Code should be investigated, even if the case be one in which a civil action will lie.

Reference.—THE applicant laid a charge in the Court that certain parties had forcibly taken his bullocks, and injured one of them, worth 40 rupees, and beat his carters. The charge was under Sections 352 and 429 of the Indian Penal Code.

The Assistant Magistrate took no evidence and made no investigation, but merely referred the applicant to the Civil Court to sue for the value of his bullocks.

From the record it appears that, on the 16th July, the Assistant Magistrate of Raneegunge recorded petitioner's statement in the most brief and illegible manner, and wrote at the bottom—"The prosecutor should sue for Rupees 40 in the Civil Court." This appears to me an order contrary to law, if it can be called an order at all. The petitioner laid a charge of assault under Section 352, and of mischief under Section 429; and the Assistant Magistrate was legally bound to investigate those charges. There are many cases in which a civil action will lie as well as a criminal charge; but that does not render the investigation of the criminal charge unnecessary.

The order is illegal, and the proceedings are referred to the High Court, under Section 434, that such order may be quashed, and the charge properly investigated.

Judgment of the High Court.

Jackson, J.—The Assistant Magistrate's order is clearly illegal. It is set aside, and the Magistrate is directed to see that legal orders are passed upon the complaint.

The 10th September 1868.

Present:

The Hon'ble E. Jackson and C. Hobhouse, *Judges.*

Bond to keep the peace—Cancelment of order—Sections 282 and 291, Code of Criminal Procedure.

Reference to the High Court, under Section 434 of the Code of Criminal Procedure, by the Sessions Judge of Gya, in the cases of Mussamut Anundee Kooer versus *Ranee Sooneet Kooer, and Government* versus *Mussamut Anundee Kooer.*

A Magistrate may, under Section 291 of the Code of Criminal Procedure, cancel an order passed by him under Section 282 of that Code, summoning a person to show cause why he should not enter into a bond to keep the peace.

Jackson, J.—THIS is a reference from the Sessions Judge of Gya. The Sessions Judge has referred to this Court two orders of the Magistrate as illegal. By the first order, the Magistrate quashed a former order which he had passed, requiring recognizances to keep the peace from Ranee Sooneet Kooer. The Sessions Judge remarks that a judicial officer has no power to alter or cancel any decision which he may pass, and he knows no reason why an order passed under Section 282 of the Criminal Procedure Code should be exempt from the operation of this rule. We refer the Judge to Section 291 of the Code, which enacts that, if the Magistrate or other officer should see sufficient cause, he may discharge any recognizance for keeping the peace taken under the preceding Section. Under Section 291, the Magistrate's order discharging the recognizances of Ranee Sooneet Kooer was not illegal.

The 11th September 1868.

Present:

The Hon'ble E. Jackson and C. Hobhouse, *Judges.*

Civil Court—Permission to prosecute—Forgery—Perjury.

Reference to the High Court, under Section 434 of the Code of Criminal Procedure, by the Additional Sessions Judge of the 24-Pergunnahs, in the case of Gobind Chunder Ghose and others.

The Civil Court, in giving permission to prosecute under Sections 169 and 170, Code of Criminal Procedure, should, in a case of forgery, state distinctly what the document is for which a prosecution is to be entertained. The particular act or acts of forgery, and, in a case of perjury, the particular words which constitute the perjury, should be specified.

Hobhouse, J.—We think that the Additional Sessions Judge is right in this case. Four persons were severally charged with offences under Sections 471 and 193 of the Indian Penal Code. Those offences were committed in proceedings before the Civil Court, and so, under Sections 169 and 170 of the Criminal Procedure Code, before proceedings against these persons could have been entertained by the Magistrate at all, there should have been previous sanction for such entertainment on the part of the Civil Court before which the offences were committed. In this case of Denoo Bundhoo Sircar the Civil Court does give some sort of sanction. It makes use of these words, that the "defendant may, if he wishes, proceed against the plaintiff for forgery." This, we think, is not a sufficient permission under the law. The Civil Court, in giving permission to prosecute, should have distinctly stated what the document was for which a prosecution for forgery might be entertained.

In the case of the three other prisoners no permission of the Civil Court seems to have been accorded at all. Under these circumstances, we agree with the Additional Sessions Judge that the commitments are void *ab initio*, and we direct that they be set aside, and we further direct that the Additional Sessions Judge do return the commitments to the Magistrate, and direct him, before he recommits the prisoner for trial before the Sessions Judge, to obtain the requisite sanction of the Civil Court in the case of each of the prisoners. Should the Civil Court see fit to direct any prosecution, that Court will no doubt specify the particular act or acts of forgery, and the particular words which constitute the perjury for which permission will be given to prosecute.

The 11th September 1868.

Present:

The Hon'ble G. Loch and F. A. Glover, *Judges.*

Breach of the peace—Police-officer's report—Credible information—Section 282, Code of Criminal Procedure.

Reference to the High Court, under Section 434 of the Code of Criminal Procedure, by the Sessions Judge of Tipperah, in the case of Bindrabun Shaha.

The report of a police-officer is "credible information" within Section 282 of the Code of Criminal Procedure.

Glover, J.—There appears to be nothing illegal in the Deputy Magistrate's order. He states himself to be convinced by the report of the police-constable, and he gives various other reasons for apprehending a breach of the peace.

It appears to us that the report of a police-officer (head-constable) would be "credible information" under Section 282 of the Criminal Procedure Code, and that, under it, the Deputy Magistrate was justified in calling upon the parties to show cause.

We observe that he has taken security from both parties.

The 11th September 1868.

Present:

The Hon'ble E. Jackson and C. Hobhouse, *Judges.*

Procedure — Witnesses for defence — Section 262, Code of Criminal Procedure.

Reference to the High Court, under Section 434 of the Code of Criminal Procedure, by the Officiating Sessions Judge of Nuddea, in the case of Akbar Tagudgeer versus *Punchoo Biswas and another.*

In a case of forcibly rescuing cattle under Section 13, Act III. of 1857, in which the accused did not summon any witnesses, it was held that, even if the accused wanted them summoned, the Magistrate, under Section 262 of the Code of Criminal Procedure, need not have summoned them, unless persuaded that they were likely to give material evidence, and that they would not attend voluntarily.

Hobhouse, J.—We have looked into the record of this case, and find the facts to be these. We find that, on a certain day, the complainants, two persons, were in charge of certain indigo-fields, and found several herds of cattle trespassing on those fields; that they then were driving off those cattle to the pound, when some 12 or 14 persons, amongst whom were the three persons punished in this case, came up, refused to allow the complainants to take the cattle to the pound, opposed their taking it, and drove the cattle from out of the complainant's custody. These are the facts upon the record; and, upon these facts, the Assistant Magistrate of Nuddea convicted the prisoners of forcibly rescuing the cattle under the provisions of Section 13, Act III. of 1857, and sentenced them to pay a fine of 10 rupees. Under these circumstances, the Sessions Judge considers that the finding of the Assistant Magistrate was illegal, and desires that it may be set aside. He desires it upon two grounds: *first*, because he says that there was no evidence of "forcible" rescue; and, *secondly*, because he says that the Assistant Magistrate ought to have summoned the witnesses for the defence. We have looked through the record, and we cannot find that any witnesses were summoned, or were asked to be summoned, by the defendants; and, even had they been so, still, under the provisions of Section 262 of the Code of Criminal Procedure, the Magistrate need not have summoned them, unless he was persuaded that they were likely to give material evidence, and that they would not have voluntarily appeared.

On the other ground, we cannot agree with the Judge that there was no evidence of forcible rescue. The complainants were two in number, and were, under the provisions of Act III. of 1857, lawfully driving off the cattle to the pound. Their assailants were 12 or 14 in number, and, as plainly as acts can show forth men's intentions, forcibly rescued the cattle, for they forcibly, *i. e.*, by a show of force, which was as irresistible as were the men by 2, opposed the taking them away to the pound, and took them away out of the complainant's custody. We think the finding of the Assistant Magistrate was right in law, and that no order, therefore, is necessary upon this reference.

The 2nd September 1868.

Present:

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice*, and the Hon'ble H. V. Bayley, L. S. Jackson, A. G. Macpherson, and F. A. Glover, *Judges.*

Procedure—Assessors—Plea of guilty.

The Queen *versus* Sree Kant Charal.

Where a prisoner pleads guilty, his conviction upon that plea is valid, although there are no Assessors.

This case was referred to the Full Bench by the Hon'ble L. S. Jackson with the following remarks:—

A LETTER* of the Registrar of this Court, dated 20th February 1866, para. 2, states that, where the prisoner pleads guilty, the opinion of the Assessors is unnecessary. This letter,† or the extract containing this opinion, having been printed in the Weekly Reporter, is doubtless accepted as authority, and the Judge in this case improves upon the ruling by not employing Assessors at all. I think the opinion expressed in the letter is incorrect, and the course taken by the Judge in this case unwarranted by law. It appears to me that, by the terms of Section 324, where trials are not by Jury, the Court of Session is not duly constituted without Assessors who are members of it: that, with a view to the "commencement of the trial" as provided in Section 362, the accused must be brought before a Court so constituted, and, if he plead guilty, the Assessors, as members of the Court, ought to give their opinion whether or not he should be convicted on his plea, this being a matter in the discretion of the Court; though, of course, the decision on this, as on other points, is vested exclusively in the Judge. It may be objected, with reference to part of the language of Sections 362 and 363, that in such cases there is no *trial*, inasmuch as the accused has pleaded guilty instead of "claiming to be tried," and that Assessors are only needed with a view to "trial" (Section 324).

* No. 157, to the Officiating Sessions Judge of Cuttack.

But I think it clear that the word "trial" is used in many Sections of the Code to indicate a judicial proceeding in which an accused person has been convicted or acquitted, and not particularly a proceeding in which the issue has been tried by the Court or Jury, *e. g.*, Sections 381, 408 (for I presume that a man who has been convicted on his own plea of guilty may yet appeal, as, for instance, against the legality of the sentence).

But, if there has been no *trial* in cases where the accused pleads guilty, then the Code has provided neither procedure for passing sentence nor right of appeal in such cases.

I think the matter should be laid before a Full Bench with a view to determine the law on this point, and to get rid of the letter above quoted.

The judgment of the Full Bench was delivered as follows:—

Peacock, C. J.—We are of opinion that, in the case of a prisoner's pleading guilty before a Court of Session, the conviction upon that plea is valid, although there are no Assessors (*see* Sections 362 and 363 of the Code of Criminal Procedure). If the accused refuse to plead or claim to be tried, the Court must proceed to try the case; and in that case, where the trial is not by Jury, it must, according to Section 324, be conducted with the aid of two or more Assessors as members of the Court.

† *See* 5 W. R., *Criminal Letters*, p. 2.

The 2nd September 1868.

Present:

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice*, and the Hon'ble H. V. Bayley, L. S. Jackson, A. G. Macpherson, and F. A. Glover, *Judges.*

Jurisdiction—Resistance of process—Civil Court.

The Ameen *versus* Bhagai Duffadar and another.

The resistance of process of a Civil Court is punishable under the Code of Criminal Procedure. Previous ruling of Chunder Kant Chuckerbutty* overruled.

This case was referred to the Full Bench in consequence of the following proceeding of the Joint Magistrate of Jessore, which was forwarded to the High Court by the Judge of the Small Cause Court of Jessore with the remarks subjoined:—

Proceeding of the Officiating Joint Magistrate.—THIS is a case of resistance

* *See* 9 W. R., *Criminal Rulings*, p. 63.

of process made over for trial by the Judge of the Small Cause Court. I find that the High Court have ruled in the case noted in the margin* that the Civil Courts must deal with cases of resistance of process themselves, and that they cannot make over an ordinary case of this nature to a Magistrate. I am not sure that this ruling would extend to cases of evasion of process; but the present case seems to be quite of the description intended by the High Court. I therefore revoke the former orders passed in this case, and direct it to be struck off the file.

*Miscellaneous case of Chunder Kant Chuckerbutty, dated 22nd April 1868.

Remarks by the Judge of the Small Cause Court.—With reference to the accompanying copy of a proceeding from the Officiating Joint Magistrate of Jessore, I beg to solicit the opinion of the High Court whether a Small Cause Court is empowered to punish resistance of its process without reference to the Magistrate.

In the case noted it was held by Loch and Glover, *JJ.*, that a Civil Court cannot make over a case of simple resistance of its process to a Magistrate for trial, Section 25, Regulation IV. of 1793, being still in force. But this decision is, I find, opposed to Circular Order No. 121, dated the 13th January 1863, which says that any offence that may be construed to be an offence provided for by the Penal Code must, under Section 2 of that Code, be punishable unde its provisions.

It appears to me that the decision of Loch and Glover, *JJ.*, will not apply to the case of Bhagai Duffadar and Futtick Gazee, as the offence with which they stand charged clearly falls within Section 183 of the Penal Code; and, as the Code subjoins express negative words, the offence must be punishable in the manner provided for in that Section.

Assuming, however, that the decision in question will apply, a further question arises whether the provisions of the Regulation referred to in that decision have been made applicable to Small Cause Courts in the Mofussil or not. They certainly have not been made applicable by Act XI. of 1865 or any other Act; and it therefore appears to me that I have no power to punish resistance of a process of my Court without reference to the Magistrate.

For the above reasons, I am of opinion that the offence with which Bhagai Duffadar and Futtick Gazee stand charged should be dealt with by the Magistrate.

The judgments of the Full Bench were delivered as follows:—

Peacock, C. J.—The question is whether the resistance of process of a Civil Court is punishable under the Code of Criminal Procedure by the Courts of criminal jurisdiction. It is unnecessary to determine whether the offence is punishable by a Civil Court, if it chose to take cognizance of it.

By Section 186 of the Penal Code, it is an offence to obstruct any public servant in the discharge of his public functions, and by Section 21 every officer of a Court of Justice whose duty it is to execute any judicial process is a public officer. The offence therefore is punishable under the Penal Code. Offences punishable under Section 186 of the Penal Code are by the Code of Criminal Procedure made punishable by the Courts mentioned in Column 7 of the Schedule to that Act.

Jackson, J.—I only wish to add that it appears to me that there has been a misapprehension in regard to the applicability of the provisions of Sections 22 to 25, Regulation IV. of 1793, to the Subordinate Civil Courts. These provisions as originally enacted applied only to the Courts of the Zillah Judges. It was held by a Full Bench of the late Sudder Court that, by the provisions of Act VI. of 1843, the power of punishing resistance of process, being part of, as being included, among the rules for the trial and decision of all original suits, had been extended to the Courts of the Principal Sudder Ameens, and the Sudder Court would doubtless have held that by parity of reasoning the power had been subsequently conferred by Act XXVI. of 1852 on the Sudder Ameens and Moonsiffs. Whether that view was correct or not, those Acts have been since wholly repealed by Act X. of 1861; consequently the provisions of Section 24, Regulation VI. of 1793, if they are still in force, now stand, as they originally did, applicable only to the Courts of the Zillah Judges. It therefore seems to me that there is no ground for holding that resistance of process of Subordinate Civil Courts can be dealt with by those Courts under the Regulation of 1793. It also appears to me

Illah Buksh Chowdry, Petitioner, S.D.A., 1852, p. 71.

more than doubtful whether the provisions of the Section are not superseded by Section 2 of the Indian Penal Code, in so far as any case of resistance of process falls within the provisions of the Code.

The 2nd September 1868.

Present :

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice*, and the Hon'ble H. V. Bayley, L. S. Jackson, A. G. Macpherson, and F. A. Glover, *Judges*.

Procedure—High Court—Difference of opinion—Section 36, Letters Patent—Section 420, Code of Criminal Procedure.

Kazeem Thakoor and others, *Appellants*.

Where a difference of opinion arises between two Judges of the High Court in a criminal appeal, the opinion of the Senior Judge prevails, under Section 36 of the Letters Patent, notwithstanding Section 420 of the Code of Criminal Procedure.

On the trial of this appeal, a difference of opinion arose between the Hon'ble E. Jackson and the Hon'ble F. A. Glover, and the case was thereupon referred to a Full Bench by the Hon'ble E. Jackson under the following remarks :—

THE alteration of the Sessions Judge's orders requires two signatures. There seems to be a conflict between Section 36 of the Letters Patent and Section 420 of the Criminal Procedure Code. If the Chief Justice has no objection, perhaps the question had better be placed before a Full Bench, as it is a most important point, and should be decided authoritatively with as little delay as possible.

The judgment of the Full Bench was delivered as follows by :—

Peacock, C. J.—The question is "when two Judges sitting as a Division Bench of the High Court in appeal in a criminal case are divided in opinion, is it necessary, with advertence to Section 420 of the Code of Criminal Procedure, that reference should be made to a third Judge; or is it sufficient, with advertence to Section 36 of the Letters Patent, that an order issue according to the opinion of the Senior Judge."

We are of opinion that, notwithstanding Section 420 of the Code of Criminal Procedure, the opinion of the Senior Judge must prevail according to Section 36 of the Letters Patent, and that it is sufficient if the sentence or order in accordance with that opinion be signed by the Senior Judge. In such case it ought to appear on the face of the order, why it is signed only by one Judge.

Section 420 of the Code of Criminal Procedure speaks merely of the Sudder Court and of Judges of such Sudder Court. The Act itself was passed on the 5th of September 1861. The High Court was established under the 24 and 25 Vic., c. 104, which received the royal assent on the 6th of August 1861. The Letters Patent under which the High Court now sits was passed on the 28th of December 1865.

Section 11 of the 24 and 25 Vic., c. 104, enacted that all Acts of the Legislature of India, which at the time of the establishment of the High Court were applicable to the Supreme Court at Fort Willam in Bengal, or to the Judges of that Court, shall be taken to be applicable to the said High Court and to the Judges thereof respectively, so far as they might be consistent with the provisions of the said Act and the Letters Patent to be issued in pursuance thereof, and subject to the legislative powers, in relation to the matters aforesaid, of the Governor-General of India in Council.

This Section, however, did not extend to the High Court the provisions of Section 420 of the Code of Criminal Procedure, which applied only to the Judges of the Sudder Court.

Section 13 of the said Act enacted that, subject to any laws or regulations which might be made by the Governor-General in Council, the High Court might, by its own rules, provide for the exercise by one or more Judges, or by Division Courts constituted by two or more Judges of the High Court, of the original and appellate jurisdiction vested in such Court, in such manner as might appear to the Court to be convenient for the due administration of justice.

By Section 15 of the rules of the High Court, it was declared that all powers and functions which were vested in the Court by the Letters Patent constituting the Court, and which were not otherwise expressly provided for by the rules of the Court, might be exercised by a single Judge or by a Division Court consisting of two or more Judges, and by rule 26 it was provided that

a Division Bench for the hearing of criminal appeals may consist of two or more Judges. These rules, coupled with Section 13, provide that a Division Court may consist of two Judges, and a Court so constituted is subject to the provisions of Section 36.

The 11th September 1868.

Present :

The Hon'ble G. Loch and F. A. Glover, *Judges.*

Fraudulent removal of property—Decree of Collector's Court—Section 206, Penal Code—Section 145, Act X. of 1859.

Reference to the High Court, under Section 434 of the Code of Criminal Procedure, by the Sessions Judge of Tipperah, in the case of Gour Chunder Chuckerbutty versus *Kishen Mohun Singh.*

A person, who fraudulently removes property, intending thereby to prevent that property from being taken in execution of a decree made by a Collector, commits an offence, and is punishable under Section 206 of the Penal Code, and not under Section 145, Act X. of 1859.

Reference.—I AM of opinion that the Deputy Magistrate's order is illegal ; but, as the amount of fine is only Rupees 50, and the term of imprisonment in lieu of fine only a month, I must send the case up to the High Court that the Deputy Magistrate's orders may be quashed. Section 145, Act X. of 1859, provides for the punishment of persons who remove property distrained under that Act. That being the case, I consider that the Deputy Magistrate was not empowered to try this case as one punishable under Section 206, Indian Penal Code, which has reference to cases other than those coming within the provisions of Act X. But, as above showed, I cannot myself reverse the Deputy Magistrate's orders, but must send the case on for orders of the High Court.

Judgment of the High Court.

Loch, J.—It appears to me that the offence is punishable under Section 206 of the Indian Penal Code, and not under Section 145 of Act X. of 1859, which relates to property under distraint, and not that taken in execution of a decree.

The Collector trying a case under Act X. of 1859 is a Judge (illustration *a* to Section 19, Penal Code), and the words "Court of Justice" denote a Judge empowered by law to act judicially alone (Section 20, Penal Code), and a suit for rent is certainly a civil suit ; so that, if a person fraudulently removes property intending thereby to prevent that property from being taken in execution of a decree or order which has been made by a Collector, who is a Court of Justice in a civil suit, *i. e.*, a suit for rent, he commits the offence described in Section 206, Penal Code. I think that there are no grounds for the interference of this Court. The papers will be returned to the Judge.

Glover, J.—I concur.

The 14th September 1868.

Present :

The Hon'ble G. Loch and F. A. Glover, *Judges.*

Procedure—Breach of the Peace—Evidence given in presence of accused.

Reference to the High Court, under Section 434 of the Code of Criminal Procedure, by the Sessions Judge of Gya, in the case of Maghun Misser versus *Chummun Telee.*

HELD by *Loch, J.*, that, in a case in which a person is called upon under Section 282, Code of Criminal Procedure, to show cause why he should not give security to keep the peace, the accused should have the opportunity of having the evidence of the witnesses for the prosecution given in his presence, and of showing by cross-examination that no charge is made out against him.

HELD by *Glover, J.*, dissenting, that in such a case it is not necessary that the Magistrate should adjudicate judicially as to the necessity for taking security on evidence given before him in the presence of the person summoned.

Glover, J.—I CAN find nothing in the Criminal Procedure Code which makes it necessary to take evidence as to the likelihood of a breach of the peace, after the accused has been summoned, and is present either in person or by agent.

Section 282 gives a Magistrate power, on receiving "credible information" that such and such a person is likely to commit a breach of the peace, to call upon that person to show cause why he should not be required to enter into a bond to keep the peace. An order of this description cannot be issued until the Magistrate has satisfied himself, in the way laid down in the Procedure Code, of the necessity for issuing it ; but being issued, and the accused appearing to show cause against it, there would be no necessity, it seems to me, for recording *de novo* the evidence of any witnesses, merely because their depositions had not been taken

in the presence of the accused. The law supposes that the Magistrate has acted prudently and with due consideration, and has received information (which he believes) that it is necessary to prevent a breach of the peace by calling for a security-bond. The words of the Section (282) appear to me to suppose that a good *primâ facie* case has already been established against the party accused, which case he is called to rebut, if he would escape the necessity of having to give security; and I cannot find either in Sections 282, 287, or 288, anything which makes it incumbent on a Magistrate to adjudicate judicially as to the necessity for taking security on evidence given before him on the appearance of the person summoned. It appears to me that if a Magistrate is once satisfied on what he considers to be credible information, that it is necessary to take security for the preservation of the peace, he has full authority to call upon the party charged, and to take such security from him without recording in his presence the evidence or information on which he himself acted.

This case has been referred to the High Court by the Judge of Gya under Section 434, Code of Criminal Procedure, with an opinion that, as a certain party against whom proceedings had been taken under Section 282 had not had the opportunity of hearing the evidence on which the Magistrate acted in calling upon him to show cause, the order for security was illegal, in accordance with the ruling of a Divisional Bench of this Court in the case of Nur Singh Narayan, petitioner (10 Weekly Reporter 1).

With great deference to the learned Judges who passed that decision, I think, for the reasons above given, that the Magistrate's order in this case was not illegal, and that there was no necessity for taking the evidence of witnesses in the accused's presence.

The point is an important one, and I should wish it referred to a Full Bench.

Loch, J.—I think that the course laid down in the ruling of the Court reported at 10 Weekly Reporter, page 1, should be followed, though the law does not distinctly prescribe what is to be done after the accused appears. He is, however, in the position of a person charged with an offence, against whom evidence has been taken, and he has been summoned to answer to the charge. Now, in ordinary cases, though witnesses in support of the charge have been examined before the accused appear, yet, when he appears, they are required to attend to be again examined before the accused, and to give him an opportunity of cross-examining them. This appears to me the course which should be taken in a case of the kind which has been referred. A criminal charge is preferred, and the accused should have the opportunity, as in other cases, of showing, by the cross-examination of the witnesses for the prosecution, that no charge is made out against him. I would, therefore, set aside the order of the Magistrate, as recommended by the Sessions Judge.

The 14th September 1868.

Present:

The Hon'ble G. Loch and F. A. Glover,

Judges.

Contempt of Court—Punishment—Section 258, Penal Code—Section 163, Code of Criminal Procedure.

Reference to the High Court, under Section 434 of the Code of Criminal Procedure, by the Sessions Judge of Patna, in the case of Buhram Khan.

In a case of interruption to a public servant in a stage of a judicial proceeding under Section 228, Penal Code, a sentence of imprisonment cannot be passed under Section 163 of the Code of Criminal Procedure.

Reference.—I HAVE the honor to forward the record of a trial held under Section 163 of the Procedure Code and Section 228 of the Indian Penal Code, in which Deputy Magistrate, Moulvie Duleel-ooddeen Khan Bahadoor, has passed an order of one month's imprisonment on Buhram Khan, Constable, for creating a disturbance and interrupting the Court during its sitting in the discharge of its judicial duties.

Under the last Clause of Section 163, Act XXV. of 1861, the Deputy Magistrate was debarred from passing sentence of imprisonment in the case, and his order is therefore wholly illegal. I have directed the discharge of the prisoner on bail, and now submit the record that the order in question may be quashed.

Judgment of the High Court.

Glover, J.—We think that the Deputy Magistrate's order was illegal, and should be quashed.

Under Section 163, Code of Criminal Procedure, the Deputy Magistrate's powers were limited to the imposition of a fine up to 200 rupees, or, in default, to simple imprisonment in the Civil Jail for one month. He had no power to award imprisonment as a substantive punishment. If he considered a fine to be too light a sentence for the offence committed, he ought, under the latter provisions of Section 163, Code of Criminal Procedure, to have referred the case to some other Magisterial officer, who would have had power to inflict the severe punishment awardable under Section 228 of the Penal Code.

As the Deputy Magistrate sentenced the accused to one month's imprisonment, he exceeded his authority, and his order must be set aside.

The 28th October 1868.

Present:

The Hon'ble F. A. Glover, *Judge.*

General Exception—Act done by threats—Section 94, Penal Code.

The Queen *versus* Sonoo and others.

Committed by the Magistrate, and tried by the Sessions Judge of Bhaugulpore, on a charge of giving false evidence, and sentenced to 5 years' rigorous imprisonment.

To obtain the benefit of the exception allowed by Section 94 of the Penal Code, it must be shewn that the prisoners were compelled to act as they did from apprehension that instant death would be the consequence of a refusal.

THE prisoners admit that they made the false statements charged; their defence is that they were coerced into doing so by the Police Inspector.

There is no proof of this coercion; and, if there were, it would be necessary to show that the prisoners were compelled to act as they did from apprehension that instant death would be the consequence of a refusal. Section 94 of the Penal Code requires nothing less than this.

It is clear, therefore, that, even granting the prisoners' statement to be true, they are not protected by law; and, as the false statements made by them, if believed, would have had the effect of convicting innocent person of homicide, I do not consider that the sentence passed by the Sessions Judge is at all too severe.

The appeal is rejected.

The 10th November 1868.

Present :

The Hon'ble J. B. Phear and C. Hobhouse, *Judges.*

Fine—Section 270, Code of Criminal Procedure.

Reference to the High Court, under Section 434 of the Code of Criminal Procedure, by the Judicial Commissioner of Assam, in the case of Hothoor Laloong versus *Hindoo Singh Mouz and another.*

HELD that, where a Magistrate is dealing with a charge which he has the power to dispose of finally under Chapter XV. of the Code of Criminal Procedure, although the charge, as originally laid, fell under Chapter XIV., he has a discretion to inflict a fine under Section 270 of that Code.

Reference.—THE complaint, as in the first instance made to the Deputy Commissioner, was that of wrongful confinement for the purpose of extorting money, to answer which charge the accused were brought into Court, the case being made over for trial to the Assistant Commissioner. Before this officer, however, the complainant withdrew that part of the charge which related to his alleged confinement, and the Assistant Commissioner, holding that the act which the accused then stood charged with, namely, having obtained money from the complainant on a promise they had failed to fulfil, did not amount to a criminal offence, dismissed the case, and awarded each of the accused Rupees 5 amends under the provisions of Section 270, Code of Criminal Procedure.

It appears to me, however, that as the case, as originally brought, fell under the provisions of Chapter XIV. of the Code, the Assistant Commissioner was not warranted in passing the order that he did, and I propose, therefore, that it be set aside, as being opposed to the Court's numerous rulings that amends can only be awarded when the complaint found to be frivolous and vexatious is triable under Chapter XV. Mr. Michell holds that he was justified in pursuing the course he did, because the case turned out to be one of a purely civil nature; but it is quite clear, seemingly, that, in a matter of this suit, a Magistrate must be guided solely by the nature of the charge on which an accused is made to appear in Court, and that, if it be of an offence triable under Chapter XIV., amends cannot be awarded, no matter what the grounds of dismissal may be.

Judgment of the High Court.

Hobhouse, J.—On the statement made by the Judicial Commissioner, we find that the Assistant Commissioner was dealing with a charge which he had the power to dispose of finally under the provisions of the Criminal Procedure Code contained in Chapter XV. We think, therefore, that the Assistant Commissioner had discretion to inflict a fine under Section 270.

The 12th November 1868.

Present :

The Hon'ble G. Loch and F. A. Glover, *Judges.*

Police-enquiry—Complaint—Powers of Magistrate—Section 67 and Chapter XIV., Code of Criminal Procedure.

Revision of proceedings in the case of Fokto Shah, Prisoner.

HELD by *Loch, J.*, that a Magistrate has no authority to order a police-enquiry in a case under Chapter XIV of the Code of Criminal Procedure.

HELD by *Glover, J.* (dissenting), that a Magistrate may order a police-enquiry into any offence punishable under the Penal Code.

HELD by both Judges that the High Court cannot interfere under Section 434 of the Code of Criminal Procedure in a case in which a Magistrate dismisses a complaint under Section 67 of that Code.

Glover, J.—As this case now stands, I see nothing to call for the High Court's interference under Section 434 of the Code of Criminal Procedure. The complainant has been examined by the Magistrate, and his story has not been credited. Under Section 67 of the Procedure Code, therefore, the Magistrate was empowered to dismiss the complaint, and no question of police-enquiry would arise.

But, granting that the Magistrate was in this particular case (one of cattle-stealing) influenced against the complainant by the report of the police, there seems to me nothing in the law that prevented his ordering that enquiry. The Sessions Judge refers to a ruling of this Court, in the case of the Queen *versus* Hurah Chund Nowlaka (8 Weekly Reporter 12), in which it is incidentally laid down that police-enquiry in cases falling within Chapter XIV. of the Procedure Code was not warranted by law.

I do not think that I am bound by this opinion, as the point raised was not the one on which the reference was made; and it appears to me that, under Section 133, a Magistrate may order a police-enquiry "into

any offence punishable under the Penal Code," and that, therefore, there was nothing illegal in the Magistrate's action in this case.

Loch, J.—It appears to me that the Magistrate had no authority to order an enquiry into this case by the police. It is a case which comes under the provisions of Chapter XIV. of the Code of Criminal Procedure, and, though some of the provisions of Chapter XII. have been extended to complaints coming under Chapter XIV., yet the power to order an enquiry by the police under Section 180 of the Code does not appear to be included among the provisions so extended. I do not see, however, that the Court can interfere. The Magistrate has examined the complainant under Section 66 of the Act, and has dismissed the complaint under Section 67, there being, in his judgment, no sufficient ground for proceeding. The order may be right or wrong, but it is one which cannot be interfered with.

The 17th November 1868.

Present:

The Hon'ble J. B. Phear and C. Hobhouse, *Judges.*

Procedure—Complaint—Sections 67 and 434, Code of Criminal Procedure.

Reference to the High Court, under Section 434 of the Code of Criminal Procedure, by the Officiating Sessions Judge of Rungpore, in the case of Batool Nushyo versus *Bhugloo Chowkeedar and others.*

A Sessions Judge, in referring a case under Section 434 of the Code of Criminal Procedure, should state reasons of his own for the reference, and not merely send up the reasons which may have been left by his predecessor.

A Magistrate has a discretion, under Section 67 of the Criminal Procedure Code, to dismiss a complaint at once, and is under no obligation to go further.

Phear, J.—THIS case does not come very regularly before us. The Officiating Sessions Judge who sends it to us does not support the application by any reasons of his own, but leaves us rather to suppose that he does not consider that there are any reasons for the application. He furnishes us instead with those which had been expressed by his predecessor, who, for some reason or other, did not send up the case himself. We will add that, from the facts stated, it does not appear to us that there is any good reason to interfere with the order of the Deputy Magistrate. He heard the evidence of the complainant, and did not consider that it made out a charge against the accused. There was no obligation upon him to go further. He had a discretion, under Section 67 of the Criminal Procedure Code, to dismiss the complaint at once.

The 17th November 1868.

Present:

The Hon'ble J. B. Phear and C. Hobhouse, *Judges.*

Procedure—Jurisdiction—Punishment—Section 277, Code of Criminal Procedure.

Reference to the High Court, under Section 434 of the Code of Criminal Procedure, by the Sessions Judge of Cuttack, in the case of Bhickaree Mullick and others.

Where a case is committed to a Magistrate under Section 277 of the Code of Criminal Procedure, the Magistrate alone has jurisdiction, and cannot commit to the Sessions on the ground that he considers the sentence which he is empowered to inflict is insufficient.

Reference.—THE particulars of this case are as follow: Prisoner No. 1, Bhickaree Mullick, was sent up by the police, charged under Section 325, Penal Code, with having voluntarily caused grievous hurt. The case was taken up by Baboo Siva Pershad Singh, Moonsiff of Kendraparah, exercising also the first-class powers of a Subordinate Magistrate. The four other defendants were also summoned and put on their trial. Formal charges were drawn up against all the prisoners under Section 325, Sections 109 and 325, and Section 147, directing that the prisoners should be tried before the Deputy Magistrate. The trial was formally held, the defendants, their witnesses, and all the witnesses for the prosecution, all being examined, and, on the 30th May, the Deputy Magistrate found that the prisoners were guilty of the offences charged against them; but as, for good reasons, the sentence which the Deputy Magistrate was empowered to inflict was considered insufficient, he referred the case to the Magistrate under Section 277, Code of Criminal Procedure. The case appears to have been made over by the Magistrate for disposal to Baboo Rungo Lall Banerjee, a Deputy Magistrate exercising the full powers of a Magistrate, who, on the 31st of July, commits the whole of the prisoners to the Sessions, because he considers that the sentence which he also is empowered to inflict is insufficient. The

two complainants were re-examined by the Deputy Magistrate on the 8th and 31st July; and with this exception, the commitment is made on the proceedings held, and the evidence taken, before Baboo Siva Persad Singh, who has no power whatever to commit to the Sessions.

The commitment seems to me illegal and irregular for the following reasons:—

The offences charged both now and in the first instance were within the cognizance of Baboo Siva Persad Singh, who originally heard the case, and who formally put the prisoners on their trial, found them guilty, and referred the case under Section 277, Criminal Procedure Code. His decision was therefore a legal decision, and the prisoners have been already tried. It merely remained for the Magistrate to satisfy himself of the correctness and legality of the decision on the evidence recorded, and it was not competent to him to pass the case on to the Sessions, simply because he considered the punishment which he could inflict was insufficient. It seems to me that, whether this was the case or not, it was too late to make the discovery.

Even if the case could be properly committed by Baboo Rungo Lall Banerjee, the proceedings which were held before Baboo Siva Persad Singh can form no ground for commitment, because that officer is not empowered by law to hold any such proceedings: these were beyond his jurisdiction, and if, under Section 276, he thought the case a fit one for the Sessions, he should have staid proceedings, and sent the case to the Magistrate. That Section then lays down that the Magistrate shall examine all the parties and witnesses afresh, and proceed in all respects as if no proceedings had been held in any other Court. This has not been done. I do not think that Section 256 gives any power to commit in a case like the present, which seems expressly provided for by Sections 276 and 277; nor do I think that the orders of the Deputy Magistrate in the case are proper and according to law, according to Section 277, as the decision of the Deputy Magistrate of Kendraparah, which he was legally competent to give, has been ignored altogether.

I would also ask whether the Magistrate to whom the proceedings are referred under Section 277 can make over the case to another Subordinate Magistrate for disposal. Section 276 makes a distinct provision for such reference; but Section 277 is silent on the point—indeed, seems to direct that the Magistrate should himself dispose of the case.

The case is quite ready for decision before the Magistrate according to the evidence taken, and the trial held, before Baboo Siva Persad Singh; and, if the Court are of opinion that the commitment is improper, the Magistrate might be instructed to dispose of the case at once.

Judgment of the High Court.

Hobhouse, J.—We think the Judge is right.

The case was one coming within the terms of Section 277 of the Code of Criminal Procedure, and was one in which the Magistrate of the district (in this instance) alone had jurisdiction.

The commitment is therefore quashed, and the above Magistrate must proceed to deal with the case according to law.

The 17th November 1868.

Present:

The Hon'ble J. B. Phear and C. Hobhouse, *Judges.*

Nuisance—Cost of excavating tank—Section 308, Code of Criminal Procedure.

Reference to the High Court, under Section 434 of the Code of Criminal Procedure, by the Sessions Judge of Beerbhoom, in the case of Paul Dass.

The order of a Magistrate under Section 308, Code of Criminal Procedure, should be confined to a direction to remove the nuisance complained of. In the case of a tank, the Magistrate cannot order the proprietor to excavate it; the proprietor ought to have the discretion allowed him as to the mode in which he will remove the nuisance caused by the tank. If a Magistrate is compelled to direct the excavation of the tank, the actual cost of excavation can alone be charged against the proprietor, at whose disposition the soil taken out in the course of excavation must be placed.

Phear, J.—It appears from the report of the Judge and the explanation of the Officiating Magistrate that the tank which was the subject of the Magistrate's order was situated within the land of Paul Dass by the side of a public road. The order of the Magistrate directed Paul Dass to excavate the tank. Without saying that a tank by the side of a public road in such a condition as to be a public nuisance could, for the purpose of Section 308, be regarded as a nuisance *upon* that road, we think it clear that the order of the Magistrate, to be justified under that

Section, should have been confined to a direction to Paul Dass to remove the nuisance. He might have chosen his own mode of removing it, so that he removed it effectually. And it is easy to suppose that the nuisance, if the tank was a nuisance, would be as completely removed by filling up the tank as by excavating it to a greater depth. Paul Dass ought, we think, to have been allowed the opportunity of exercising his discretion as to the mode in which he would remove the nuisance. It therefore seems to us that the order as made by the Magistrate was illegal, and ought to be quashed.

But, even supposing that the order was itself a proper one, it is clear that the manner in which Paul Dass has been sought to be made liable for the expenses of excavation is improper. If the Magistrate carried the order into execution himself, as under certain circumstances he would be empowered to do under Section 311 of the Criminal Procedure Code, then he would be entitled to realise the expenses so incurred by him from the person upon whom the order was made. In this case the matter was conducted in such a way that it was impossible to say what was the exact expense which the Magistrate was at in excavating the tank of Paul Dass. And it certainly was not the proper mode of estimating that expense to take the total sum which that excavation, together with another work, namely, the filling up of a neighbour's ditch, cost, and to divide the amount between the parties. Paul Dass was entitled to say that he would only pay the amount which the excavation of his tank actually cost the Magistrate.

But, further, the Magistrate utilised the soil which was taken out of Paul Dass's tank in the course of excavating it. Now, that soil clearly belonged to Paul Dass, and it ought to have been tendered to him; or, if it was used for another purpose, the Magistrate should have taken care that Paul Dass's consent to its being so used was first obtained. Had that soil been placed at the disposition of Paul Dass himself, it might have been worth while either to the Magistrate or to the neighbouring proprietor, who had to fill up the ditch, to purchase such soil for the purpose; and Paul Dass ought, under the circumstances of the case, certainly to be paid some consideration for his soil which was used in that way, or to have been allowed an abatement from the expense of excavation in lieu thereof. But it is only necessary, under the circumstances of this case, to say that, inasmuch as we consider the original order invalid, Paul Dass cannot be rendered liable for the expenses which have been incurred as a consequence of the action taken by the Magistrate on his (Paul Dass's) failure to obey it.

Both orders are quashed.

The 19th November 1868.

Present:

The Hon'ble G. Loch and F. A. Glover, *Judges.*

Exposure of child—Murder—Section 317, Penal Code.

The Queen *versus* Khodabux Fakeer *alias* Khudiram Fakeer.

Committed by the Magistrate, and tried by the Sessions Judge of Dacca, on a charge of murder.

HELD that, where from the circumstances it appeared that a child who had been exposed by the prisoner did not die in consequence of the exposure, except in a remote degree, the prisoner, though guilty under Section 317 of the Penal Code, could not be convicted of murder. That Section contemplates cases in which death is caused from cold or some other result of exposure.

Glover, J.—I DOUBT the propriety of this conviction.

The prisoner is, I consider, proved to have taken the child away shortly after its birth, and to have abandoned it in a thicket not far from a house and foot-path, and in a place where the villagers were in the habit of herding cattle.

The child was found almost immediately after its exposure, and was taken into the village. Ineffectual means were used to feed it, and the child died (I presume from want of sustenance) some six hours after.

The explanation to Section 317, Penal Code, renders a party abandoning a child liable for murder or culpable homicide, as the case may be, "if the child die in consequence of the exposure."

I understand these words to mean "dies from cold, or some other result of exposure," and not to refer to deaths which may possibly have resulted afterwards from a deprivation of natural, and a substitution of artificial, sustenance.

In this case the child was found before, apparently, any injury had been sustained: for the infant was carefully wrapped in a quilt, and was not exposed to the weather,

Death seems to have been caused by the ignorance of the people into whose hands the child fell, trying to feed an infant of a few hours old with milk from a shell. There appears to be no reason for supposing that the child died in consequence of the exposure except in a remote degree, or for thinking that it would not have lived had it been properly nursed. The finding of the child in ample time to take all necessary measures for keeping it in life seems to me to take the case out of the purview of the explanation to Section 317, Penal Code.

At the same time I would convict the prisoner on most satisfactory evidence under that Section (to which he pleaded in the Court below), and sentence him to 7 years' rigorous imprisonment.

Loch, J.—In this case I do not think it can be said that death was the consequence of the exposure of the child. It was found soon after it was exposed. It had been carefully wrapped, and does not appear to have suffered from the effects of the weather. Cow's milk was offered to it, but probably through the awkwardness of those who kindly sought to supply its wants, the child would not take the sustenance offered. The prisoner is clearly guilty of wholly abandoning the child, but, under the circumstances mentioned above, not of murder. I concur in the sentence proposed by my colleague.

The 20th November 1868.

Present:

The Hon'ble J. B. Phear and C. Hobhouse, *Judges.*

Obstruction—Nuisance—Procedure—Sections 62 and 308, Code of Criminal Procedure.

In the Matter of (1) Huri Mohun Malo and others, *Petitioners.*

(2) Joykristo Mookerjee.

Baboo Debendur Chunder Ghose for Huri Mohun Malo.

Baboo Peary Mohun Mookerjee for Joykristo Mookerjee.

The powers of a Magistrate and the procedure to be observed by him in issuing orders under Sections 62 and 308 of the Code of Criminal Procedure discussed, and the difference between these Sections pointed out.

Phear, J.—In these two cases* we have had to consider the effect of Sections 62 and 308 of the Code of Criminal Procedure as operating to give authority to the Magistrate under certain circumstances to issue injunctions against individuals, controlling them in the exercise of their proprietary rights.

* In the Matter of Huri Mohun Malo and others (Jessore), directing the petitioners to remove certain koomars from a stream, in which they had a right of julkur, on the ground of their being an obstruction.

In the case of Joykristo Mookerjee (Hooghly), in which the Deputy Magistrate directed under Section 62, Criminal Procedure Code, the removal of an obstruction to a public foot-path.

On the whole, we have come to the conclusion that these two Sections are not in conflict with one another, and also that they are not, properly speaking, alternatives. The essential difference between them is that Section 308 expressly directs that the injunctional order of the Magistrate should, in cases to which that Section applies, be an order *nisi*, so to speak; that is, an order accompanied by a condition that it is not to operate if the party show cause, within a specified time, why the order should not be obeyed; while, on the other hand, Section 62 speaks only of an order absolute, without saying that the party is to be afforded an opportunity for showing cause against the order. In cases falling under either the one Section or the other, the order must clearly be in writing. This is expressed in so many words by the provisions of Section 62, and it is also implied

by the terms of Section 308, followed as it is by the provisions which appear in Section 309. Now, it appears to us that in these two cases it is not necessary that we should determine exactly what is the meaning or scope of Section 62. It is enough for us to say that in our judgment, if any part of the ground covered by that Section also falls within the scope of Section 308, the Magistrate must conform to the more particular directions of the latter Section, and it is not sufficient that he should comply merely with the general words of the former; that is, he cannot choose whether he will issue an order without a condition, or whether he will issue an order with a condition, but is bound in all cases which fall within the operation of Section 308 to comply with the provisions of that Section.

Now, it appears to us that in both the cases which are before the Court, the subject or the occasion of the order fell directly within the meaning of Section 308. In each case, according to the view of the facts which the Magistrate apparently took, the obstruction or nuisance which it was the object of the order to remove or abate occurred in a public place or a public highway. Consequently, Section 308 applied; and, from what we have already said, it follows that the Magistrate had not any authority in either of these cases to issue an order absolute, but was bound to give in his order an opportunity to the person to whom it was directed to show cause against it; and we need hardly say that in neither of the orders complained of was this opportunity given.

The Jessore case was brought before us by petition of the parties aggrieved. The Magistrate had directed in his order that certain *keomars* should be removed from a piece of water; and it appeared that his reason for directing this was two-fold, namely, that they constituted an obstruction to persons lawfully using this piece of water as a highway, and also that they produced a nuisance by causing the accumulation of decaying vegetation in a public place. We think that the complainants have made out that this order was an improper one. It was absolute in its terms, and did not comply with the provisions of Section 308. We are therefore of opinion that it should be quashed.

The Hooghly case has come before us in the shape of a reference from the Judge, who recommends that the order of the Magistrate be quashed on the ground of its illegality. There the Magistrate had issued an absolute order for the removal of a fence which he thought was an obstruction to a certain public path or highway. For the reasons which we have already mentioned, this order also is bad, because it did not give the persons affected by it the opportunity to show cause against it. Accordingly, we think that the Judge is right in considering that the order is illegal, and ought to be quashed.

We think it right to add that it seems to us that in all cases, whether cases falling exclusively under Section 62, or cases coming

under the provisions of Section 308, the order ought to contain a clear statement of the facts which the Magistrate, in the exercise of his judicial discretion, considers to constitute the material facts of the case, and upon the footing of which he has made the order. It is only fair, I think, to the party against whom the order is made that he should be made to know distinctly the grounds upon which the Magistrate has acted, in order that he may be better guided to a conclusion as to whether the order is one which he is bound to obey, or whether he can safely resist it either under the penal procedure which is laid down by Section 188 of the Penal Code, or by showing cause under the provisions of Section 308 and the following Section. But whether an order would be bad or not when it did not contain a statement of the material facts in the way we have indicated, we still think that at least the record which is sent up to this Court, when the validity of the Magistrate's order is put in question, should disclose all the facts upon which the Magistrate acted, and upon which he relied for justification of his order. We may say that in neither of the cases before us is this so. We can perhaps just gather from some rather informal orders endorsed upon the back of successive petitions in each case, what view the Magistrate took of the general facts. But there is no formal adjudication, no formal statement of those facts, either in the order itself for the information and benefit of the parties, or in the record for the purpose of enabling this Court to come to a judgment upon the validity of the order. And we are inclined to the opinion that this alone would justify us in quashing the order, because we think we ought not to maintain orders of this kind in force unless we see that the fact of the case, as exhibited in the record, justify them in law.

The 24th November 1868.

Present:

The Hon'ble J. B. Phear and C. Hobhouse, *Judges.*

Report and evidence of Inspector of Police —Breach of the peace.

In the Matter of Rajendro Kishore Roy Chowdhry, *Petitioner.*

Baboos Sreenath Dass and *Nullit Chunder Sein* for Petitioner.

A report of an Inspector of Police and the evidence given by the same Inspector are not sufficient to justify an order binding a person to keep the peace.

Phear, J.—We think it impossible to hold that the report of the Inspector of Police and the evidence subsequently given by the Inspector himself, taken together, afford any ground for supposing that Rajendro was likely to commit a breach of the peace, or to do any act that might probably occasion a breach of the peace. Therefore, there was no legal evidence before the Magistrate which could justify him in coming to the conclusion that it was necessary to bind Rajendro to keep the peace, and the order of the Magistrate is consequently illegal, and must be quashed.

The 24th November 1868.

Present:

The Hon'ble J. B. Phear and C. Hobhouse, *Judges.*

Procedure—Confession—Evidence.

Revision of proceedings in the case of Munger Bhooyan.

The confessions of a prisoner in one case in which he was convicted cannot be used against him in another case, unless they are deposed to on oath either by the person who took them down, or by some one else who heard them.

Phear, J.—In this case the Deputy Magistrate has committed the prisoners for trial upon the following charge, namely, "that "they, on or about the 14th day of September 1868, at Sherghatty, intentionally gave "false evidence in a stage of a judicial proceeding, in that they, in their depositions "taken down by the Deputy Magistrate of "Sherghatty on the said 14th day of September 1868, stated on solemn affirmation "that they did not know Lutchmun Bhooyan "and Byjnath Bhooyan, and did not make "any confession implicating these persons "in the dacoity committed at Sildilurja on "the 5th August 1866, such statements "being deliberately false, and that they "have thereby committed an offence punishable under Section 193 of the Indian "Penal Code." The Deputy Magistrate says that the only evidence upon which this commitment is made "rests entirely upon "the confessions made by the accused, "who are prisoners in the Digah jail, undergoing their sentence, having been convicted "by the Sessions Judge of Gya about two "years ago of a dacoity committed by then, "and others at Mouzah Sildilurja, Pergunnah Sherghatty, and sentenced each to "four years' rigorous imprisonment."

Now, these confessions were made on another occasion, when the accused were upon their trial for another offence; and, although their words may have been at that time duly taken down in writing by the presiding Judge or other officer of the Court, still they can only be used against them for the purposes of the present charge by being deposed to on oath either by the person who took them down, or by some one else who heard them, and who can pledge his oath to them. But it appears that no person has spoken to this effect, or indeed been examined at all on the occasion of this commitment. Consequently, these confessions are not in this case properly put in evidence against the accused.

The Deputy Magistrate in his grounds of commitment also refers to the depositions of other persons, which appear to have been given in the former trial. At any rate, they were not given in the presence of these prisoners when they were before the committing Magistrate on the charge of which he has committed them, and therefore are not evidence legally admissible to support the commitment. It appears to us, therefore, that whatever may be the real merits of the charge, the commitment is void, because it has been made by the Magistrate without being based upon proper and legal evidence. Under these circumstances, we agree with the Judge, and are of opinion that the commitment must be quashed. It is quashed accordingly.

We will add that, even assuming that the former confessions of the accused had been properly brought before the Deputy Magistrate, it would scarcely have been a good exercise of judicial discretion on his part, if he, having regard to the fact that they were not made upon oath, but by way of defence on a criminal trial, had allowed them alone to prevail against the subsequent statements of the same persons, which were deliberately sworn to.

The 2nd December 1868.

Present:

The Hon'ble J. B. Phear and C. Hobhouse, *Judges.*

Procedure—Evidence—Jury.

The Queen *versus* Ramgopaul Dhur.

Mr. G. C. Paul for the prisoner.

Committed by the Magistrate, and tried by the Judicial Commissioner of Assam, on a charge of abetting the commission of the forgery of a document—Sections 109 and 468, Indian Penal Code.

The evidence of a person stating before the Jury upon oath facts which he does not know of his own observation, facts which constitute the substance of the charge against a prisoner, and which the Jury themselves have to enquire into and arrive at as their verdict, ought not to be allowed to go to the Jury; and still less so when the person does not orally depose before the Jury, but his evidence is presented to them in the form of a written deposition.

Phear, J.—In this case the prosecution alleges that the prisoner, a Sub-Overseer in the Public Works Department, charged in the accounts rendered by him to his immediate superiors a certain item for the purchase of iron as having been bought by one Behari for that Department, and that he supported this charge by a pretended voucher, which purported to be a receipt from Punchanun Doss given to him by Behari. The prosecution maintains that this receipt is a fictitious document, and that the prisoner abetted the forgery of it. The prisoner's defence is that he in fact got the receipt from Behari, and that he knows nothing further about it—whether it is fictitious or not.

The evidence produced against the prisoner is first the testimony of Munsook Doss, who says that he sold iron to Behari Lall at the rate of 4 rupees, but he gave no receipt. He swears that the receipt in question was not signed by him or by any one in his employment.

It is to be remarked, with reference to this man's testimony, that it is rather negative than direct with regard to the matter which is charged against the prisoner. For the prisoner did not represent at any time to his superiors that the iron was bought of Munsook Doss, nor does the receipt purport that the iron was bought of Munsook Doss. On the contrary, according to the receipt, the iron was bought of one Punchanun Doss. Witnesses were also called to show that no one was known in the place of the name of Punchanun Doss. And this, I think, makes up the whole of the evidence against the prisoner with the exception of the one principal witness, Sham Nath. Sham Nath says that he was the writer of the receipt which is alleged to be forged; that he wrote it at the dictation of the prisoner upon a piece of paper which already bore a Nagree signature; and that the prisoner told him that this Nagree signature was the signature of Munsook Doss. So that this man Sham Nath brings home the making of the receipt directly to the prisoner; and he also makes the evidence of Munsook Doss relevant, by stating that the prisoner himself had represented to him that iron was bought of Munsook Doss, and there can be no doubt that, if this witness's evidence is accepted in its entirety, the offence charged is clearly made out against the prisoner.

Now, I feel bound to say that I do not consider that the trial even on this second occasion, upon the remand made by this Court, has been a satisfactory one. Mr. Robinson's deposition was, in the absence of Mr. Robinson himself, laid before the Jury exactly in the form in which it was taken down by the Magistrate, and it appears that the Magistrate, in allowing Mr. Robinson to give his evidence before him, paid very little regard to even the commonest rules which govern the reception and admissibility of evidence. For in this deposition Mr. Robinson states upon oath facts which he did not know of his own observation; the very facts, indeed, which constitute the substance of the

charge against the prisoner, and which the Jury themselves had to enquire into and arrive at as their verdict, if the case of the prosecution was to be made out.

Amongst other things Mr. Robinson swears that "the prisoner purchased a certain quantity of iron for the use of the Public Works Department from one Munsook Doss, and paid him the sum of 49 rupees for it, and took no receipt for the money, and subsequently on the 1st October submitted to him a false account, in which it was stated that he had paid 118 rupees on account of the purchase of the iron, for which he had in reality paid only Rupees 49. On the same day he also submited a voucher for the sum of 118 rupees paid on account of the purchase of some iron, and purporting to be signed by the vendor of the iron, one Punchanun Doss, who was the real vendor, and whom I believe to be an imaginary person."

This was, in fact, swearing to the whole case of the prosecution—a case which the prosecution could only make out through the means of circumstantial evidence, because neither Mr. Robinson nor any one else was able of his own knowledge to swear to the facts which are assumed by Mr. Robinson to have taken place, and which he thus ventured to swear to. I have no hesitation in saying that it was extremely improper on the part of the Judge to allow testimony of this kind to go before the Jury, and to influence them in the matter which they have to consider. It would have been bad enough had Mr. Robinson himself been there, and been permitted to say this orally; but it was worse to present it to the Jury in the form of a written deposition; for in this way there was no possibility of correcting, through the means of a properly directed cross-examination, the misapprehension which must almost necessarily have been produced by it.

Again, the Sessions Judge himself, in summing up the case to the Jury, says this: "I may add also in regard to the witness Munsook Doss that he is a man of well-known respectability, whose word is deserving of a large degree of credit." There was not, so far as I have been able to gather from the depositions in the record, a single word from beginning to end in the evidence which was before the Court tending to represent any thing as to the credibility or character of Munsook either the one way or the other. Therefore it would seem that the Judge in using this language to the Jury was not speaking from the evidence which had been put before the Court, but was in reality giving evidence to the Jury himself. I need not say that, if he did in this way, as I am supposing, give evidence before the Jury, he was going entirely beyond the proper barrier of a Judge.

And there is this further misfortune with regard to the conduct of this trial, that the evidence of Sham Nath, which is, in truth, the sole evidence upon which the conviction of the prisoner can be made to rest, was put before the Court like that of Mr. Robinson in the shape of a written deposition. Now, Sham Nath, by his own account, was the principal agent in the fabrication of this document, and must have known, at the time that he was writing it, that it was fabricated. Consequently, by the nature of the case, his testimony required to be scrutinized with considerable care and suspicion. It was, therefore, in the highest degree important that he should have gone before the Jury himself, and given his testimony *vivâ voce*, subject to the test of cross-examination. I do not say that the Judge was wrong as a matter of law, under the circumstances which occurred, in allowing the written deposition of Sham Nath to be substituted for an oral examination of the man himself; but I do consider that it was a misfortune in regard to the trial of the case that he was so induced to exercise his judicial discretion (a discretion which, no doubt, did rest with him) as to take this course. It would have been better, in my opinion, for the interests of justice, if he had postponed the trial in order to admit of Sham Nath's evidence being given in person.

In view of what I have just now mentioned, I am unable to say that I am satisfied with the trial that has taken place. At the same time I do not think that Mr. Paul has made out to us that the trial has been so entirely misconducted as to amount to no trial at all, and therefore to justify us in setting it aside, and directing a new trial. But, while I think that the trial must be allowed to stand, I am also of opinion that the sentence which has been passed by the Lower Court, based upon the verdict of the Jury, which has been arrived at in the way which I have represented, is severe beyond the exigencies of justice. I therefore think that it ought to be mitigated, and that the sentence of the Sessions

Judge should be reversed, and in lieu thereof the prisoner should be sentenced to undergo nine months' rigorous imprisonment, which period of time is to date from the date when the sentence in the first trial was passed upon him.

The 8th December 1868.

Present:

The Hon'ble J. B. Phear and C. Hobhouse, *Judges.*

Murder—Act done with intent to cause miscarriage—Clause 4, Section 300, and Section 314, Penal Code.

The Queen *versus* Kalachand Gope and others.

Committed by the Magistrate, and tried by the Sessions Judge of Backergunge, on a charge of murder under Section 302, and causing the disappearance of evidence of an offence committed under Section 201, Indian Penal Code.

To bring a case under Clause 4, Section 300 of the Penal Code, it must be proved that the accused, in committing the act charged, knew that it must, in all probability, be likely to cause death, or that it would bring about such bodily injury as would be likely to cause death.

When a poisonous drug was administered to a woman to procure miscarriage, and death resulted, and it was not proved that the accused kne wthat the drug would be likely to cause death, &c., they were acquitted by the High Court of murder, and convicted of an offence under Section 314 of the Penal Code.

Phear, J.—We think that the conviction of the prisoners cannot be upheld, even upon the view of the facts taken by the Sessions Judge.

In the first place, with regard to Udhab, there is nothing, as it appears to us, to lead reasonably to the inference that, at the time when he assisted the other prisoners in carrying out and burying the body, he knew or had reason to believe that the death was the result of an offence committed. It is true that, if the evidence on the record be accepted in its entirety, it would appear that the cremation of the unfortunate woman was conducted without the usual observances; and this might reasonably be expected to excite suspicion in any one looking on, that there was some motive, not altogether proper, for hastening the destruction of the body. But we are not prepared from this alone to come to the conclusion that the prisoner Udhab was guilty of the offence defined by Section 201 of the Penal Code. Under these circumstances, we are of opinion that he should be acquitted, and the sentence passed upon him reversed. He will be released from custody so far as this charge is concerned.

We also think that the facts found by the Sessions Judge do not support a charge of murder against Kala Chand and Zahir, the two other prisoners. The Sessions Judge himself admits that, if the offence is murder, it is so only because it falls within the definition of the 4th Clause of Section 300 of the Penal Code. The essential element of that Section is that the person who committed the act from which death resulted knew at the time of doing it that it was so imminently dangerous that it must, in all probability, cause death, or such bodily injury as is likely to cause death. Now, assuming that the evidence in this case is sufficient to prove that these two prisoners administered to Lukhi a poison or drug which caused her death, we do not think that it goes so far as to show that the prisoners at the time knew that the administering of this drug was so dangerous that it must, in all probability, be likely to cause death, or that it would bring about such bodily injury as would be likely to cause death. The Judge says that they knew they were administering, without any sufficient cause, something to Lukhi which was intended to work contrary to the course of nature, and they must, therefore, have been aware that such a violent disturbance of the natural functions was so imminently dangerous as was likely in all probability to cause death. It seems to us that this presumption which the Judge makes is scarcely more than speculation. There is nothing scarcely in the evidence

to disclose the actual mental condition of the prisoners; and we think it may well have been that, while they were administering the drug for the purpose of procuring a miscarriage, they might also have been quite ignorant that the mode in which the drug acted to that end would be likely to be dangerous to life, or even to produce, as the Judge says, a violent disturbance of the natural functions. And, further, it seems to us that the evidence is insufficient to bring the act of the prisoners, assuming that they did administer the drug, within the general operation of Section 299, because, as I have already observed, the evidence does not seem to us to be sufficient to show that the prisoners were aware that the administering of the drug was likely even to cause bodily injury. It follows that Kala Chand and Zahir ought not to have been convicted on the evidence before the Court of culpable homicide in any shape. We are of opinion, consequently, that these prisoners, too, should be acquitted of the charge which was actually made against them, and the sentence passed upon them by the Lower Court in respect of that charge reversed.

But, on the facts of the case disclosed by the evidence, we think that we ought to exercise the discretion which resides in us by virtue of Section 405 of the Criminal Procedure Code. We think that the evidence which is on the record does serve to convict the prisoners of the offence defined in Section 314 of the Penal Code, namely, that they, with intent to cause the miscarriage of a woman with child, did an act which caused the death of that woman. We think there can hardly be any doubt from the depositions of the witnesses, if their testimony is relied upon, that these two prisoners did administer to Lukhi some drug for the purpose of causing miscarriage; and we think, further, that the death of the unfortunate woman was the consequence of their having so administered it.

There is evidently a distinction between the case of Kala Chand and Zahir in this particular, namely, that Kala Chand is represented by the witnesses as being the person who actually administered the noxious article, while the part that Zahir took in the transaction was passive. We think, on the whole, that the evidence of the witnesses may be trusted in all material points, and we do in our finding make the distinction which I have just referred to between the parts played by Kala Chand and Zahir. At the same time, in apportioning the punishment, taking all the facts into consideration, we are of opinion that no difference ought to be made. While Kala Chand was the person no doubt more particularly interested in bringing about the miscarriage, Zahir was not a mere ordinary companion accidentally present, but was the chowkeedar of the village, and in that capacity had a duty to perform which should especially have led him to be active in preventing the commission of an offence of this kind, instead of remaining beside Kala Chand to abet him. Under the circumstances, we think that he at least ought to suffer an equal punishment with Kala Chand.

Further, on looking at the account of the transaction which is given by the witnesses, we are disposed to think that Kala Chand's offence did not reach to the highest limit which is contemplated by the legislature in Section 314. Although there is no express evidence that the drug was administered with the consent of Lukhi, it is almost impossible to resist the conclusion that it must have been so. It is difficult to understand how the woman could have drunk or taken down the drug into her stomach otherwise than of her own voluntary act. She might, of course, have been induced to take it by compulsion or under the influence of threats against her own will, but there is nothing to indicate that that was the case here, even if the two women-witnesses are believed in all the details which they mention. The words which they say were made use of by Lukhi do not necessarily amount to more than the expression of a reluctance to take the drug. Probably this reluctance was overcome by Kala Chand's persuasion and her own personal motives, and we think that we ought not to come to the conclusion that the administering was effected against her consent.

In this view, we think that the sentence which has been passed, although it would be justified by the terms of Section 314, if the act which caused the death had been done without the consent of the woman, is greatly in excess of the punishment which ought to be given in respect of the offence which we think was actually committed by the prisoners under the 1st Clause of Section 314. It seems to us that the proper punishment for the offence, which in our judgment was committed, is two years' rigorous imprisonment. We, therefore, without directing an acquittal, reverse the sentence which has been passed upon the prisoners, and instead thereof pass the sentence upon each of them of two years' rigorous imprisonment.

The 11th December 1868.

Present :

The Hon'ble G. Loch and F. A. Glover, *Judges.*

Complaint—Procedure—Sections 67, 265, and 266, Code of Criminal Procedure.

Reference to the High Court, under Section 434 of the Code of Criminal Procedure, by the Sessions Judge of Rungpore.

Beelash *versus* Makroo.

A Magistrate may dismiss a complaint, under the provisions of Section 67 of the Code of Criminal Procedure, before issuing a summons for the attendance of the accused; but when all the parties are in attendance, he is bound to follow the procedure laid down in Sections 265 and 266, and cannot dismiss the complaint without hearing the evidence.

Loch, J.—It appears to me that the Magistrate's order is erroneous. The complainant charged certain parties with assaulting him, and obtained a summons requiring their attendance before the Magistrate. On their appearing, one of the parties charged was a boy, supposed by the Magistrate to be about 8 years old; and he therefore, without going into the evidence for the complainant, considered the complaint frivolous, discharged the accused, and fined the complainant under the provisions of Section 270, Code of Criminal Procedure. Even if the charge could not be sustained against the boy, it might have been against the other parties. It is quite possible that a boy of 8 or 10 years might, from the love of mischief or fun, or from the example or directions of his elders, join with them in assaulting a person; but it would be no reason for dismissing a case, or holding the complaint to be frivolous or vexatious, because one of the assailants was a child. I think this order imposing a fine should be set aside.

The Magistrate considers that he was justified in dismissing the case without hearing the evidence, and that, even if there were no trial, he had authority to impose a fine under the provisions of Section 270. A Magistrate has certainly authority to dismiss a complaint under the provisions of Section 67 before issuing a summons for the attendance of the accused. But when the parties charged are in attendance, as well as the complainant and his witnesses, it appears to me that the Magistrate is bound to follow the procedure laid down in Sections 265 and 266, and cannot dismiss the complaint without hearing the evidence. The Magistrate's order dismissing the complaint should also, I think, be set aside, and the complainant be allowed to prosecute the charge, if so minded.

Glover, J.—I am of the same opinion.

The 14th December 1868.

Present :

The Hon'ble G. Loch and F. A. Glover, *Judges.*

Forgery—False document—Injury to reputation—Sections 29, 463, and 469, Penal Code.

Criminal Revisional Jurisdiction.

Revision of Proceedings in the case of Sheefait Ally and others.

The simple making of a false document constitutes the offence of forgery under Section 463 of the Penal Code, and it is not necessary that it should be issued or made known to the injury of a person's reputation either by being presented in Court or shewn to any person. A false document may be made in the name of a fictitious person.

Where a draft-petition was prepared with the intention of being used as evidence of a matter, it was held that it fell within the terms of Section 29 of the Penal Code; and, as it contained false statements calculated to injure the reputation of a person, the offence was held to fall within Section 469 of the Penal Code.

Sheefait Ally, Elahi Buksh, and Movy Shah.

Loch, J.—The persons noted in the margin were apprehended in the act of writing the draft of a petition bearing the name of Delawur Shah, charging Rajah Leelanund Singh with the murder of a fukeer, with the object, as alleged by the complainant, of extorting money from the Rajah. They were committed for trial: Sheefait Ally, on a charge of forgery under Section 469 of the Indian Penal Code; and the other two, on a charge of abetment. The fact of the parties being concerned in concocting and writing the petition appears

to be established, and the only question before us is the law-point whether any offence recognized by the Penal Code has been committed or not. The Sessions Judge holds that no offence has been committed, *first*, because it did not appear that there is such a person as Delawur Shah; *second*, that the draft in question had never been presented in Court or shewn to any person, and consequently no one had been harmed by it; and he therefore acquitted the prisoners without calling upon them for a defence.

An appeal has been preferred from this order, and the Court was asked to interfere under the precedent given in 5 Weekly Reporter, page 45, Criminal Rulings; and the record was accordingly sent for.

It is necessary, before determining whether an offence has been committed, to refer to certain Sections of the Indian Penal Code. The offence of forgery is thus defined in Section 463: "Whoever makes *any false* "*document* with intent to cause any per-"son to part with property, or with intent to "commit fraud, commits forgery." A person is said to make a false document who *dishonestly or fraudulently* makes a document with the intention of causing it to be believed that such document was made by, or by the authority of, a person by whom or by whose authority he knows that it was not made; and in the second explanation to Section 464 it is stated that the making of a false document in the name of a fictitious person, intending it to be believed that the document was made by a real person, or in the name of a deceased person, intending it to be believed that the document was made by the person in his lifetime, *may* amount to forgery.

Section 29 of the Penal Code describes a document in the following terms: "The word 'document' denotes any matter "expressed or described upon any substance "by means of letters, figures, or marks, or by "more than one of those means, *intended to* "*be used, or which may be used, as evidence* "*of that matter.*"

"*Dishonestly*," according to Section 24, is thus defined: "Whoever does anything "with the intention of causing wrongful "gain to one person, or wrongful loss to "another, is said to do that thing dis-"honestly."

Now, it is clear, from the definition of forgery in Section 463, that the simple *making* of a false document constitutes the offence of forgery, and that it is not necessary, as apparently supposed by the Judge, that it should be issued or made known to the injury of a person's reputation before the offence is completed or the offender liable to punishment. The publication of such a document forms no part of the offence, and the Judge is therefore wrong in holding that no offence had been committed, because the petition had not been presented in Court or shown to any person. He is equally wrong in considering that no offence had been committed, because it was uncertain whether such a person as Delawur Shah was in existence, for, as shewn by the 2nd explanation to Section 464, it is clear that a false document may be made in the name of a fictitious person.

It cannot be questioned that the document has been made dishonestly, *i. e.*, with the intention of causing wrongful gain to the makers by extorting money from the Rajah, and wrongful loss to the Rajah, who was falsely charged with committing murder. And, if the draft-petition be a document, as defined in Section 29 of the Penal Code, it is evident that the prisoners were rightly charged with the offence of forgery. Now, the gist of that definition lies in the last few words "intended to be used as evidence of that matter." The matter expressed in this paper is the fact of a murder alleged to have been committed by the Rajah through his servants. Is this paper evidence of that matter? Could it, as it stands, be used as evidence against him to support the charge of murder which it sets forth? It certainly is not evidence as it stands. The paper is a mere narration of an alleged fact, and there is no one to swear to the truth of its contents. But what was the intention with which the petition was prepared, for that has also to be considered. There can, I think, be little doubt that the person who prepared the petition believed that it might be used as evidence, and prepared it with that intention; and, this being the case, the petition does become a document within the meaning of Section 29 of the Penal Code; and, as it contains statements injurious to the character of Rajah Leelanund Singh, and can have been prepared with no other intent than to cause injury to him, and the statements contained therein are alleged to be false, the parties concerned were rightly committed to the Sessions on a charge of forgery.

d

The Judge has acquitted the prisoners erroneously on a point of law, and therefore, under the ruling of the Full Bench in the case of Gora Chand Gope, reported at page 48 of Volume 5, Weekly Reporter, I think the order of acquittal should be set aside, and the Judge required to apprehend the prisoners and to pass the proper sentence upon them as guilty of the offence of forgery under Sections 463 and 469.

Glover, J.—There can be no doubt, I think, on the admitted facts of this case that there was an offence committed under Section 469, Penal Code, if the written paper found in possession of the accused can be styled a "document" in the sense of Section 29.

By that Section a document is "any matter expressed by writing, figures, or marks intended to be used, or which may be used as evidence of that matter." Now, the writing in question could not have been used as evidence of the alleged murder, and therefore the case turns on the meaning of the words "intended to be used."

It appears to me that the accused, in concocting the anonymous petition against the Rajah Leelanund Singh to the address of the Magistrate of the district, intended that petition to be used as evidence that a certain fakeer had been beaten and killed by the Rajah's order. I do not think that it affects the case that the petition could not have been so used: it is enough that the accused thought it could, and made their arrangements accordingly. It was not necessary, moreover (see Explanation to Section 29) that the evidence was intended to be used in a Court of Justice.

Further, the large illustration to Section 29 describes any authority containing instructions to be a document. Now, this petition gave information to the Magistrate of the commission of a murder, and may therefore be said to be an "instruction," on which the Magistrate would most properly have taken action.

On all the other points raised, I concur entirely in the opinion expressed by Mr. Justice Loch. The Sessions Judge's reasons for discharging the accused are manifestly insufficient.

I think, therefore, that the Judge below should be directed to try the case with reference to the words of the Section above quoted.

The 15th December 1868.

Present:

The Hon'ble J. B. Phear and C. Hobhouse, *Judges.*

Charge—Sentence—Rioting armed with deadly weapons—Causing hurt with dangerous weapons—Sections 148 and 324 of the Penal Code.

The Queen *versus* Dina Sheikh and others.

Committed by the Magistrate, and tried by the Sessions Judge of Mymensing, on a charge of rioting being armed with deadly weapons, &c.

HELD that, where the prisoners were charged under Section 148 of the Penal Code of rioting armed with deadly weapons, and also under Section 324 of voluntarily causing hurt by dangerous weapons, they should have been sentenced only under *one or other* of these Sections, the charges being, properly speaking, only alternative charges.

The High Court refused to interfere with the reception by the Sessions Judge of the uncorroborated evidence of accomplices.

Phear, J.—THE two charges upon which the prisoners have been convicted may be stated in the following way: *first*, that they were members of an assembly, the common object of which was to take possession of property by means of criminal force, and that force actually was used; *secondly*, that they, by the force so used, caused hurt, but to whom the hurt was caused no mention is made. It appears to us that, substantially, these two charges are but two different forms of stating the same criminal acts. The substance of both of them obviously is that violence was used, or, in other words, hurt was caused. It is essential to the first that force or violence actually was used; and it is essential to the second that hurt was caused, that is, that violence was used. It would appear, therefore, that the prisoners have been convicted under the second charge of causing hurt, and under the first charge of causing that hurt with the addition of a special motive, namely, that of taking away property in an unlawful manner. In this view of the case, we think that the prisoners ought not to have been convicted of both charges simultaneously. They were, properly speaking, alternative charges, and therefore the prisoners should have been found guilty of the one or the other, according as the evidence satisfied the Court that the one or the other charge was made out.

After perusing the record, and considering the judgment of the Sessions Judge, we are of opinion that the prisoners should be convicted of the first charge, namely, the charge made under the provisions of Section 148, and not of the second; and we are even

disposed to the opinion that the second charge is in itself, if not incomplete, at least irregular, for not in some way designating the person upon whom the hurt was inflicted. We have doubts whether we ought, upon the facts of this case, in affirming the conviction upon the first charge, to modify in some degree the sentence which has been passed; but, after full consideration, we think that we cannot make any distinction between the prisoners, and also that the sentence which has been passed is not too severe for the offence of which the prisoners have been convicted.

It has been objected before us that, with regard to the three last prisoners, taking them in the order in which they stand in the charge, the evidence is insufficient to make out the offence of which they have been convicted. It is said that the evidence is essentially the evidence of accomplices without corroboration, and therefore ought not to be believed by the Court. We find that the Sessions Court, which had the witnesses before it, and therefore possessed greater powers of discriminating than we have in regard to the credibility proper to be attached to their testimony, considered that these persons, even accomplices as they in a certain degree might be termed, were deserving of belief, and we see no reason to come to a different conclusion. Accordingly, we acquit the prisoners of the second charge, namely, the charge under Section 324, and set aside the sentence which has been passed therein. Therefore, so far as that charge is concerned, they are entitled to be discharged. But we think that they are guilty of the first charge, and that the sentence passed in respect of that charge must stand. The appeal, therefore, will be dismissed as regards the first charge.

The 21st December 1868.

Present:

The Hon'ble G. Loch and F. A. Glover, *Judges.*

Breach of the peace—Land disputes—Rioting—Right of private defence of property—Sections 104 and 147, Penal Code—Chapter XXII., Code of Criminal Procedure.

Reference to the High Court, under Section 434 of the Code of Criminal Procedure, by the Sessions Judge of Patna.

Case of Toolsee Singh, Thakoor Singh, and others.

In investigating a case of dispute as to land between two parties under Chapter XXII. of the Code of Criminal Procedure, a Magistrate found that one party was in possession, but, there being a charge against both parties of rioting under Section 147 of the Penal Code, he punished both parties. HELD that the party in possession were protected by Section 104 of the Penal Code in maintaining their possession, and the punishment inflicted on them was accordingly remitted.

Reference.—I HAVE the honor to submit the record of a case tried by Deputy Magistrate Duleelooddeen Khan, in which he has fined three persons 50 rupees each, and a fourth 20 rupees, awarding in each case a month's imprisonment on non-payment of the fine. The conviction is under Section 147. The fines have all been paid.

The facts of the case are very simple. A dispute existed between Toolsee Singh and others on one side, and Kale Khan and others on the other, in respect of 5 beegahs of land which the former declare to belong to Mouzah Abad Ahmudpore Hur Singh, and the latter to Mouzah Ghoolam Gurdish.

On the 20th June last, notice was given to the police of an anticipated breach of the peace. The police proceeded to the spot, according to the evidence of the two constables examined. There was no actual violence, but Kale Khan with three others were ploughing the land, and the opposite party who were armed were threatening them.

Other witnesses examined tell the tale as suits their own side respectively. There does not appear to have been any actual assault committed; but it is clear that both parties were claiming the ground, and were prepared to drive off their opponents as trespassers.

The Magistrate, at the same time that he tried the charge under Section 147 made against both parties, tried the question of possession under Chapter XXII. of the Criminal Procedure Code, and on the 4th September 1868 found that Thakoor Singh's party were in actual possession of the land in dispute. Notwithstanding this, he punished both sides equally. Thakoor Singh's party object that they had a right to maintain their possession, and it appears to me that, under Section 104 of the Penal Code, they were fully justified in all that was actually done.

I would therefore quash the conviction, but, as the order is one from which no appeal lies to this Court, I am obliged to refer it to the High Court.

The Deputy Magistrate, to whom this letter has been sent, does not wish to offer any remarks.

Judgment of the High Court.

Loch, J.— We concur in the opinion expressed by the Judge, and direct that the fine imposed upon Thakoor Singh and his party be remitted.

Occupation and service of prisoners to be stated —Column 7 of Statement No. 4, and Column 6 of Statement No. 5 how to be filled up.

Extract (paras. 3 and 4) from Letter No. 694, dated 4th June 1868, from the Registrar of the High Court, to the Sessions Judge of Hooghly.

Present:

The Hon'ble L. S. Jackson, *Judge.*

3. THE occupation of the prisoners Russicklal Bose and others (Case No. 4, Statement 4) should have been more explicitly given, and the particular "service" should have been stated. In column 7, in lieu of the words "the Court concurs and directs that "the prisoners be sentenced to suffer rigorous "imprisonment for five years each," should have been entered—

"Sentence.

"Rigorous imprisonment for five years.

"The Judge approved of the verdict."

4. The Court observe that in column 6, case of Golam Sheikh (Case No. 2, Statement No. 5), instead of the words "the Court dissents and directs that the prisoner be discharged," should have been entered the words, "the Judge disapproved of the verdict." Similarly, in column 6, case of Petambur Aduck (Case No. 3, Statement No. 5), the words, "the Judge approved of the verdict," should have been entered.

Charge of theft or robbery cannot be maintained where person has taken article under a fair and honest claim of right in excess of what he is entitled to.

Extract (para. 5) from Letter No. 871, dated 23rd June 1868, from the Registrar of the High Court to the Sessions Judge of Gya.

Present:

The Hon'ble L. S. Jackson, *Judge.*

I AM to remark that your view in the case of Gungoo Singh (Case No. 1, Statement No. 5) is of questionable accuracy. You seem to hold that the charge of plunder which was made would be unfounded, only if the grain taken by the person accused turned out to be not in excess of what he was entitled to; so that, if under a fair and honest claim of right the accused had taken more than his lawful share, according to you there would be ground for a charge of theft or robbery. To the Court it would seem that the element of dishonesty would be in such a case wholly wanting, and that the party bringing a criminal charge in such a case might be justly amenable to the provisions of Section 211. But the Court has no doubt that, in the particular case, justice was done.

Prisoner committing two acts of perjury on different occasions should not be tried on one charge—Prisoner convicted not to be discharged without punishment.

Extracts (paras. 9 and 12) from Letter No. 990, dated 20th July 1868, from the Registrar of the High Court to the Sessions Judge of Dacca.

Present:

The Hon'ble L. S. Jackson, *Judge.*

9. The Court observe that it was irregular for you to try the prisoners Fagoo Takoor and another (Case No. 28, Statement No. 4, for Furreedpore) on one charge. They did not join in committing one act of perjury, but separately gave, or, were alleged to have given, false evidence. The circumstance that the evidence related in both cases to the same subject-matter, or even that the false statements were similar, makes no difference in the principle. The acts were separate, and committed at different times. As the sentence of six months' rigorous imprisonment appears to the Court quite inadequate for the offence, I am to request that you will submit an explanation as to your reasons for passing so light a punishment.

12. The Court observe that, as you convicted the prisoner Phelee (Case No. 13, Statement No. 5, for Furreedpore), you were not competent to order her discharge without punishment—Section 380, Code of Criminal Procedure. The circumstances of the case not being stated, the Court cannot conceive on what ground the man with whom a woman has contracted a bigamous marriage can be charged with abetting.

Names of Assessors and opinion of each Assessor to be given in Column 6 of Statements.

Extract (para. 5) from Letter No. 1009, dated 23rd July 1868, from the Registrar of the High Court to the Judicial Commissioner of Chota Nagpore.

(Criminal Side.)

Present:

The Hon'ble L. S. Jackson, *Judge.*

In column 6, case of Sadhooa Sahan and another (Case No. 1, Statement 5), the Court observe that the Assessors' names have not been given, and that one opinion has been recorded for both Assessors contrary to Section 324 of the Code of Criminal Procedure, and para. 2 of Circular Order No 4, dated 23rd June 1865,* which require that "the opinion of *each* Assessor shall be given orally, and shall be recorded in writing by the Court."

Assessors not to be directed as to opinion which they ought to give.

Letter No. 1012, from the Registrar of the High Court to the Sessions Judge of Shahabad, dated Calcutta, the 23rd July 1868.

(Criminal Side.)

Present:

The Hon'ble L. S. Jackson, *Judge.*

In acknowledging the receipt of the Jail Delivery Statements of your District for the month of May last, I am directed to inform you, with advertence to the entry in Column 7, Case of Bhullub (Case No. 6, Statement 4), that you have no authority to *direct* the Assessors. They are members of the Court, and are to give their opinion for your concurrence.

* *See* 3 W. R., Crim. Cir., p. 1.

Deposition given before Magistrate by witness whose residence is not known may be admitted before Sessions Judge under Section 369, Code of Criminal Procedure.

Extract (para. 3) from letter No. 1014, dated 25th July 1868, from the Registrar of the High Court to the Sessions Judge of Midnapore.

Present:

The Hon'ble L. S. Jackson, *Judge.*

WITH advertence to your abstract in the case of Prem Chund Bera (6, Statement 4), the Court observe that, on proof alleged, to wit, that his residence was unknown, the deposition of the witness Peary Mohun before the Magistrate might have been given in evidence under Section 369 of the Code of Criminal Procedure.

Opinion of each assessor to be delivered separately, though not at great length—Case of a prisoner who has appealed from a sentence in a previous case not to be postponed till result of that case is known.

Extracts (paras. 4 and 5) from letter No. 1108, dated 15th August 1868, from the Registrar of the High Court to the Officiating Sessions Judge of Jessore.

Present:

The Hon'ble L. S. Jackson, *Judge.*

4. WITH advertence to the opinion of the assessors entered in Column 7 of the case of Cazim Faqueer, I am directed to observe that you should have required them to deliver their opinions as required by law (*vide* Section 324 of the Code of Criminal Procedure). It is not necessary that each assessor should give his opinion at great length, but it must be separately given. The assessors are individually members of the Court, and are not a Jury. This remark applies equally to the cases of Chand Gazi and others (9, Statement 4), and Peary Mohun Deb (10, Statement 4). The Court observe that you have evidently introduced the plan of having one assessor to deliver the opinion of all. This is not, as above stated, in accordance with the law, and must be discontinued.

5. Regarding the remark entered in Column 7, Statement 6, that "the sentence was suspended till the results of the appeal made by the prisoner against the sentence passed upon him on 15th May in another case is known," the Court observe this was unnecessary, as the sentence might have been

ordered to take effect from the termination of the previous sentence.

Amendment of charge to be made by Sessions Judge only when the variation is material, and when the charge is absolutely defective.

Extract (para. 6) from letter No. 1123, dated 21st August 1868, from the Registrar of the High Court to the Sessions Judge of Sarun.

Present :

The Hon'ble L. S. Jackson, *Judge.*

In regard to your remark in the case of Mewa Sing and another, that the wording of the charge by the committing officer having been found defective was amended, the Court observe that it was hardly necessary for you to take the trouble of making mere verbal amendments, unless the variation was really material, and the charge absolutely defective.

---

b

Charges to be described in language of Penal Code—False personation—Evidence of child—Sections 14 and 15, Act II., 1855.

Extracts (paras. 2, 3, and 6) from letter No. 1134, dated the 24th August 1868, from the Registrar of the High Court to the Sessions Judge of Tirhoot.

Present:

The Hon'ble L. S. Jackson, *Judge.*

2. THE 1st head of charge against prisoner 3, and the second head against prisoner 5 (Case 2, Statement 4), should not, I am to point out, have contained the word "aiding," which is not to be found in Section 109 of the Indian Penal Code. On this point your attention is drawn to Section 234 of the Code of Criminal Procedure, which requires the charge to describe the offence "as nearly as possible in the language of the Indian Penal Code."

3. The Court cannot discover what the offence was which the prisoners Lulwah and Rughoolal (5, Statement 4) are supposed to have committed. Mere false personation is not punishable under Section 205 of the Indian Penal Code; there must be some act done in such assumed character of the nature mentioned in the Section. I am to request that you will forward the proceedings of the case for the Court's revision.

6. The Court observes that a most material witness in the case above mentioned (as far as his knowledge went), namely, the boy who accompanied the deceased, was *not examined* on the ground that he was of "tender years," *viz.*, 8 years of age, and did not understand the nature of an oath. This matter should have been dealt with under Section 15, Act II. of 1855, which ordains that any person who, by reason of his age, &c., ought not to be admitted to give evidence on oath or solemn affirmation, *shall be admitted* to give evidence on a simple affirmation. The 14th Section of the same Act excludes *only such children under 7 years* of age as appear incapable of receiving just impressions of fact, or of relating them truly. The error in this case may have been of serious consequences, as the case against the prisoner appears to be far from strong. The Court also observes that you advert to the fact that the presence on the spot of Choony, one of the witnesses for the prosecution, is mentioned by two of the prisoners in their examination. This could not be used as evidence against the accused.

7

Complainant not to be designated co-prosecutor.

Extract (para. 3) from letter No. 1553, dated 18th December 1868, from the Registrar of the High Court to the Sessions Judge of Shahabad.

WITH advertence to the case of Kullupnath Roy (9, Statement IV.), the Court observe that it is not correct to designate the complainant as the co-prosecutor. That was the practice for a time before the introduction of the Code of Criminal Procedure, but it ought not now to be continued.

Murder—Act imminently dangerous.

Extract (para. 3) from letter No. 1565, dated the 19th December 1868, from the Registrar of the High Court to the Sessions Judge of Mymensingh.

WITH advertence to the case of Sheik Gohu (53, Statement IV.), the Court observe that several Sessions Judges, in dealing with cases of culpable homicide, advert to the consideration of the act done by the accused being "so imminently dangerous," &c. The Court desires to point out that this circumstance, which, under the 4th Clause of Section 300 of the Indian Penal Code, is one which raises culpable homicide to murder, is not applicable when the action was done *with intention of causing death or bodily injury*, but to acts done recklessly, though without such distinct intention, of which an illustration is given in the Code itself. Illustration (D).

"*A*, without any excuse, fires a loaded cannon into a crowd of persons, and kills one of them. *A* is guilty of Murder, although he may not have had a premeditated design to kill any particular individual."

Exempts Nawab Syud Mahomed Zamiool Abdeen from personal attendance in the Civil Courts.

CIRCULAR MEMO. No. 2.

From the Registrar of the High Court of Judicature at Fort William in Bengal, Appellate side, to the Civil Authorities in the Lower Provinces, dated Calcutta, the 23rd June 1868.

(Civil Side.)

Present:

The Hon'ble G. Loch, *Judge.*

THE Government of Bengal* having been pleased to exempt Nawab Syud Mahomed Zamiool Abdeen, of Moorshedabad, from personal attendance in the Civil Courts, the High Court direct that his name be included in the list prepared under the provisions of Section 22, Act VIII. of 1859.

* *See* Government letter No. 3211, dated 5th June 1868.

Mode in which the average duration of civil suits is calculated to be shown in Annual Statement No. 6.

CIRCULAR MEMO. No. 3.

From the Registrar of the High Court of Judicature at Fort William in Bengal, Appellate side, to all Zillah Judges and Judicial Commissioners, dated Calcutta, the 25th June 1868.

(Civil Side.)

Present:

The Hon'ble G. Loch, H. V. Bayley, L. S. Jackson, and A. G. Macpherson, *Judges.*

THE Zillah Judges and Judicial Commissioners of the Lower and Extra Regulation Provinces are requested to state the mode in which the average duration of civil suits in the Mofussil Courts of different grades is calculated when Annual Statement No. 6 is prepared for submission with the local Administration Reports.

In order to enable the Court to form an exact opinion on the subject, the actual figures and calculations for 1867 should be submitted.

Rescinds Circular Order No. 55, dated 17th November 1854.

CIRCULAR No. 7.

From the Registrar of the High Court of Judicature at Fort William in Bengal, Appellate side, to all Civil Judges, dated Calcutta, the 25th June 1868.

(Civil Side.)

Present:

The Hon'ble Sir Barnes Peacock, *Kt., Chief Justice,* and the Hon'ble G. Loch, H. V. Bayley, L. S. Jackson, and A. G. Macpherson, *Judges.*

The Circular Order No. 55, of 17th November 1854, being applicable to a procedure no longer in existence, has become obsolete, and is hereby rescinded.

I am to remind you that the orders of Government of the 1st March 1864, No. 1338, which are modified by the present Circular, will be found attached to the Court's Circular Memorandum No. 9, dated 10th March 1864.

Circular from Lieutenant-Colonel J. R. Pughe, Inspector-General of Police, Lower Provinces, to all Deputy Inspectors-General and District Superintendents of Police.

In modification of the orders contained in Government letter No. 1338 of 1st March 1864, published with this Office Memorandum No. 834, dated 21st idem, the Lieutenant-Governor is pleased to direct as follows: "Where Moonsiffs' Courts exist, a day in each month will be fixed by the Judge on which the money will be paid over to the police for transmission to the treasury."

2. The Moonsiff will give notice at the police-station on the day before the guard is required, and the police-officer in charge will himself, on the day appointed, proceed to the Moonsiff's Cutcherry with a guard, as directed in Circular No. 28 of 1867.

3. He will receive charge of the money, and at once make it over to the guard with a memorandum of the amount. The officer in charge will forthwith proceed with it to the treasury or sub-divisional treasury.

4. Should any necessity arise for a second remittance during the month, the same course will be pursued on due notice being given at the police-station.

Enjoins rules for the production as witnesses in civil and criminal cases of persons confined in civil and criminal jails.

CIRCULAR ORDER No. 10.

From the Registrar of the High Court of Judicature at Fort William in Bengal, to all Zillah Judges, Judicial Commissioners, District Magistrates, and Deputy Commissioners, dated Calcutta, the 7th September 1868.

(Civil and Criminal.)

Present:

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble G. Loch, H. V. Bayley, L. S. Jackson, and A. G. Macpherson, *Judges*.

THERE being no rules under which prisoners confined in civil or criminal jails can be produced as witnesses in civil or criminal cases, and it being very desirable in the interests of justice that reasonable facilities should exist for obtaining the evidence of such persons, when material to cases under trial, and calculated to promote the administration of justice, the following rules on the subject are laid down by the Court with the concurrence and at the suggestion of His Honor the Lieutenant-Governor of Bengal:—

1st.—The District Judge, either on the motion of any person interested, or on the application of any inferior Court, Civil or Criminal, may direct the attendance of any prisoner confined within the local limits of his district to give evidence in any case, Civil or Criminal.

2nd.—The grounds of such motion or application shall be that the prisoner sought to be produced as a witness is a necessary witness, without whose evidence the party seeking to examine him cannot safely go to trial. The Judge, before complying with the application, may require to be satisfied in such manner as he may deem proper as to the existence of such grounds.

3rd.—It shall not be competent to the District Judge, but it shall be competent to the High Court, on the application of the District Judge, to direct the attendance, for such purpose as aforesaid, of any prisoner confined beyond the local limits of the jurisdiction of the Judge so applying.

4th.—Prisoners in jail at a greater distance than 100 miles from the place where their evidence is required in civil cases, whether within or without the local limits of the district, may be examined under a commission issued in accordance with the provisions of Section 175, Act VIII. of 1859. Commissions under this rule may be directed to the "officer in charge of the jail" in which the prisoner to be examined is confined.

5th.—The cost of bringing up a prisoner as a witness, or of examining a prisoner under a commission, shall be paid by such party as the District Judge or the High Court respectively may direct, unless, for reasons to be recorded, the Judge shall otherwise direct, a deposit to meet such cost shall be made before issue of the Judge's order.

6th.—It shall be competent to the District Judge to direct summonses to defendants in civil cases, who are prisoners in any jail or lock-up within his district, to be served on such defendants within the precincts of such jail or lock-up, in such manner as the Lieutenant-Governor may, by his order, from time to time direct.

Communicates the lists of books sanctioned for the Libraries of the Lower Courts.

CIRCULAR No. 11.

From the Deputy Registrar in charge of the Office of Registrar of the High Court of Judicature at Fort William in Bengal, to Judges and Judicial Commissioners, Lower and Extra-Regulation Provinces, dated the 26th October 1868.

(Civil Side.)

Present:

The Hon'ble G. Loch, *Judge.*

THE Judges and Judicial Commissioners subordinate to the High Court are informed that the Lieutenant-Governor, on the 1st of April last, sanctioned the supply of the books named in the first list (A) on the margin, for the office Libraries of Judges and Subordinate Judges; and, on the 14th ultimo, the supply of the Books specified in the second list (B), for the Libraries of Moonsiffs.

(A) 1. All the Regulations and Acts in force.
2. Macnaghten's Hindoo and Mahomedan Law.
3. Dyabhaga (or Mitakshara, where that law applies).
4. Dattaka Chandrika and Mimansa.
5. The Weekly Reporter, from the commencement to the end of 1865.
6. Norton on Evidence.
7. Broughton's Act VIII. of 1859, New Edition.
8. Thomson on Limitation of Suits.

(B) 1. Regulations and Acts in force.
2. Macnaghten's Hindoo and Mahomedan Law.
3. Dyabhaga (or Mitakshara).
4. The Full Bench Rulings of the High Court about to be brought out by the Council for Law Reporting in Bengal.
5. Norton on Evidence.

2. Such of the Moonsiffs as understand English will be supplied with the books sanctioned for them in that language.

3. The above information, as far as it relates to Subordinate Judges and Moonsiffs, should be communicated to those officers.

Blank Statements not to be sent up with the Quarterly Statements.

CIRCULAR No. 12.

From the Registrar of the High Court of Judicature at Fort William in Bengal, to the Civil Authorities in the Lower and Extra-Regulation Provinces, dated the 27th November 1868.

(Civil Side.)

Present:

The Hon'ble G. Loch, H. V. Bayley, and L. S. Jackson, *Judges.*

THE Court direct that in future blank Statements be not sent up with Civil Quarterly Statements, as they only cumber the office. Whenever, therefore, any Statement is blank, a note to that effect will be entered at the foot of Statement No. 1, and the blank Statements will not be sent up.

Circular resolution of the Government of India regarding the execution in Foreign States of decrees of civil tribunals of British India.

CIVIL CIRCULAR.

Memo. No. 240.

Extract from the Proceedings of the Government of India in the Foreign Department (Judicial), under date, Simla, the 27th August 1868.

READ again the following papers regarding the execution of the decrees of British Courts in foreign States:—

Resolution No. 23, dated 31st January 1867.

Circulars Nos. 74 and 75, dated 10th April 1867.

Read also the following replies to the above-mentioned Circulars:—

From Resident, Nipal, No. 2, dated 24th April 1867.

„ Political Agent, Munipore, No. 33, dated 27th April 1867.

„ Officiating Commissioner, Mysore, No. 606—15, dated 30th April 1867.

„ Chief Commissioner, British Burmah, No. 100P, dated 6th May 1867.

„ Resident, Hyderabad, No. 21, dated 10th May 1867.

„ Officiating Secretary to Chief Commissioner, Oudh, No. 1960, dated 29th May 1867.

„ Under-Secretary, Government of Bengal, No. 4554, dated 24th July 1867.

„ Secretary to Government of Punjab, No. 275—1121, dated 25th July 1867.

„ Agent, Governor-General, Rajpootana, No. 929-12 I, dated 5th August 1867.

From Acting Chief Secretary, Fort St. George, No. 1276, dated 7th August 1867.

„ Agent, Governor-General, Central India, No. 10—231, dated 24th August 1867.

„ Secretary to Government, North-Western Provinces, No. 292 A, dated 29th August 1867.

„ Agent, Governor-General, Central India, No. 12—252, dated 9th September 1867.

„ Secretary to Government, Bombay, No. 118, dated 29th May 1868.

RESOLUTION.—His Excellency the Viceroy and Governor-General in Council observes that the object aimed at by the Resolution of the 31st of January 1867, which was forwarded to all Governments, Administrations, Departments, and Agencies, was to give facilities for the execution of the decrees of civil tribunals obtained by British subjects in our own territory, by enlisting the influence of the several political authorities with the Princes and the Chiefs of Native States to which the debtor had absconded, or in which he was possessed of property.

2. It then appeared that several Political Officers objected to the Resolution in question, and the subject again came under the consideration of the Government on the 10th of April 1867.

3. On that occasion, the Governor-General in Council explained the broad principle under which the decrees of Courts of one nation or country are recognized by the Courts of another country, and the Government declared its opinion that there was no reason why this just and equitable principle should not be recognized in India. The Governor-General in Council next proceeded to modify and explain the Resolution of the 31st of January preceding, by proposing more specific rules for the guidance of the Political Authorities, and by inviting their

opinions on this important question. The rules, it may be stated, comprised the following provisions:—

I.—Where there were regular Courts in Native States, the holder of a decree obtained from a British tribunal was himself to apply to such Native Courts for the execution of his decree.

II.—Where there were no regular Courts, the decree-holder was to bring the decree to the notice of the Native ruler through the Political Representative of the British Government, who was to recommend to the Native Chief or Prince that effect should be given to the decree in whatever way the system of administering justice in such State would permit.

III.—The practice of reciprocity in execution of decrees between our own and Native tribunals was, if possible, to be adopted.

4. The replies to the Circulars above mentioned, of the 10th of April, inviting opinions and suggestions, have been received and have been fully considered by the Government of India in Council.

5. The opinions of the experienced officers consulted on this question differ considerably both as to the propriety of issuing the proposed instructions and as to the possibility of attaining the end which the Government had in contemplation.

6. The Governor-General in Council sees no reason whatever to question the soundness and equity of the principle laid down in the Circulars of the 10th April 1867; nor does he cease to hope that, in process of time, regular tribunals may gradually be established in all important Native States, which shall eventually secure the confidence of suitors, which shall be reliable instruments for the execution of the decrees of British tribunals, and which, in their turn, shall deliver decrees such as would, in ordinary cases, be respected by our own Judges.

7. But looking to the weighty objections urged by several able and experienced officers to the adoption of the second provision of the Circulars in question, to the inexpediency of subjecting Native Princes and Chiefs to the constant official pressure of the British Representatives, to the irritation and complications to which such a course might possibly give rise, and to the probability that, in the end, the legitimate influence of high Civil or Military Officers may be weakened or diverted from its proper scope, the Government of India is not prepared to insist on carrying out the instructions which it had previously contemplated in the interest of honest and successful suitors. In future, then, all Administrations and Political Representatives of the British Government will be guided solely by the following instructions.

8. The rule contemplated for cases and States where regular tribunals exist will still be maintained. Holders of decrees obtained in British tribunals must present them themselves, or by their lawfully-constituted agents, for execution before such tribunals, without in any way invoking the aid or relying on the influence of the British Representative. The question of reciprocity in the execution of decrees is one which the tribunals of the respective Governments must decide.

9. Where there are no regular tribunals, the Political Representative will, as a general rule, abstain from putting any pressure on, or using his influence with, the Chief or the Durbar, in order to the execution of a decree obtained in British territory.

10. Nor ought this determination to inflict any real hardship on claimants who successfully have resorted to our Courts for redress.

11. In many cases where large sums of money are claimed from debtors resident in British territory, such persons, if they abscond into Native States, leave either pro-

perty or partners behind them in the said British territory, against whom execution may at once be taken out; and in all cases, where plaintiffs apprehend that a defaulting debtor may abscond or may convey away his property, the provisions of Act VIII. of 1859, regarding the attachment of property while a suit is pending, afford to all litigants, who are properly alive to their rights and position during litigation, a fair and adequate security against eventual loss by evasion or default.

12. There may occur, however, the Governor-General in Council observes, some flagrant cases in which a defaulting and absconding debtor possesses large means within the limits of Native territories, in which the default and evasion may be marked by acts of gross fraud and flagrant dishonesty, and in which, by deceit or artifice, he may have reduced the honest creditor to ruin, or have left him without the slightest prospect of redress; and there may be other peculiar circumstances which, in the judgment of the Political Officer, might render interposition on his part expedient.

13. In such cases, the Representative of the British power may, when applied to, most properly use his discretion in pointing out to the Chief and the Durbar the special circumstances which render intervention desirable, and may urge them to compel the defaulter to discharge his liabilities. In cases of remarkable difficulty or doubt, the Political Authority may, if he thinks fit, refer the matter to Government for orders before taking any action.

14. But it must be clearly understood that these cases will form the exception and not the rule, and that the Political Authority will only adopt this course when he is fully satisfied that the case is distinguished by exceptional circumstances, and that the claimant has been the victim of fraud and trickery, and has, practically, no other means of obtaining his rights.

15. In such marked cases, the Governor-General in Council does not doubt that the moral influence and advice of the British Official may be properly exerted, and that the Durbar will recognize the propriety of insisting that the evading debtor shall come to some satisfactory arrangement with his creditors.

16. The Resolution of the 31st of January is hereby cancelled, and all officers will henceforth be guided by the principles as above laid down.

ORDER.

ORDERED that a copy of the above Resolution be forwarded to all Departments, Governments, Administrations, and Agencies.*

(True extract.)

(Signed) W. S. SETON-KARR,
Secretary to the Govt. of India.

* Secretaries, Home, Military, Financial, and Public Works Departments.
Secretary, Government of Bombay.
" " of Madras.
" " of North-Western Provinces.
" " of Bengal.
" " of Punjab.
Chief Commissioner of Oudh.
" " of Central Provinces.
" " of British Burma.
Commissioner of Mysore.
" of Coorg.
Agent, Governor-General in Rajpootana.
" " in Central India.
" " in North-East Frontier.

Resident, Hyderabad.
" Nipal.
Political Agent, Munipore.
" " Turkish Arabia.

CIRCULAR MEMO. No. 4.

FORWARDED for the guidance of all Civil Judges as well as for the information of such persons as may have decrees of their Court to be enforced in foreign territories.

HIGH COURT: *The 8th Dec. 1868.* } By order, &c., (Sd.) F. B. PEACOCK, *Registrar.*

CRIMINAL CIRCULAR ORDERS.

Promulgates rules regarding the conduct of trials and preliminary inquiries before Magistrates.

CRIMINAL CIRCULAR No. 5 A.

From the Registrar of the High Court of Judicature at Fort William in Bengal, to Magistrates, dated Calcutta, the 7th September 1868.

(Criminal Side.)

Present:

The Hon'ble G. Loch, H. V. Bayley, L. S. Jackson, and A. G. Macpherson, *Judges.*

THE Court, having had under consideration the result of trials and preliminary inquiries before the Magistrates in 1867, as shown in the annexed Table, promulgate the following general rules upon the subject:—

Every Magistrate, who is authorized to receive complaints, is enjoined to comply strictly with the provisions of Sections 66 and 67 of the Code of Criminal Procedure.

The examination of the complainant is not to be a *mere form*, but an intelligent inquiry into the subject-matter of the complaint, carried far enough to enable the Magistrate to exercise his *judgment* as to whether there is or is not sufficient ground for proceeding.

Where it appears to the Magistrate that there is sufficient ground for proceeding, he is to issue his summons, or, in certain cases, his warrant, for the appearance of the accused before the Magistrate himself or before some other Magistrate having jurisdiction in the case. Where, in the judgment of the Magistrate, there is no sufficient ground for proceeding, he is to dismiss the complaint.

The examination of the complainant is to be upon oath or solemn affirmation, and is to be taken by the Magistrate himself.

The order upon such examination for the issue of warrant or summons, or for dismissing the complaint, shall be in the handwriting of the Magistrate himself.

The provisions of Section 180 should be resorted to in cases of doubt, in respect of the offences to which this Section applies. When a Magistrate directs a previous enquiry to be made into the truth of a complaint, under the provisions of Section 180, he should fix a day for the further appearance of the complainant, and for taking into consideration the report of the officer directed to make such enquiry, with a view to the issue of process, or otherwise, as the Magistrate may find proper.

Complaints should be received at a fixed hour each day, and should be immediately numbered in the order of their receipt. They should then be entered in a book to be kept in the form annexed. This book should be kept under the special control of the Magistrate himself.

It will be the duty of the Magistrate of the District to take care that these rules are exactly observed by all Magistrates within the district who receive complaints, and he should impress it upon his subordinates that the object in view is not to secure a certain proportion between acquittals and convictions. *That* is merely a result which may suggest a necessity for inquiry. The real object of the rules is to ensure that *no person shall be compelled to appear before a Magistrate to answer to a criminal charge, unless a Magistrate has first satisfied himself that there is reason for proceeding against such person.*

The very knowledge that the complainant will be at once brought face to face with the Magistrate, and that his examination will be a reality, may be fairly expected to have the effect of keeping out of Court many false and some exaggerated complaints, and the examination itself will show the slight foundation on which many charges rest.

In cases where the Magistrate may have a suspicion that the charge is false or vexatious, but the suspicion is not sufficiently strong to justify him in withholding process, he may fairly warn the complainant of the risk which he runs of being prosecuted for a false complaint or of being ordered to pay something to the accused by way of amends. But he will, of course, be careful not to do so in such a manner as to deter honest complainants.

It will be the duty of the Sessions Judge, whenever he has reason to believe that proper care as to the issuing of process has not been exercised by his subordinates, to inquire how far the rules above laid down have been observed and carried out.

TABLE.

1	Total Result.				Result as to Cases tried or committed by the Magistrate.		Result as to arrests by the Police.		Result as to committals.	
	2	3	4	5	6	7	8	9	10	11
DISTRICTS.	Total number of accused disposed of.	Per cent. of those convicted or committed.	Per cent. acquitted or discharged.	Per cent. discharged under Sections 225 and 250, C. C. P.	Per cent. convicted or committed.	Per cent. released.	Per cent. convicted or committed.	Per cent. released.	Per cent. convicted.	Per cent. acquitted.
Mymensingh	4,377	52	48	20·8	51	49	62	38	68·4	31·6
East Burdwan	6,200	41	59	15·8	34	66	60·4	39·6	62	38
Sarun	3,120	57	43	26	65·6	34·4	49·4	50·6	73·3	26·7
Nuddea	4,396	53	47	29·4	55·2	44·8	61	39	74·6	25·4
Jessore	5,782	47	53	23·6	40	60	65·6	34·4	69	31
Backergunge	6,203	40	60	20	37	63	65·3	34·7	49·25	50·75
Midnapore	3,305	67	33	12·6	66	34	71	29	59	41
Rajshahye	2,730	62	38	13·1	57	43	70	30	70	30
Pubna	1,905	47	53	21·1	72	28	21	79	55	45
Dacca	4,047	58	42	28	61	39	52	48	50	50
Furreedpore	1,574	63	37	6·1	66	34	56	43	77	23
Chittagong	2,907	51	49	33·6	45	55	70	30	60	40
West Burdwan	4,151	22	78	11·8	82	18	66	34	92	8
Beerbhoom	2,410	65	35	22·9	69	31	54	46	82	18
Hooghly	4,806	59	41	14	54	46	68	32	50	50
Howrah	4,566	67	33	13·7	36	64	86	14	76	24
Shahabad	2,343	46	54	13·4	41	59	55	45	64	36
Rungpore	1,886	48	52	26·1	54	46	33	67	74	26
Bogra	2,353	39	61	34·7	28	72	63	37	77	23
Sylhet	4,533	79	21	15·4	87	13	49	51	56	54
Bhaugulpore	1,792	71	29	13·4	67	33	77	23	56	44
Monghyr	3,114	61	39	6·8	54	46	67	33	69	31
Moorshedabad	3,209	47	53	24·8	42	58	52	48	58	42
Tipperah	3,051	65	35	16·7	65	35	63	37	81	19
Noakhally	2,515	53	47	24	52	48	59	41	60	40
Patna	4,766	57	43	10·2	56	44	60	40	58	42
Purneah	2,512	48	52	18·5	46	54	51	49	59	41
Cuttack	3,345	50	50	29·1	39	61	63	37	37	63
Balasore	2,196	54	46	24·8	29	71	71	29	61	39
Pooree	2,549	52	48	27	79	21	26	74	28	72
24-Pergunnahs	11,751	59	41	18·6	40	60	75	25	47	53
Dinagepore	1,221	57	43	34·4	38	62	71	29	65	35
Maldah	689	62	38	23·9	68	32	47	53	44	56
Gya	2,344	68	32	21·2	71	29	63	37	67	33
Tirhoot	2,695	58	42	16·5	53	47	69	31	74	26
Chumparun	1,547	55	45	22·9	65	35	45	55	30	70
TOTAL ...	1,22,890	1,980	1,620	734·9	1964·8	1635·2	2136·7	1462·3	2231·38	1375·92
Average for 35 districts...	3413·6	55	45	20·4	54·5	45·5	59·4	40·6	61·98	38·22

REGISTER OF CRIMINAL COMPLAINTS.

Serial No. for Month.	Date.	Name of Complainant.	Thannah.	Offence charged, with Section of P. C.	Orders passed.	Remarks.
1	1st March ...	Alee Bux ...	... ...	Theft, 380, P. C.	Enquiry under 180, C. C. P., directed ...	
2	" " ...	Noor Jehan ...	... ...	Assault, 352 ...	Summons granted ...	
3	" " ...	Mahomed Alee ...	... ...	Cheating, 415...	Warrant granted ...	
4	" " ...	Phoolbee Beebee.	... ...	Rape, 376 ...	Warrant granted ...	
5	" " ...	Mr. Smith ...	... ...	Criminal Breach of Trust, 406.	Warrant granted ...	
6	2nd " ...	Tafuzzul Hosen ...	... ...	Plunder of Crops	Enquiry directed ...	
7	" " ...					
8						
9						

Directs discontinuance of Sessions statement of acquittals, and the omission of referred cases from statement of convictions.

CRIMINAL CIRCULAR ORDER No. 6.

From the Registrar of the High Court of Judicature at Fort William in Bengal, to Sessions Judges and Judicial Commissioners, dated Calcutta, the 9th September 1868.

(Criminal Side.)

Present:

The Hon'ble G. Loch, H. V. Bayley, L. S. Jackson, and A. G. Macpherson, *Judges.*

THE High Court are pleased to direct that the submission of Sessions Statement* No. 5 be discontinued, and that no cases be included in Sessions Statement † No. 4, which have been referred to the High Court under Chapter XXVIII., Code of Criminal Procedure.

* Abstract Statement of persons acquitted before the Court of Session.

† Abstract Statement of prisoners punished, without reference to the High Court, by the Court of Session.

Directs that the residence of persons convicted be entered in warrants issued to officers in charge of Jails.

CRIMINAL CIRCULAR ORDER No. 7.

From the Registrar of the High Court of Judicature at Fort William in Bengal, to all Criminal Authorities, dated Calcutta, the 10th September 1868.

(Criminal Side.)

Present:

The Hon'ble G. Loch, H. V. Bayley, L. S. Jackson, and A. G. Macpherson, *Judges.*

DIFFICULTY and doubt having arisen in the preparation of the "*Roll of Released Prisoners*" (kept by the Police Department) in consequence of the non-insertion in warrants of imprisonment of the place of residence of persons convicted and sentenced, the High Court are pleased to direct that in future Judicial Officers shall enter in the warrants issued to officers in charge of jails the *residence* of the persons whom they convict and sentence.

States how a charge is to be entered in the statement of convictions when a person is convicted of only one charge out of several.

CIRCULAR No. 8.

From the Registrar of the High Court of Judicature at Fort William in Bengal, to the Sessions Judges in the Regulation and Extra-Regulation Provinces, dated the 27th November 1868.

(Criminal Side.)

Present:

The Hon'ble G. Loch, H. V. Bayley, and L. S. Jackson, *Judges.*

THE Court request that, when persons are charged with several offences, and convicted of one only, the head of charge on which they have been convicted may be indicated in Column 5 of the Sessions Statement No. 3 by red underlining, thus—Culpable homicide.

Circulates Full Bench ruling that a conviction of a prisoner pleading guilty before a Sessions Court is valid, although there are no assessors.

CIRCULAR MEMO. No. 1.

From the Registrar of the High Court of Judicature at Fort William in Bengal, to Sessions Judges, dated the 27th November 1868.

(Criminal Side.)

Present:

The Hon'ble G. Loch, H. V. Bayley, and L. S. Jackson, *Judges.*

A FULL BENCH of the Court have ruled that the conviction of a prisoner, pleading guilty before a Court of Session, under Section 362 of the Code of Criminal Procedure, is valid, although there are no assessors.

CIRCULAR MEMO. No. 1.

The above ruling is circulated for the information and guidance of the Sessions Judges in the Lower and Extra-Regulation Provinces.

By Order,
(Signed) F. B. PEACOCK,
Registrar.

Appeals heard by Magistrates from orders of District Superintendents of Police, and cases of Ministerial Officers punished, not to be entered in the Magistrate's Statements.

CIRCULAR No. 9.

From the Registrar of the High Court of Judicature at Fort William in Bengal, to all Criminal Authorities, Regulation and Extra-Regulation Provinces, dated Calcutta, the 15th December 1868.

(Criminal Side.)

Present:

The Hon'ble Sir Barnes Peacock, *Kt.*, *Chief Justice*, and the Hon'ble G. Loch, H. V. Bayley, L. S. Jackson, and A. G. Macpherson, *Judges*.

THE Court, having reason to believe that it is the practice for Magistrates to hear appeals from the orders of District Superintendents of Police, direct that if such appeals are heard by a Magistrate as head of the police (and he has no jurisdiction to hear them as Magistrate), they should not be shown in the Magistrate's Returns.

2. The Court also direct that the cases of Ministerial Officers punished by fine for neglect of duty be not entered in the Magistrate's Statements.

States how cases should be entered in the 1st Column of Sessions Statements III. and IV.

CIRCULAR MEMO. No. 2.

From the Registrar of the High Court of Judicature at Fort William in Bengal, to the Sessions Judges in the Regulation and Extra-Regulation Provinces, dated Calcutta, the 19th December 1868.

(Criminal Side.)

Present:

The Hon'ble L. S. Jackson, *Judge*.

THE Court direct that the numbers given in column 1st of Sessions Statement III. may be those which the cases bear in Statement IV. respectively, *viz.*, in the order of trial in the Court of Session.

The Magistrates' No. may be conveniently given below this in the 1st column of Statement IV.

Directs Sessions Judges not to indent for fly-leaves to Statement No. 4.

CIRCULAR MEMO. No. 3.

From the Registrar of the High Court of Judicature at Fort William in Bengal, to the Sessions Judges in the Regulation and Non-Regulation Provinces, dated Calcutta, the 21st December 1868.

(Criminal Side.)

Present:

The Hon'ble L. S. Jackson, *Judge*.

THE Court is pleased to direct that Sessions Judges will indent for no more fly-leaves or docketed covers to Sessions Statement No. 4 after their present supply is expended, as they will be attached to the Statements on receipt in this Office.

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

The 7th November 1866.

Present:

Lord Westbury, Sir James Colvile, Sir Edward Vaughan Williams, and Sir Lawrence Peel.

Practice—Judgment—Disclaimer—Breach of faith with Court.

On Appeal from the High Court at Madras.

Sreemuthoo Raghoonadha Perya Oodya Taver

versus

Kattama Nauchear.

A suit was brought by *A* to recover property in which, on appeal to the Privy Council, two questions arose, *viz.*, whether the property was to pass as divided or undivided property, and whether such property was conveyed away to *A's* father by a deed of testamentary disposition? The Lower Court had decided only the latter point, and the Privy Council remanded the case for determination of the former point. On a second appeal to the Privy Council, that Committee were about to enter upon the question as to the validity of the testamentary paper, when *A* gave up the point that the paper was in any sense testamentary in its character, and disclaimed having any title under it as a testamentary devise, and the Privy Council, therefore, did not decide that question.

HELD that a subsequent suit by *A*, in which he sought to recover the property by setting up the paper as a valid will and testament, was a suit instituted without *bona fides*, and could not be allowed to proceed, because, *first*, the nature of the paper was in issue in the former suit, and what was in issue must be taken to have been decided by the judgment; and, *secondly*, because *A* having used the document, and abandoned all right to it as a will, he could not again use it for a different purpose.

THE facts of this case have been lucidly presented to us, and the case has been argued very ably by the learned Counsel for the appellant; but their Lordships feel no difficulty upon the point. All that has been urged is involved in, and decided by, the judgment of the Privy Council in the year 1863, and what passed before this tribunal on that occasion.

To render our decision intelligible, it is necessary to make a short recapitulation of the leading facts of the case.

On the death of the zemindar, the original proprietor, questions arose whether he was undivided in estate with his brother, and whether this property was to pass as undivided or divided estate. A document was produced in which the zemindar made a testamentary gift of the estate to the appellant's father, in the event of the child of one of his widows, who was *enceinte*, not proving to be a son. A great deal of litigation ensued; but in the suits that were brought before the Privy Council in 1844, the exact issue whether the family was undivided or divided had not been so raised as to become necessarily the subject of judicial determination. The issue, however, of the alleged testamentary paper had to be raised, and the decision of the Sudder Court was against it.

When the case came before the Privy Council in 1844, having regard to the law touching undivided property, their Lordships were of opinion that there must be a judicial determination upon the point whether the family was divided or undivided before the question of the validity of any devise could arise. No opinion, therefore, was expressed upon the issue raised as to the validity of the testamentary paper, which remained until it had been ascertained that the property in question was capable of being devised. The Privy Council accordingly remitted the case, pointing the parties' attention to the necessity of having it determined whether there was division or no division. It is plain that, when the issue was raised, whether there was division or no division, the importance of determining whether the paper in question was a valid testamentary gift or not would immediately be felt; because, if it should turn out that it was a divided property, then the party in possession, claiming by virtue of his being a nephew of the deceased proprietor, would immediately have been enabled to set up the will as constituting his title. But it has been contended before us to-day that what was said by the Privy Council must be considered as amounting to a positive direction that there should not, in the subsequent litigation contemplated, be any question what-

ever raised except the question of division or no division. It is plain to us that the language used by the Privy Council on that occasion does not admit of any such construction. The same point was raised and insisted upon before the Judicial Committee in 1863; for it was then contended, on behalf of the present appellant, or those who preceded him in title, that the suits which had been instituted and were brought by way of appeal were suits that transgressed the limits imposed by the order of the Privy Council in 1844 (being, in effect, the same argument that we have heard to-day); but that contention was overruled, and it was held that the order of the Privy Council in 1844 did not at all interfere with or preclude the parties from bringing forward the claim, and instituting the suits which they had instituted subsequently to 1844, the decrees in which were the subject of the appeal to the Privy Council in 1863.

We take as an example of these suits the form of the suit No. 10 of 1856. One of the present respondents filed her plaint in that suit for the recovery of the zemindary, and the question of the forgery or genuineness of this alleged testamentary paper was distinctly raised in that plaint. By the answer to it, the present appellant, answering by his guardian, did not set up the alleged testamentary paper, but he rested his defence on the ground that as to this property the brothers were undivided. Ultimately, all the suits came before the Judicial Committee of the Privy Council in 1863; and the Judicial Committee were of opinion that that question of division or no division was after all immaterial, because they found it clear that the zemindary in question was self-acquired property; that is, that the deceased proprietor had been the first purchaser of it; and they accordingly held that, even if the brothers were undivided, yet that the estate, being self-acquired, was not governed by the law applicable to undivided property, but descended to the heirs general, and was capable, therefore, of being devised. Immediately, it became most material in the mind of the Judicial Committee of 1863 to determine the question with regard to the testamentary paper; but they were wholly relieved from the necessity of doing so, because the present appellant, then appearing by most able Counsel as respondent at the Bar, deliberately told their Lordships, that, although the paper in question had been familiarly called a will, the name had been introduced only as a short denomination of the instrument, which, in reality, was not testamentary, and neither had, nor was ever intended to have, the effect of devising the property; and that the respondent did not claim any title under it as a testamentary devise, but used it only as conclusive evidence of what the opinion of the last proprietor was, *viz.*, that this zemindary was, in reality, undivided property. It is quite plain why the learned Counsel for the then respondent adopted that course. In their minds it was thought safest to rest their case upon the question of division or non-division. They appear to have reasoned thus: "If we set up this as a will, then it is a conclusive declaration by the alleged testator that the property was devisable; and if devisable, that it was not undivided. We will, therefore, abstain from treating that instrument as an instrument of title. We will abstain from insisting upon it as a devise, and we deliberately tell the Judicial Committee that it is not to be regarded as being in any sense testamentary." The result, therefore, was that the Judicial Committee, carefully acting, as it did throughout, in the hope and with the express object of preventing further litigation, recorded in its judgment the fact that the respondents' Counsel, the present appellants' Counsel, had deliberately elected to disclaim any title under that instrument as a will, and that, therefore, its validity or invalidity became no longer material for decision.

That being the state of the case, we are now called upon to approve of a suit, subsequently instituted by the very person who had deliberately given this character to the instrument—a suit founded upon an allegation wholly contradicting what he had stated to this Court of Justice, and insisting upon this paper as being a valid will and testament. It is impossible that any such suit should be allowed to proceed. In the first place, it is clear, upon the former record, that the appellant had then the power of relying upon that document as being a valid will. He in effect stated, or might have stated, his defence in the suits of 1856 in the alternative. He might, *first*, have insisted that it was an undivided property, and that, therefore, the plaintiff in those suits had no interest therein; and, *secondly*, he might have pleaded—"But if it shall turn out to be "a divided property, then my title arises "under this instrument, and I plead and rely "upon it as amounting to a valid devise in my "favor." When a plaintiff claims an estate, and the defendant being in possession resists

that claim, he is bound to resist it upon all the grounds that it is possible for him, according to his knowledge, then to bring forward. The present appellant might have insisted on the validity of the alleged will; but, instead of doing so, when his suit came on to be heard and decided in the Court of final appeal, he, in effect, disclaimed all title under the instrument as a will, and insisted that it must be regarded by the Court as not being testamentary. There would be an end to all security in the administration of justice if the course now taken by the appellant of setting up the will were allowed.

On every ground, therefore—*first*, on the general ground that the thing was in issue, and that what was in issue must be taken to have been decided by the judgment; *secondly*, upon the personal ground that the appellant, having used this document, and abandoned all right to it as a will, cannot now use it for a different purpose—we are of opinion that there is no doubt as to the correctness of the determination of the Court below. We regard this suit, in which the present appeal is brought, as a suit instituted without *bona fides*, and directly contrary to what the appellant must be considered to be bound by; and we have no hesitation, therefore, in advising Her Majesty to affirm the decree, and to direct that this appeal be dismissed with costs.

Sir Roundell Palmer.—If it would not be taking too great a liberty, it may be a satisfaction to your Lordships to know that what Sir Hugh Cairns did at the Bar was a mere repetition of what had been done in the printed answer to the appeal by the respondent in India, and your Lordships will find it at page 218, paragraph 39, of the Record of 1863. If I may be permitted to read it, it runs thus: "In opposition to paragraph 64 of appeal-petition, respondent "submits that the correspondence which passed at the time shows that the Government "authorities did acknowledge the *primâ-facie* "right of the respondent's grandfather, and "that the Civil Court was correct in terming "the will a mere declaration of right. It is "only necessary to refer to Regulation V. of "1829 to perceive that it could not possibly "be more, and that, in quoting it, the Government officers could only have viewed it in "that light, and not as a bequest."

Lord Westbury.—I am very glad that you have stated that, because it removes from the case any possibility of its being supposed that Sir Hugh Cairns either mistook or exceeded his instructions.

Sir Roundell Palmer.—That was my motive for presuming to mention it.

The 1st February 1867.

Present:

The Hon'ble Sir James W. Colvile, Sir Edward Vaughan Williams, Lord Justice Cairns, Sir Richard T. Kindersley, and Sir Lawrence Peel.

Gift—Evidence—Hindoo widow—Stridhun—Mitakshara.

On Appeal from the late Sudder Court at Agra.

Mussamut Thakoor Dayhee

versus

Rai Balack Ram and others.

In establishing the validity of a deed of gift taken from a woman stricken with a mortal disease and in expectation of death, proof at least of equal strictness as is required to prove a testamentary disposition must be given, and the proof to support such a transaction ought to be sufficient to establish that she knew what she was about, and intended to make such disposition of her property.

According to the Mitakshara, a Hindoo widow may dispose of moveable property inherited from her husband, a power she does not possess under the law of Bengal, but by both laws she is restricted from alienating any immoveable property whether ancestral or acquired, so inherited. On her death, the immoveable and the undisposed of moveable property pass to the next heirs of her husband.

The devolution of *stridhun* from a childless widow is regulated under the Mitakshara by the nature of her marriage, and if the marriage was according to the four approved forms, the *stridhun* goes to the collateral heirs of her husband.

THE question on this appeal is the right of succession to certain property of which one Choteh Bebee, a Hindoo widow, died possessed. She was the widow of one Ramjee, who died in 1824 without issue; and he was the only son and heir of Benee Ram, one of the five sons of Rai Suhuj Ram. The respondents are all descended from the last-named ancestor through one or other of his four other sons, and are admitted to be the collateral male heirs of Ramjee living at the death of his widow's death. The appellant is the niece of Choteh Bebee, her brother's daughter. She is said to have

been from her infancy adopted by her aunt, and treated as a daughter. But the word "adopted" must here be taken in its popular, and not in its technical, sense. It is not now contended that the adoption was of that kind which, according to Hindoo Law, would create between Choteh Bebee and the appellant the relation of parent and child for all religious and legal purposes, or give to the latter any right of inheritance. The question in this case is, whether the property in dispute, on the death of Choteh Bebee, descended to the respondents as the collateral heirs of her husband then living, or passed, under a deed of gift alleged to have been executed by her shortly before her death, to the appellant. That property is partly moveable and partly immoveable. The latter is situated in the districts of Tirhoot, Behar, Shahabad, and Benares, and the deceased was domiciled at Benares. Therefore, the law by which the succession to the whole is governed is that of the Western Schools.

The issues recorded in the cause were, whether Mussamut Choteh Bebee was competent to bestow the property in gift or not; and, if she was, whether the deed of gift relied upon by the defendant (now the appellant) is valid or not. Between the date, however, at which the issues were recorded and that of the trial, a change took place in the constitution of the Court of the Principal Sudder Ameen of Benares, in which the cause was pending; and Mr. Smith, by whom it was tried, in his judgment, says: "The disposal of the case rests on two important issues—*1st*. Whether the property which was the subject of the gift to the defendant was joint ancestral or not? *2nd*. Whether the alleged deed of gift is or is not a *bonâ-fide* instrument?" The first of these questions, as will hereafter be shown, is by no means identical with the first-recorded issue. Mr. Smith, however, having decided it in favor of the appellant, appears to have considered that the necessary consequence from his finding was, that Choteh Bebee was legally competent to alienate the property; and he further found that she had duly executed the deed of gift. He, therefore, dismissed the respondents' suit with costs. There was an appeal to the Sudder Court of Agra, and that Court, confining its attention to the second of the recorded issue, and after taking further evidence as to the *factum* of the alleged deed of gift, came to the conclusion that the instrument was forged, and on that ground alone made a decree in favor of the respondents. The present appeal is against that decree.

Their Lordships, reverting to the recorded issues, will consider them in their inverse order. They will first consider whether the evidence in the cause can be taken to have established that the alleged deed of gift was duly executed by Choteh Bebee. The case set up by the appellant is the following. In 1858, Choteh Bebee undertook a pilgrimage to Juggernath. She was accompanied by the appellant, the appellant's brother Balkishen, Nathoo Ram, a priest and Bunsee, a menial servant. On her return homewards from the shrine, and a few days before she reached Midnapore, she was attacked with dysentery, and arrived at Midnapore very ill, and despairing of recovery. The instrument itself expresses that she had no hope of getting home alive. It was prepared by Hurry Doss, a pleader in the Judge's Court of Midnapore, and by his nephew and clerk Deenbundhoo Muttye. It was written in Bengalee, a language foreign to the person by whom it purported to be executed, a language which it is admitted she did not understand. It was executed at the door of the cutcherry of the Registrar of Deeds, to which place both Choteh Bebee and the appellant were taken in separate palanquins, and there registered. The appellant says: "After the registry was effected we returned home and left the station." Balkishen says that Choteh Bebee remained at Midnapore about two days after the deed was executed and registered. All the witnesses who speak to the fact seem to agree that she died about thirteen or fourteen days after the execution of the deed at a place called Gobind Chuttee, distant about seven days' march from Midnapore, and that her body was there burned.

We have now to consider the evidence given to prove this transaction more minutely; and first it may be well to see what evidence there really is that the person who put her hand to the instrument was Choteh Bebee.

The subscribing witnesses to it are Balkishen, Nathoo Ram, Bunsee, and four Bengalees, *viz.*, Tarachund Muduk, Modhoo, a Chowkeedar, Sree Chedum Surma or Sirdar, and Deenbundhoo, who was concerned in the preparation of the deed. The first three of the Bengalee witnesses may be at once disposed of. Neither their subscriptions nor the testimony of such as have

been examined can add anything to the credibility of the transaction. Tarachund almost admits that he was called out of the crowd about the door of the cutcherry to become a subscribing witness, without previous knowledge of the parties or of the transaction. He says that Chedum Surma, elsewhere called Chedum Sirdar, and Modhoo, the watchman, were unable to write, and he does not know who signed for them; whilst Balkishen says: "Those witnesses who could write signed for themselves, and those who could not, Deenbundhoo signed for them." Chedum Sirdar does not seem to have been examined, and Modhoo was probably a witness of the same class with Tarachund; for his statement that he, a village-watchman, had been admitted into the presence of Choteh Bebee, or had been requested by her to sign the deed, is utterly incredible. Besides the evidence of the subscribing witnesses, we have that of Hurry Doss and Shamachund Ghose, who took upon themselves to identify Choteh Bebee to the Registrar. But it is obvious that they could only speak to her identity from information derived from those who travelled in her company, or from the person spoken of as the Chowbey. He was the only resident in Midnapore, who, it is pretended, had ever seen or known Choteh Bebee before this transaction. He was a Pundah, a sort of priest, who had migrated to Midnapore from the upper provinces, and there dealt in sweetmeats. His name is not given, and he appears to have been known only as the Chowbey-Hulway, an appellation which expresses both his *status* as Brahmin and his occupation as confectioner. What was the extent of his previous acquaintance with Choteh Bebee does not appear. Balkishen says: "She knew a Chowbey of Muttra at Midnapore. On going to Juggernath, she saw the Chowbey, who kept a shop, but did not halt at Midnapore; she halted further on." But whatever was the extent of his acquaintance, the Chowbey neither attested the deed nor appeared before the Registrar to identify her, nor gave evidence in the cause. When the examination of the additional witnesses took place at the instance of the Sudder Court, he had disappeared from Midnapore, and could not be traced. There is, therefore, no evidence of the identity of the person who signed the deed with Choteh Bebee except that of the appellant, her brother, their dependant, the priest, and a servant. This might have been corroborated by satisfactory evidence of the handwriting; but from the evidence on that point and a comparison of the Nagree signature on the deed with the admitted signature of Choteh Bebee upon other documents, the Sudder Court has come to the conclusion that the former is a forgery. The testimony too of the Kobiraj or native doctor, if forthcoming, might have afforded some slight corroboration of the story. He could at least have proved that he was called in to attend a woman dangerously ill of dysentery, and have shown in what state of body or mind his patient was.

Again, there is no evidence, except that of the four persons above mentioned, of the time and place of Choteh Bebee's death. Their testimony on that point might have been corroborated by that of the police authorities of the station where she is said to have died. But that corroboration is wanting.

We will next consider the evidence touching the preparation and execution of the deed. It seems clear that Hurry Doss, the pleader, was called in on the night of the arrival of the party at Midnapore. He is the person called Sreedhur Moonshee by the Hindustani witnesses. There is a good deal of discrepancy in the evidence as to the manner of calling him in. He himself says that Balkishen and Nathoo Ram called on him, and said he had been recommended to them by the Chowbey, Shamchunder Doss, who seems to have been hanging about the house where the pilgrims put up, professes to have directed them to Hurry Doss. Bunsee says: "The Chowbey sent for Sreedhur Moonshee." Nathoo Ram's evidence is to the same effect; and Balkishen says "that he and the Chowbey went to Sreedhur Moonshee, who sent for the writer" (Deenbundhoo). These discrepancies, however, are not of much importance. It is clear that Hurry Doss went to the house where the woman alleged to be Choteh Bebee was on the night of her arrival; and, though the evidence is not altogether consistent on that point, that he took Deenbundhoo with him.

Hurry Doss being the professional person responsible for the preparation of the document, it is to his evidence that we naturally look for a true account of that part of the transaction. His statement is to this effect: "I found Choteh Bebee lying down. She said, 'Are you a vakeel?' I said, 'I am.' She said, 'All my property I wish to make over in gift to Thakoor Deyhee, my niece'—

who was then sitting by her. I asked 'What estate (talooqua), and what property, that a rough copy might be prepared.'' She said, 'To-night I am not at all well, but to-morrow morning I will have it all written out.' I then returned that night to my house. The next morning I sent Deenbundhoo to take a list, and ascertain what she wanted to have written. He went, and took down all particulars. I said the whole of the property was to be made over, and that she had no stamp-paper. I then drew out a deed of gift in the Bengalee language, and I sent Deenbundhoo with it to Choteh Bebee to be read to her, and ascertain whether it was what she wanted. Deenbundhoo returned, and said she had agreed to what I wrote. The next day I had it all clearly written out on stamp-paper, and brought it to the cutcherry. Choteh Bebee and Thakoor Deyhee also came in palkees to the Court, and I then read out to Choteh Bebee the contents of the *hibbenamah*, and she signed it with her own hand. Choteh Bebee was then taken in a palkee before the Registrar, the door of the palkee was opened, and the Nazir questioned her by the Principal Sudder Ameen's orders, and she admitted that she had executed the deed. I received back the *hibbenamah* after registry, and the next day took it to Thakoor Deyhee through Balkishen.''

From this statement it is to be inferred that, on the first evening, nothing was expressed but a general intention to make a gift of the whole property; that on the following morning the pleader obtained more particular instructions through Deenbundhoo; that he then, in his own house and with his own hand, drew up the draft-deed, and sent it by Deenbundhoo to be explained to the woman; that on the following day he had the engrossment made on stamp-paper in his own house, and took it thence to the Court-house where he met the two women in their palkees; that he read over the fair copy to the woman said to be Choteh Bebee outside the Court, who executed it there; that she was then taken in her palkee before the Registrar, and to him or his Nazir acknowledged her signature. One would have expected that this account would have been confirmed, at least by the clerk Deenbundhoo, in all its material particulars. This, however, is not the case. His statement is that, on the night when, according to Hurry Doss, Choteh Bebee was too ill to give full instructions, he remained behind, and took down from her dictation what he calls a list containing the names of her husband and her father: that the rough copy of the deed was drawn on the next day, and was clearly written out and taken to her by him. In another part of his evidence he says that Hurry Doss prepared the rough copy of the deed in his house; that Choteh Bebee explained to him what she wanted done, and that he (the witness), at Choteh Bebee's request, wrote the copy out clearly on paper. (This probably means the copy on stamp-paper.) He says that on the same day (being the day after the evening on which Hurry Doss was first called in), the two women came to the cutcherry, and that the deed was then and there executed and registered. He does not state how, or by whom, the Bengalee instrument was explained to her. The testimony of the Hindustani witnesses, on the whole, tends to confirm the statement of Deenbundhoo rather than that of Hurry Doss. Both Nathoo Ram and Balkishen say that both the draft and the fair copy of the deed were written and explained by Deenbundhoo at Choteh Bebee's house. They do not speak to the fair copy having been explained to her by Hurry Doss at the cutcherry when it was executed. They say that the deed was written and executed on the same day, *viz.*, that following the evening of Choteh Bebee's arrival at Midnapore. Bunsee, however, states that the fair copy on stamp-paper was written at the cutcherry, and that the deed was written after remaining three days at Midnapore.

Here, then, their Lordships have to deal with an instrument avowedly taken *ex capite lecti* from a woman stricken with a mortal disease and in expectation of death; that woman being one of a class which the law regards as in need of special protection. Whatever strictness is required in the proof of a testamentary disposition is, at least, equally required here. The document is written in a character and language which, if in the fullest possession of her faculties, she could neither read nor understand. The accounts given by the witnesses of its preparation and explanation are inconsistent and unsatisfactory. If it were even established that the person who put her hand to the paper were Choteh Bebee, the proof would still fall short of that which ought to be given to support such a transaction—proof that she really knew what she was about, and intended to make this disposition of her property.

Again, the circumstances of the execution are, in their Lordships' judgment, extremely suspicious. This sick and almost dying woman is said to have been carried down on the afternoon of an August day, and deposited at the door of the cutcherry. Whilst lying there, she has the instrument explained to her, for the first time, by the person chiefly responsible for its preparation, through the half-opened doors of her palanquin. She executes it, and some of the witnesses of her act are picked up then and there out of the crowd. One witness says that the deed itself was fairly copied at this time and place; several, and that is far more credible, that an additional copy for registration was then made. After all this ceremony is gone through; she is carried into Court, and questioned by the Nazir.

Now, she might certainly have executed the deed in the privacy of her own house. Nor, does she seem to have been bound, by the Acts and Regulations touching registration, to appear personally before the Registrar in order to have it registered. She might have sent it for that purpose by a duly authorized representative, with one or more of the witnesses who could speak to her execution of it.

Appearance in a public Court, even under the protection of a palanquin, is a thing repugnant to the feelings and habits of a Hindoo woman of Choteh Bebee's position, even when she is in perfect health. The same feeling might not operate on one who personated her, or on one who sought to profit by the fraud. And the extraordinary publicity resorted to on this occasion seems more likely to have been designed to give a color to a false transaction than to have been an incident in a regular one.

Considering, then, the whole evidence and the startling improbabilities of the case set up, their Lordships are of opinion that the appellant has failed to establish the validity of the deed of gift on which she relies. It is not necessary to say that on this evidence she and her witnesses must be taken to have been guilty of conspiracy, perjury, and forgery. It is sufficient to say that the proof falls very far short of what is required to support the affirmative of the issue, which she was bound to prove.

If the appellant were suing to recover possession of the property from the respondents by virtue of the deed of gift, the conclusion to which their Lordships have come would, of course, determine the cause. That, however, is not the nature of the suit; and the respondents, being the plaintiffs below, have to show a title to the relief which they claim. The object of their suit, as stated in the plaint, was to be confirmed in the possession of the various parcels of immoveable property which are therein specified; to recover certain moveable property which seems to have been under attachment; to have the deed of gift cancelled and set aside; and to avoid the title which the appellant was then understood to claim by virtue of adoption. The first things to be determined are the *status* of the family and the nature of the property.

The respondents alleged in their plaint that the family of the common ancestor Suhuj Ram, including Benee Ram and Ramjee, had continued to be undivided. But the evidence, and above all the indisputable fact, that Choteh Bebee was in possession of the greater part of the property in dispute as heiress of her husband for upwards of thirty years, seem to their Lordships to support the finding of the Principal Sudder Ameen—that Ramjee was not a member of an undivided family, of which the respondents, whatever be their *status inter se*, are or represent the other co-parceners; Benee Ram having separated from his co-heirs, and taken as his share of the ancestral estate the villages in Tirhoot, which form the first parcel of the immoveable property that is the subject of this suit. Their Lordships also accept as true the history which has been given by the learned Counsel for the appellant of the acquisition of the other parcels of immoveable property.

The state of the family and the nature of the property having been thus ascertained, the only question is, whether the respondents became entitled to the possession of it on the death of Choteh Bebee as the next heirs of her husband. The appellant's supposed title by adoption has been abandoned, and the validity of the deed of gift has already been disposed of. It is difficult, however, to deal with the remaining question without adverting to the arguments which have been addressed to their Lordships in support of Choteh Bebee's power to dispose of the property, since the right of the husband's collateral heirs depends in some degree on the nature of the widow's estate.

The learned Counsel for the appellant—whilst they admitted that, by the law as it prevails in Lower Bengal, the estate of in-

heritance which a Hindoo widow takes in the property of her husband, dying without male issue, is limited in its enjoyment; that she cannot alien such property, whether moveable or immoveable, except for certain defined purposes, and subject to certain restrictions; and that it passes on her death to those who are then the next heirs of her husband—have nevertheless contended that this is not the law of the Western Schools, and have attempted to show that at Benares and in the other Provinces governed by the Mitakshara the widow's estate in her husband's property is absolute; that she has full power to dispose of it; and that, if she fails to do so, it is, after her death, subject to a different course of succession from that which obtains in Bengal.

The opinion of the Pundit taken by the Sudder Court does not support this contention in its integrity. He admits the right of the widow to alien moveable property, whether ancestral or not, and the immoveable property acquired by her husband or herself with the proceeds of the former's share in the ancestral estate; but he denies her right to dispose of her husband's share in immoveable ancestral property, and states that, on her death, it devolves on her husband's next of kin. He does not show that, if she does not exercise her alleged power of disposition over property of the two other classes, that does not also pass on her death to her husband's heirs.

The learned Counsel for the appellant relied mainly on arguments drawn from the 1st and the 11th Sections of the 2nd Chapter of the Mitakshara, and on the supposed confirmation of them by Sir Thomas Strange. The first of these Sections deals with the right of the widow to inherit the estate of one who leaves no male issue. It states the various conflicting authorities on the subject—some favorable, others adverse to the widow's right; it weighs and contrasts them, and comes ultimately to the conclusion embodied in the 39th article, *viz.*: "Therefore, it is a settled rule that a wedded wife, being chaste, takes the whole estate of a man who, being separated from his co-heirs, and not subsequently re-united with them, dies without male issue." It need hardly be observed that the rule thus stated merely affirms the widow's right of succession, with a qualification unknown to the law of Bengal, *viz.*, that her husband was not, at the time of his death, a member of an undivided family. The text is wholly silent as to the disabilities of the woman, or the nature of the interest which she takes in her husband's estate. It may also be conceded that nothing on these points is to be found in the rest of that portion of the Mitakshara which has been translated by Mr. Colebrooke, and published under the title of "The Law of Inheritance from the Mitakshara." It is not, however, a necessary consequence from these circumstances that the Benares School recognizes in the widow an absolute power of disposition over the estate which she has inherited from her husband, or her absolute interest therein. We have not the whole Mitakshara. Mr. Colebrooke, in his preface, page 4, states that his work includes only an extract from that celebrated treatise, comprising so much of it as relates to inheritance. The widow's disabilities, which depend in a great measure upon the notions which the Hindoo legislators entertained of the infirmity and necessary dependence of the sex, may be dealt with in other parts of the work. It is certain that, upon other subjects, the Mitakshara cites with approbation Menu, Catayana, Narada, and others, upon whose *dicta* the limitation of the widow's enjoyment of her husband's estate, and of her power over it, chiefly depends; and that these authorities are received by the Western Schools as well as by that of Bengal. Accordingly Sir Thomas Strange (Vol. I., page 1246) states clearly that such limitations are, with some slight variations, common to all the Schools.

A more plausible argument in favor of the appellant's contention may be derived from the 11th Section of the 2nd Chapter of the Mitakshara, if the words "also property which she may have acquired by inheritance," which occur in the 2nd article of this Section, are taken (as they are taken by Sir Thomas Strange and others) to include property inherited from a husband; for it may be said that there can be no distinction between different portions of a woman's *stridhun*, or separate property. If she can dispose of part of it, she may dispose of the whole; and, further, that the whole must pass on her death according to the law which regulates the succession to *stridhun*. Sir William Macnaghten, however, in his "Principles and Precedents of Hindu Law," Vol I., page 38, lays down broadly that there is such a distinction. He says: "In the Mitakshara, whatever a woman may have acquired, whether by inheritance, purchase, partition, or finding, is denominated woman's property, but it does not constitute

her *peculium*." And he then proceeds to show what is that *peculium*, or *stridhun* proper, according to Menu.

Certain it is that, whilst no decided case has been cited in support of the appellants' contention, there are many to show that, according to the Benares and other Western Schools, the power of a widow over property inherited from her husband is limited, and that, on her death, it passes to his heirs. The case of Keerut Sing *vs.* Koolahul Singh (2 Moore's Indian Appeals, page 331), where the property in dispute was situate in the district of Benares, is directly in point. To the same effect are the cases at pages 32 and 189 of the 2nd Volume of Macnaghten's "Principles and Precedents." Several of the cases set forth in the Appendix to the 10th Chapter of Sir Thomas Strange's work, with the remarks of Mr. Colebrooke and others thereon, also support this view. (See 2 Strange, pages 402, 407, 408, and 439.) The "Vivada Chintamani," which has been recently translated by Baboo Prosunno Coomar Tagore, and is of high authority in the Mithila School and in the district of Tirhoot, where some of the lands in dispute are situate, expressly shows that the widow has no power of disposition over the immoveable property of her husband, and that his heirs take it on her death. (See pages 261 to 263.) The doctrine has been assumed as incontestable in the more recent cases, like that of the Collector of Masulipatam *vs.* Cavaly Vencata Narainapah (8 Moore 528). The result of the authorities seems to be that, although, according to the law of the Western Schools, the widow may have a power of disposing of moveable property inherited from her husband, which she has not under the law of Bengal, she is, by the one law as by the other, restricted from alienating any immoveable property which she has so inherited; and that, on her death, the immoveable property and the moveable, if she has not otherwise disposed of it, pass to the next heir of her husband. There is no trace of any distinction like that taken by the Pundit between ancestral and acquired property. In some of the cases cited, the property was not ancestral.

Again, supposing that any of the property claimed in this suit were of the nature of *stridhun*, and passed as such, the respondents would seem to have a better title to it than the appellant. The devolution of *stridhun* from a childless widow is regulated by the nature of the marriage. There is nothing here to show that Choteh Bebee was not married according to one of the four approved forms. In that case her *stridhun* would, according to the Mitakshara (Chap. II., Sec. XI., Art. 11), go to the respondents as the collateral heirs of her husband. This view of the law is confirmed by two cases in 2 Strange, pages 411 and 412, and the comments of Mr. Colebrooke and others thereon. Upon this record, however, it seems admitted that the whole of the property in dispute was either inherited from the husband Ramjee or the fruit of its accumulations.

Their Lordships, then, are of opinion that Choteh Bebee had no power of disposition over the immoveable property inherited from her husband, whether ancestral or acquired. Whether she had any such power over his moveable property, it is unnecessary to determine, since it has been found that no valid disposition of either kind of property has, in fact, been made. And, this being the case, their Lordships are of opinion that, as between the parties to this record, the right to the possession of the whole of the property in dispute, on the death of Choteh Bebee, passed to, and became vested in, the respondents.

The decree impeached is, therefore, substantially right. Whether it is altogether right in point of form may be doubted. It contains an order that the respondents should recover from the appellant the possession of the immoveable property with mesne-profits from the date of the institution of the suit; whereas the plaint seems to admit that the whole or a large portion of such property was at that date in the respondents' possession, and made no demand for mesne-profits. The error (if error there be) appears only in the formal decree—not in the judgment upon which it is founded. The recommendation which their Lordships will humbly make to Her Majesty is, that the decree of the Sudder Court be varied, and that it be thereby decreed that the respondents (the plaintiffs) be confirmed in the possession of so much of the immoveable property in the plaint mentioned as was in their possession at the date of the institution of the suit, and be declared entitled to the moveable property; and that they do recover from the defendant (the appellant) so much (if any) of the said immoveable property as was in her possession at the date of the institution of the suit, with the mesne-profits of such last-mentioned property from the said date, together with the costs of suit in both Courts. Their Lordships, however, are of opinion that, notwithstanding the variation of this decree, the appellant must pay the costs of this appeal.

The 25th February 1867.

Present:

Sir William Erle, Sir James W. Colvile, Sir Edward Vaughan Williams, Sir Richard T. Kindersley, and Sir Lawrence Peel.

Practice (of Privy Council)—Findings of Lower Courts on evidence—Wife.

On Appeal from the late Sudder Court at Agra.

Mussamut Jariut-ool Butool

versus

Mussamut Hosseinee Begum.

In a suit by *A* for possession of property which belonged to her uncle *B*, the defendants *C* and *D* each alleged herself to be the wife of *B*, and each said that the other was his concubine. *C* also set up a will in her favor by *B*. *C* admitted that she had once been *B's* concubine, but alleged that she had been subsequently married to *B*. The evidence was conflicting, and the Courts below pronounced against both the marriages and also against the will. *C* alone appealed to the Privy Council, who held that lapse of time and propriety of conduct, and the enjoyment of confidence with powers of management reposed in her, are not sufficient to raise the presumption that *C* was a lawful wife; and there was wanting in this case that clear indication of error in the finding which was necessary to take the case out of the rule laid down by the Privy Council, in the case cited, that the Judicial Committee would not interfere with the decision of the Courts in India, when they have concurred in opinion, merely on the effect of evidence or the credit due to witnesses.

THIS is an appeal from a decision of the Sudder Dewanny Adawlut of the North-Western Provinces of India, which affirmed a decision of the local Court of Jounpoor in favor of the respondent, the plaintiff in the suit. The plaintiff sought to recover certain moveable and immoveable property specified in her plaint "by right of inheritance to Mirza Abdoolla Beg, her uncle and ancestor, and also to Mirza Jumud Beg, her husband." The plaint contained a detailed description of the property sought to be recovered. The principal defendants were Mussamut Hossein Buksh, Mussamut Ruzzee-ool-nissa *alias* Rugbee Khanum, and Mussamut Uzeez-ool-nissa *alias* Mussamut Emamun.

The first and second named female defendants claimed each to be a widow of the deceased Abdoolla, but each denied that the other was ever married to Abdoolla, each alleging the other to have been his mistress and not his wife. The third female defendant claimed to be the legitimate daughter of Abdoolla by his alleged wife, her mother, the second female defendant. The first female defendant, the present appellant, also set up a will alleged to have been made in her favor by Abdoolla the day before his death, by which he bequeathed to her by the description of "my married wife Mussamut Jariut-ool Butool *alias* Bebee Hossein Buksh," all his moveable and immoveable property, subject to certain provisions in favor of the plaintiff, to which it is not necessary to allude further. The validity of this will was disputed both by the plaintiff and by the second and third defendants. The Civil Court decided against the will, and also against both the alleged marriages, and the alleged title of the third female defendant. On appeal to the Sudder Dewanny Adawlut, the decision was affirmed. The first female defendant alone has appealed to Her Majesty from the decision of the Sudder Dewanny Adawlut. The second and third defendants have not appealed, and therefore their interests are put out of the case entirely.

In the case of Naragunty Lutchmeedavamah *vs.* Vengamah Naidoo* (9 Moore's Indian Appeals, page 87), their Lordships said: "It is not the habit of their Lordships, unless "in very extraordinary cases, to advise the "reversal of a decision of the Courts of India "merely on the effect of evidence, or the cre-"dit due to witnesses. The Judges there have "usually better means of determining ques-

* See 1 W. R., Privy Council Cases, p. 30.

"tion of this description than we can have, "and when they have all concurred in opinion, "it must be shown very clearly that they were "in error in order to induce us to alter their "judgment."

Their Lordships, after a very careful attention to the evidence, and to the arguments addressed to them on the part of the appellant, are of opinion that there is wanting in this case that clear indication of error in finding against the marriage and the will, which would be necessary to take this appeal out of the operation of the above salutary rule.

The Sudder Court thought the evidence as to the marriage of the appellant insufficient. The same Court concurred with the Court below in thinking the evidence in support of the will untrustworthy. They say: "We concur with the Judge in dis-"crediting the evidence in support of the will. "We consider the attendant circumstances as "altogether improbable and unworthy of "belief."

Is error clearly manifest in these conclusions? Is the evidence clearly sufficient to prove either issue? The claim to be declared the wife of the deceased would establish, on oral testimony, a heavy charge on the estate of the deceased person to the amount of 50,000 rupees, and the will is one made *in articulo mortis*. Some of their Lordships can judge by their experience of precedent cases before this Committee of the dangers likely to ensue if the Courts of Justice in India did not require cogent proof in such cases.

If it were once conceded that a woman, once a concubine, could be converted by judicial presumption into a wife, merely by lapse of time and propriety of conduct, and the enjoyment of confidence with powers of management reposed in her, when and after what period of time should such presumption rise? The ordinary legal presumption is that things remain in their original state. Were, then, the Courts below well founded in treating the original connexion by the appellant with the deceased Abdoolla as an illicit connexion? The evidence was conflicting. She herself admits that she was once a prostitute. It is true that she alleged penitence and a change of life, and some of her witnesses say that she had relinquished the life of a prostitute before her intercourse with Abdoolla began; and one witness says that she had discontinued it five years before she came to live with Abdoolla. But no evidence is adduced to prove what was her intermediate employment, or what were her means of maintaining herself in the *interim*. She declares the deceased to have been a man entertaining one mistress whilst his wife was living. The Court had to determine, amidst conflicting evidence, whether it was more likely that he should make a woman of that class his wife, and settle on her a very large dower, or that he should induce her to live with him as his mistress, displacing the former favorite. The evidence was conflicting, and the finding cannot be viewed as a decision against the weight of evidence. If, then, the Courts below were justified in finding that the original connexion was illicit, where is the evidence of any change in its character? If length of time be invoked as a reason for considering the previous connexion as lawful, the appellant herself is found placing no reliance on mere length of intercourse with respect to the second defendant's claim to be regarded as a wife; and if the subsequent removal to a different house of that lady be insisted on as an argument that she was not a wife, the answer seems to be that the mere removal into, and maintenance in, a separate house is not at all inconsistent with the *status* of a regularly married wife, superseded either by wife or concubine, but undivorced. The appellant, indeed, is not content to rely on any presumption from length of time; she alleges or calls witnesses to prove an actual marriage-ceremony, accompanied with some degree of publicity, the presence of witnesses, and the oral assignment of a large sum of dower.

The witness Imam Buksh, the physician, deposes to this effect, that only one year before the death of Abdoolla, the latter assured him that the appellant was his wife; that the witness asked the question in consequence of the appellant referring him to the deceased for information on the point, asserting that she was a wife, and that the second defendant was not, and that the Mirza would so inform him. Now, this witness describes himself as having attended both on the Mirza and on the appellant, not as a mere stranger in the house. But what origin can reasonably be ascribed to this inquiry as to her *status*, unless some ambiguity existed in relation to it; and how is this

ambiguity consistent with a marriage celebrated from the first before witnesses, with an out-spoken assignment of a large dower in the husband's house? Can any ignorance or uncertainty about such a *status* exist at all in the house of the husband with such an introduction of a new wife, and such an open celebration of a marriage? The evidence, therefore, does not cohere, and the Court might well distrust it; nor could their distrust be reasonably found fault with in a case where each alleged wife brought forward the same kind of evidence of an open celebration, and each treated as undeserving of credit the allegations and evidence of the other.

With respect to the will, the improbabilities against it are strong, and the evidence in its favor weak. It is deposed that the second female defendant was present during the time that the will was being dictated, rough copied, and clean copied; that a provision was made in the will for her expenses in case she proceeded on a pilgrimage to Mecca; and that this was done on her request. She is therefore described as cognizant of the will, and assenting to it in some degree by accepting a contingent benefit under it. Yet she was united with her daughter and son-in-law in interest, and throughout acted in conjunction with them. She claimed to be a wife, and sought to establish her daughter as an heir. Her assent to the will is, therefore, most improbable, and the supposition is rendered more so by this, *viz.*, that at this very time her son-in-law Usghur was making a public protest by way of petition addressed to a public officer, claiming his interference and presence at the house of Abdoolla to prevent a will being executed in the name, as he alleges, of Abdoolla, then a senseless and dying man. Is the second alleged wife to be supposed acting at variance with herself without adequate motive, and in so short a period of time to return to opposition? It appears that she had two years before protested against a description of herself as "prostitute" on a public assessment, and had been described as wife on her own application on more than one public document. She was, therefore, claiming to be a wife. The reason for describing her as present and acquiescent at the time of the preparation of the will is obvious. That a Mahomedan of high position and wealth, a man of business besides, should, with a view to prevent disputes in his family, make such a will as likely to foment as to quell them, and omit to make that disposition which would, had her story been true, secure to the appellant her dowry of 50,000 rupees and her share as widow, is not a probable occurrence in itself. One would expect him to act with the advice and aid of his usual mooktear, and not defer the settlement of disputes in the confused state of his family-connections until his last hours, and then to put himself in the hands of people not previously employed by him; on the other hand, if a will, whether from fraudulent or merely mistaken prudential motives, was to be put forth, though without his concurrence, as his, the preparation and execution would be delayed until his end was so near, his strength so reduced, and his mind so inert, that he would probably be found incapable of opposition to a proposition pressed upon him. Between these conflicting views of the subject, the Courts below were called on to decide, and their conclusion does not appear to their Lordships unreasonable or against the weight of evidence.

Their Lordships think, therefore, on a careful view of the evidence, that the case is not taken out of the operation of the rule laid down in 9 Moore, which has been frequently asserted and constantly acted on. Their Lordships will therefore humbly advise Her Majesty that the appeal be dismissed with costs.

The 10th July 1867.

Present:

Lord Cairns, Sir James William Colvile, Sir Edward Vaughan Williams, Sir Richard Torin Kindersley, and Sir Lawrence Peel.

Lease—Jungle-lands — Contract — Farmer— Regulation XVII. of 1827.

On Appeal from the High Court at Bombay.

Ruttonjee Eduljee Shet

versus

The Collector of Tanna and the Conservator of Forests.

Where an application for a lease for farming jungle-lands was in their nature general, but the answer was specific and clear, and granted the lease on certain conditions, the answer determined the contract, and was the only contract between the parties.

The word "farmer," as used in Regulation XVII. of 1827, is used, not as a cultivator of the ground, but as a farmer of public revenue, a person who would stand between the Government and the ryots as possessors of the ground.

A lessee who sues, alleging that there has been an interruption to his lease to cut or sell the trees on the land included therein, must base his right, *first*, upon its being a necessary incident of the lease by reason of the objects of the lease; or, *secondly*, under some positive law; or, *thirdly*, under some custom to be incorporated in the lease; or, *fourthly*, under the express terms of the lease.

In this case a plaint was filed in the Konkum District Court by the appellant, and the complaint which he made was founded on a lease which was granted to him by the Acting Collector of the District of Tanna, on the 31st of December 1845, of the village of mouzah Ghautkopur. The complaint was that, contrary to the terms of that lease, the defendant did not allow the appellant to fell unassessed trees in the village, or to apply them to his own use; that is, to carry off the trees from the ground on which they grow, and to dispose of them to the use of the appellant; that claim being on the face of it founded upon the lease which had been granted to the appellant.

The evidence with regard to this timber is to be found in the testimony of Ruhimoo Kasum. That witness thus describes the timber: "I know Ruttonjee Eduljee, the "plaintiff in this case. Three or four years "ago I entered into a contract with him "to cut all the teak, black-wood, and kheir "trees, small and great, in the forests of "Ghautkopur, for Rupees 4,900. It was "agreed that I should cut the trees at my "own costs. I accordingly cut a portion of "the trees, but was prevented from doing so "by the Government authorities, and the "trees cut down were attached, and there-"fore I could not remove the trees. I paid "Ruttonjee Eduljee Rupees 1,225 on account "of the contract, but as the wood was not "made over to me, Ruttonjee Shet paid me "Rupees 1,950, including expenses, &c." In answer to the defendant's questions, he says: "Some of the trees for which I had "made a contract were timber trees, and "some were fit for firewood, and had I "carried out the contract, I should have "cut down all the teak, black-wood, and "kheir trees, great and small. Some of "the trees would only have been fit for "firewood, other jungle-trees fit for fire-"wood would have remained in the forests "of Ghautkopur. I took the said contract "at a public sale, and there was a written "agreement for the same. I have not "brought it with me. The auction was "held in the village of Ghautkopur."

Lower down, in answer to the Court's questions, he says: "If I had cut the trees "according to the contract, wood to the value "of Rupees 1,000 or Rupees 2,000 would have "been left in the jungle. Before I was "prevented by the authorities from removing "the wood, I sold about 300 rupees worth of "wood to the neighbouring villagers, and "the said sum was accounted for."

Another witness of the appellant, Manockjee Rustomjee, adds this: "There are "jungle-gharaks at Ghautkopur, which are "on the tops of the hills and on the banks "of ravines. If the jungle were not cleared, "rice would not grow, but other grains "might grow there; but it is not the custom "here to raise other grains; but grass "would grow on the said land. When the "plaintiff got the village in A. D. 1845, "Government had no right to the jungles "in the Talooka Salsette, nor did Govern-"ment interfere. I have no knowledge "whatever regarding the other villages of "Government. The plaintiff did not fell

"the trees on the jungle-gharak with the "intention of bringing the land into "cultivation."

The claim, therefore, is not to cut certain trees for the purpose of clearance or cultivation; not to cut certain trees for the purpose of repairs or consumption on the ground of which the appellant is lessee; but to sell to a timber merchant the whole of the trees, large and small, upon the land, to be cut and carried away by him for his own purposes.

It will be convenient now to observe the position of the appellant under the lease upon which he grounds his claim.

The petition for that lease is in these terms: "That your petitioner is desirous "of farming the village of Ghautkopur, on "the island of Salsette, and prays that your "Honorable Board will be pleased to lease "it to him on the same terms as villages "have been granted to different individuals "in Salsette. In submitting this application "to your Honorable Board's favorable con-"sideration, your petitioner begs to state "that he is aware there is in the village in "question little or no waste land whereby "he could at present much benefit himself, "but he is desirous of obtaining it to give "effect to a speculation which he has had "for a long time under consideration, *viz.*, "the recovering a large tract of swamp "land, for the purpose of converting it into "salt batty-fields and salt-pans. Your "petitioner wishes to lay out capital on the "work contemplated, which, when finished, "he feels assured, while it will benefit "himself, will much improve the village, "benefit the ryots, and increase the revenue "which Government derives from it."

Founded on that application, the lease was made on the 31st of December 1845. It begins by stating that the lessee had "petitioned Government on the 23rd May "1843, that, if the village of Ghautkopur, "Turf Trombay, Talooka Salsette, be allow-"ed to you in farm in the same manner as "villages have been granted to other farmers "in Salsette, that you would reclaim certain "swampy land, and that you would form salt-"pans and salt batty-fields, whereby the in-"habitants on the one hand, and the Govern-"ment on the other, will be much benefited. "Your application having been duly reported "upon by the Acting Collector, under date "the 10th August 1843, Government, in its "Secretary's letter, dated 4th September "following, No. 2903, intimated its sanc-"tion to the aforesaid village being granted "to you in farm. Accordingly, it is hereby "leased to you from the year 1844-45, "for a period of 99 years, on the revenues "of the year 1842-43 (exclusive of the "Abkaree), on the following conditions." The objects, therefore, for which the lease was solicited, and the objects for which the lease was granted, were the reclaiming certain swampy land, and farming salt-pans and salt batty-fields, together with such incidental advantages as might be obtained from the use of the waste land as it then stood in the village.

It may be convenient to advert here to an argument which was much pressed upon their Lordships, *viz.*, that, inasmuch as the application had been for a lease to be made in the same manner as villages had been granted to different individuals in Salsette, therefore, as it was contended, this lease was upon whatever terms it might be found that leases had been made to other farmers in that district.

Their Lordships are of opinion that, although the application was general, the response was specific and clear. The answer to the application was that a lease would be granted, but granted on "the following conditions," which are described in the lease itself, and which, therefore, determine the contract, and the only contract between the parties.

Proceeding with the lease, the first clause describes, as it states, the details of the boundaries, houses, inhabitants, lands, and the jummabundee of the said village.

It is important to observe that, among the details of lands under this head, it is admitted there are no lands upon which the trees in question are growing. The lands described under the first head are the arable or cultivated lands of the village, and certain limited waste land described by admeasurement. It is admitted that they had not growing upon them any of the trees which are now in question. The second section of the lease provides that "the waste land in the vil-"lage, including Jugli-gurk, Nala-gurk, and "Nowsad, &c., is hereby granted to you in "Mafee (that is to say, rent-free) for 4 "years from 1844-45." It then provides that this waste land was to be brought under tillage, "out of the sweet waste land, one-"fourth within the term of ten years from the "date hereof, and you should, in the same "manner, continue to do so every ten years "from the date hereof; and you should, in the

"same manner continue to do so every ten "years, so as to bring the whole of it under "tillage within that period," that is, so that, at the expiration of forty years, the whole might be under tillage, and bring revenue to the Government accordingly.

It is to be observed here again, that it is admitted that the land upon which the timber now in question grows was not included under the second head. The contest, indeed, of the appellant is that for the land upon which that timber is growing, he is, under no circumstances, to be called upon to pay rent.

The 32nd clause of the lease states: "There are in the aforesaid village about 150 "beegahs of swampy land which might be "made available for salt-pans; you are, "therefore, as proposed by you in your "petition, to expend whatever sum of money "may be considered necessary, and convert "the said land into salt-pans within five "years from 1844-45," under a certain penalty in the event of failure so to do.

It is admitted again that, with regard to the lands specified under the 32nd head, none of the timber is growing upon that land. We have, then, under the 2nd and the 32nd heads of the lease, an enumeration of the whole of the land upon which any operation of farming or reclaiming was to be performed by the lessee. It is for the land specified under those heads, and for that land alone, that any rent or any assessment is to be paid by the lessee; and for the land upon which the timber in question is now growing, no rent has already been paid, or is in any event to be paid.

Then, there are a series of provisions especially contained in paragraphs 6, 7, 9, 10, 11, 12, 25, 26, 27, 28, and 29, which provide for the preservation and protection of the possessory and other rights of the ryots and other persons having pre-existing claims upon land in the village. Among them is an important Section, referred to in the argument, the 6th, that provides: "It "is clearly to be understood that this lease "confers no right which Government does "not now possess, and only such portion of "the rights of Government as may be herein "specifically granted is hereby granted to "you."

We are in a position, from this statement of the paragraphs of the lease, to understand distinctly the objects for which the lease was granted. The first object was to enable the lessee to cultivate the arable land. The second object was to enable him, and to oblige him to reclaim and bring under tillage certain specified waste-land—land other than that upon which this timber is growing. The third object was to convert into salt-pans 150 beegahs of land,—being, again, land other than that upon which the timber in question is growing.

Over and above these three objects, he was to be styled the "farmer" of the village; not that he was to have possession of other parts of the village, or to dispossess those already in occupation—not that he was to be the cultivator or farmer of other parts in the English sense of the term "farmer"—but as the 12th Section expressly provides: "In respect to the above-named "village, you are considered farmer thereof; "you are, therefore, to exercise the authority "vested in farmers by Chapter 6 of Regula-"tion XVII. of 1827, or such as may be "hereafter vested in them by any new enact-"ment."

Upon turning to the Regulation here referred to, it is apparent that the term "farmer" is used, not as a cultivator of the ground, but as a farmer of the public revenue—a person, namely, who would stand between the Government and the ryots as possessors of the ground in the village; he being, as it were, the custodian or ranger, taking care that the revenue of the Government was collected, and the rights of the Government as against the possessor in the village maintained.

At the time, then, that this lease was made, the whole of the land, and all the rights connected with the land, subject to such claims as third parties might have upon it, belonged to the Government. The trees upon the land were part of the land, and the right to cut down and sell those trees was incident to the proprietorship of the land.

The appellant, therefore, who complains of an interruption such as is described in his plaint, must ground his title to these trees and the right to cut them down, either upon this that it is a necessary incident of the lease by reason of the objects of the lease; or, *secondly*, under some positive law; or, *thirdly*, under some custom to be incorporated in the lease; or, *fourthly*, under the express terms of the lease.

Now, as regards the right to cut timber being necessarily incident to the lease, it

plainly is not so. There was no work to be done, and apparently no right to execute any work, upon the land on which this timber grows. Clearance or cultivation of the other land might require the cutting of timber on that other land, but that right does not come into question in the present suit.

As to positive law, none has been cited to justify what has been done by the present appellant. We were referred to the Regulation of 1808 with regard to the island of Salsette; but, so far as that Regulation is concerned, the whole drift and tenor of it, when it deals with timber at all, is in favor of the preservation of the right, and not of the surrender of the right in the Government to the timber.

The appellant, however, relies upon a custom which he says justified the cutting of timber; and evidence of that custom has been adduced.

Their Lordships would entertain very considerable doubt whether any evidence of custom could be allowed to control the express stipulations which they find in the lease of this village; but, turning to the evidence which has been given in support of the alleged custom, their Lordships find that several of the witnesses speaking to that custom admit that the villages upon which they say timber has been cut down by the lessees were villages leased under written contracts—contracts which dealt, in some way or other, with the subject of the timber; contracts, therefore, which prevented any general custom flowing out of the rights exercised by those tenants. Their Lordships find that others of the witnesses, when speaking of the timber cut on other villages, expressly state that that timber has been cut, not as of right, but by permission of the Government. And their Lordships find generally, with respect to all the witnesses, or all but one, that they are silent as to any information leading them to judge whether the timber which they say was cut, was cut for the purpose of repairs or other consumption in the villages, or was cut for the purpose of clearance or cultivation, or cut (as the right to cut is here alleged to be) for the purpose of sale or other disposition as property of the tenant.

Their Lordships, therefore, are of opinion that the allegation of custom entirely fails to be supported by evidence.

With regard, lastly, to any express right given by the lease itself, their Lordships can find none. On the contrary, the 6th clause, which has been already referred to, expressly declares that only such portion of the rights of Government as may be therein specifically granted is thereby granted to the lessee.

The 4th clause, however, was said by implication to confer the right to cut that timber. The words of that clause are these: "You are prohibited from cutting "down or destroying any brab, date, or "other trees liable to taxation, without the "permission of the Collector."

Their Lordships, however, do not consider that this clause is susceptible of the implication which is derived from it by the appellant.

In the course of clearing and cultivating the waste-land which the appellant was obliged to clear and to cultivate, it naturally would be requisite to cut down and remove the timber growing upon that waste-land, and their Lordships read that permission as simply declaring that, if, with reference to that timber which it would thus be necessary to cut down and remove, any of it was "brab, date, or other trees liable to taxation"—even as to such timber, none should be removed without the express permission of the Collector.

Their Lordships, therefore, are of opinion that the case of the appellant entirely fails. They concur with the judgments pronounced by the Judge of the District Court and by the Appellate Court at Bombay; and they will humbly advise Her Majesty that the appeal should be dismissed with costs.

b

The 21st May 1868.

Present :

Lord Westbury, the Master of the Rolls, Sir James W. Colvile, Sir Edward Vaughan Williams, and Sir Lawrence Peel.

Hindoo widow—Adoption—Permission of husband—Consent of kinsmen—Administration of Hindoo law—Usage—Opinions of Pundits—Maintenance.

On Appeal from the High Court of Madras.

The Collector of Madura *versus* Muttu Ramalinga Satthupathy; Annudai *alias* Ranee Kunjara Nachear and another *versus* Ranee Purvata Vurdany Nachear and another, and *the cross-appeal.*

Power of a childless Hindoo widow to adopt a son to her husband with or without his permission under the various Schools of Hindoo law considered. The difference between them relates rather to what shall be taken to constitute in cases of necessity, evidence of authority from the husband, than to the authority to adopt being independent of the husband.

According to the doctrine of the Benares and Mahratta Schools, a Hindoo widow can adopt a son without her husband's express authority, if the adoption be made with the consent of her husband's kindred. Rule indicated as to the kinsmen whose consent is essential.

The duty of a European Judge in administering Hindoo law is not so much to enquire whether a disputed doctrine is fairly deducible from the earliest authorities, as to ascertain whether it has been received by the particular School which governs the district with which he has to deal, and has there been sanctioned by usage.

Under the Hindoo system of law, clear proof of usage will outweigh the written text of the law.

Extent of authority to be given to the opinions of Pundits laid down.

The *quantum* of maintenance to be awarded is a question with which the Courts in India are best able to deal, and the Judicial Committee will not interfere with the discretion excercised in this respect, unless on strong grounds.

THE principal question raised by these appeals is the validity of an adoption made by the widow of the last male zemindar of Ramnad.

His title to that zemindary, which is of great extent, and like many of the large zemindaries in the south of India, in the nature of a Raj or Principality descendible to a single heir, was thus derived. In 1795, the then zemindar, Muttu Ramalinga Satthupathy, having rebelled against the Government of the East India Company, was deprived of his zemindary, which, in the month of July in that year, was granted to his sister Ranee Mangalaswari. Her title was confirmed by a formal sunnud, executed on the 22nd of April 1803 by Lord Clive, the then Governor of Madras, which granted the zemindary to her, her heirs, successors, and assigns. She was married to Ramasami Taver, who died some time between 1797 and 1804; and in the latter year Mangalaswari, then a widow, and professing to act under a written agreement between her and her late husband, adopted one Annasami, his nephew, whose title she afterwards confirmed by a will executed on the 11th of April 1807. She died in that year, and was succeeded by Annasami. He had seven wives, of whom only his chief wife, Mootoo Verayee, and the appellant Kunjara, need be mentioned, but had no male issue by any of them. And on the 26th of January 1820, he adopted a son, Ramasami, who was the natural brother of Mootoo Verayee, and, by a testamentary instrument of that date, confirmed that adoption, stating it to have been made "by himself and his chief wife, Mootoo Verayee, unanimously." He died in February 1820, and was succeeded by Ramasami, who died in 1830 without male issue, but leaving a widow, the respondent Purvata, and two infant daughters, Mangalaswari and Doraraja, surviving him. It is unnecessary to notice the unsuccessful suits by which the titles of Annasami and Ramasami were impeached during their lives, though some of the proceedings in them help to swell the voluminous record before their Lordships. The title of Ramasami to the zemindary, as stated above, is the common ground of all the parties to this litigation, and, on the consideration of these appeals, must be taken to be incontestable.

On the death of Ramasami without male issue, his successor in the zemindary, according to the course of succession *ab intestato*, was his widow. He had, however, two days before his death, addressed to the Collector, as the representative of Government, the urzee of the 16th of April 1830, which is set forth at page 84 of the record. In that document, after stating that he was suffering from small-pox, and that the issue

of his illness was uncertain, he expressed himself as follows: "I have made an arrangement that my mother, Ranee Mootoo Verayee, who is my guardian in every respect, and who holds chief right to this zemindary, should enjoy this zemindary and all other things; pay peishkhist to the Sirkar; maintain my royal wife, my daughter Mangalaswari of five years old, and her younger sister, a small child; and, when these children shall attain their proper age, to make an arrangement with regard to their right to the zemindary, and continue the same; that my natural brother Muttuchella Tevar should manage the affairs of the zemindary until my children shall attain their proper age; and I have issued necessary orders for the strict observance of the above arrangement."

The affairs of the zemindary seem to have been managed under this arrangement between 1830 and 1840. The respondent Purvata is said to have been herself very young at the date of her husband's death; her children were infants; and the mother-in-law was probably the only member of the family with any capacity for business. In 1840 Mangalaswari, the elder daughter of Ramasami, who had previously been married, died after giving birth to a male child, who did not survive her. About that time, differences arose between Purvata and her mother-in-law, who appears to have set up some claim to the zemindary in her own right. The Board of Revenue, acting as Court of Wards, intervened; appointed, in April 1840, Purvata guardian of Doraraja, her infant daughter, in the place of Mootoo Verayee; and assumed the management of the estate, treating apparently Doraraja as *de-facto* zemindar, either by virtue of the urzee executed by Ramasami or by reason of Purvata's waiver of her rights in favor of her infant daughter.

Doraraja died on the 24th September 1845. She had previously been married, and having no children attempted on the day before her death to adopt as a son a child named Anundai. By the document called her will, she declared, however, that this person would only be entitled to the zemindary in succession to her mother Purvata, whom she calls "chief heiress to the zemindary." This adoption was communicated to the Collector by a letter of the 23rd of September 1845, but was treated by him as invalid under the 25th Section of Regulation V. of 1804, because made by a disqualified landholder without the consent of the Court of Wards. The right of Purvata to the zemindary as heiress either to her husband or to her daughter was, therefore, recognized by the revenue authorities, who, in April 1840, put her in possession of it as a qualified proprietor, and relinquished the management of it to her.

In the meantime, and ever since 1840, Mootoo Verayee had been engaged in active litigation with Purvata and others for the enforcement of her alleged rights to the zemindary. The proceedings in her last suit are set forth in the record from p. 16 to p. 48. For the most part they have no bearing upon any of the questions which their Lordships have now to determine: and it is unnecessary to notice any of them except the supplemental rejoinder which was filed by Purvata on the 6th of March 1846; and the razeenamah or agreement of compromise by which this litigation was terminated on the 26th of February 1847. In the former Purvata asserted, apparently for the first time, a right to adopt a son to her husband either under an alleged authority from him, in the event, which had happened, of both his daughters dying without issue, or under the more general power of adoption which is disputed in these appeals. By the latter Mootoo Verayee, in consideration of the provision made for her foster son Sevasami, declared that Purvata might thenceforward enjoy the zemindary for ever; and, besides, might adopt a son at her pleasure as specified in the supplemental rejoinder.

It is clear, therefore, that whatever obscurity and confusion there may be in the history of the zemindary and its management between the death of Ramasami in 1830, and the month of May 1847, Purvata was, at the last mentioned date, in undisputed possession as zemindar of Ramnad.

In that state of things she made the adoption which is the subject of the present dispute. On the 19th of May 1847, she gave notice to the Collector of her intention to adopt her sister's younger son, and invited him to be present at the ceremony. On the 24th of the same month, she formally adopted the respondent Ramalinga. It is admitted that all the requisite ceremonies were duly performed, and that the adoption cannot be impeached except on the ground of the insufficiency of her power to make one. The Board of Revenue, by an order dated the 10th of March 1849, declared that the adoption was invalid, and that, on the death

of Purvata the zemindary would escheat to Government. On the 23rd of July 1855, the Madras Government set aside this order, and determined to recognize the adoption until it should be declared invalid by a decree of a Civil Court. But on the 29th of October 1855, the same Government cancelled its former order, and confirmed the order of the Board of Revenue of the 10th of June 1849, and caused this its final determination to be intimated to Purvata through the Collector, by a letter dated the 15th of November 1855.

The first of the suits out of which these appeals arise (No. 3 of 1856) was instituted in that year by Kunjara, claiming as the last surviving wife of Annasami, and her daughter, Mangalaswari, against Purvata alone. They impeached the validity of the adoption, insisted that, on Purvata's death, Kunjara, as the next in succession, would be entitled to the zemindary, and claimed maintenance in the meantime. Purvata, by her answer, alleged that Kunjara was not the wife, but the concubine of Annasami, and could have no title to the zemindary. Various persons afterwards intervened under different titles, and were all, by supplemental plaint, made parties-defendants to this suit. But none of them, except the respondent Ramalinga and the Collector, are parties to these appeals, or have any interest therein.

The second of the two suits (No. 1 of 1860) was brought in February of that year by the respondent Ramalinga, who had then attained his majority, against Purvata and the Collector. Against the latter it sought to have the before-mentioned order of intimation of the 15th of November 1855 set aside as illegal; and against the former it prayed that immediate possession of the zemindary might be adjudged to the respondent Ramalinga.

The second suit was the first heard, and by his decree, dated the 18th March 1861, the Civil Judge ordered that the order of the Collector of the 15th of November 1855, and his orders to certain subordinate officers therein referred to, should be cancelled; and that, as he had failed to establish any right to the estate, or to invalidate the acts of Purvata in respect to it, he should abstain from all further interference; and that Purvata, subject to the provisions of Hindoo law, and Section 8 of Regulation XXV. of 1802, might, without the previous consent of the Collector or of any other authority, assign and transfer to the plaintiff (the respondent Ramalinga), or whomsoever she might think proper, by the sale, gift, or otherwise, her proprietary right in the Ramnad zemindary. The decree further declared that it was to be without prejudice to the Collector's right to bring a regular action for the estate, if he conceived that the Government had a superior title to the party in possession, but it prohibited him from summarily seizing it as an escheat whilst there were heirs.

The decree made by the same Judge in the first suit bore date the 12th of April 1861. It found that Kunjara was one of the wives of Annasami, but that, as such, she had no right to succeed to the estate after Purvata, being only her step-mother, and therefore excluded from inheriting; it further decreed that the zemindar of Ramnad for the time being should pay to the plaintiffs (the appellants Kunjara and her daughter) maintenance at the rate of 400 rupees per mensem, with the arrears of such maintenance from the date of the institution of the suit.

Against the first of these decrees the Collector, against the second Kunjara and her daughter, appealed to the High Court of Madras; and on the 26th March 1863, that Court made an order on both appeals, whereby it directed the Civil Judge to try the following issue: "Was the adoption made "with the authority of Mootoo Verayee, "widow of Annasami, or with that of any "others of the kindred of the late zemindar "Ramasami, in whose behalf the said adop-"tion was made?" It further gave certain directions as to the evidence to be produced on the trial of the issue.

This issue was accordingly tried on the 1st of September 1863; and the findings of the Civil Judge are in effect that the consent of Mootoo Verayee, and of all the then surviving kindred of Ramasami, had been obtained to the adoption. Against this finding the Collector, as well as Kunjara and her daughter, again appealed to the High Court, which, on the 7th November 1864, after two hearings, pronounced an elaborate judgment in favor of Purvata's right to adopt, and her exercise of it in the particular case, and in doing so, the Court came to the following conclusions:—

1. That the widow of the late zemindar had made a valid adoption; that there was no doubt that it was made with the assent of the majority of her husband's sapindas; and that, though it might be doubtful whether the Civil Judge was right, there were

not sufficient grounds for saying that he was wrong in thinking that all the sapindas then living had been proved to have assented.

2. That considering the extent of the property, and the fact that she was the last surviving widow of the zemindar Annasami, Kunjara was entitled to a more liberal maintenance than that awarded by the Civil Judge; and that such maintenance should be at the rate of 10,000 rupees per annum. Subject to that modification, the decrees below were affirmed, and the appeals dismissed without costs.

From the decrees drawn up in conformity with the judgment, the following appeals have been presented, *viz.* :—

1st.—An appeal by the Collector, impeaching the validity of the adoption, and also objecting to so much of the decree of the 18th of March 1861 as declared or implied that Purvata had power to alienate or affect the zemindary beyond her life-interest.

2ndly.—An appeal by Kunjara and her daughter, also impeaching the adoption, and further objecting to the decree of the 12th of April 1861, in so far as it declared that Kunjara had no right of succession to the zemindary.

3rdly.—A cross-appeal by Purvata and Ramalinga, objecting to the maintenance awarded by the High Court as exorbitant, and insisting that the decree of the Civil Judge ought not to have been varied in that respect.

All these appeals have been heard together; and their Lordships have now to dispose of them.

The principal contest has been upon the broad and general question whether, by the Hindoo law as current in what is known as the Dravada country (wherein Ramnad is situate), a widow can adopt a son to her husband without his express authority; and, if so, by whose assent that defect of authority must be supplied?

Their Lordships think it will be convenient to consider in the first place how this question really stands upon the authority of Mr. Colebrooke and Sir Thomas Strange.

Mr. Colebrooke's note on the Mitakshara (Chap. I., Sec. 11, Art. 9), which has been much discussed, clearly involves three propositions: 1, that the widow's power to receive a son in adoption, subject to some conditions, is now admitted by all the Schools of Hindoo Law except that of Mithila; 2, that the Bengal (or Gaura School insists that the widow must have the formal permission of her husband in his lifetime; 3, that some at least of the other Schools admit the adoption to be valid, if made by the widow with the assent of her husband's kindred. The two first propositions are admitted; but it has been argued for the appellants that, on the true construction of this note, Mr. Colebrooke's authority for the last proposition is limited to the Mahratta School, in which the treatise called the Mayukha is the predominant authority. Balambhatta, however, whom he cites as an authority for a power of adoption in the widow wider even than that expressed in the third proposition, was a commentator of the Benares School. And the several notes of Mr. Colebrooke, at pp. 92, 96, and 115 of the 2nd volume of Strange's Hindoo Law, seem to their Lordships to show conclusively that he considered the doctrine embodied in the third proposition to be common "to the "followers of the Mitakshara in the Benares "as well as in the Mahratta School," and as such to be receivable as the law current in the Zillah Vizagapatam, which lies within the northern or Andra division of the Dravada country.

Again, Sir Thomas Strange's statement of the Law in his work, Vol. I., p 79, is clear and unambiguous. He says: "Equally loose is the reason alleged against adoption by a widow, since the assent of the husband may be given to take effect, like a will, after his death; and according to the doctrine of the Benares and Mahratta Schools, prevailing in the Peninsula, it may be supplied by that of his kindred, her natural guardians; but it is otherwise by the law that governs the Bengal provinces."

Their Lordships entertain no doubt that the term "the Peninsula," as used here and in other passages by the same author, denotes that part of India which is south of the line drawn from Ganjam to the Gulf of Cambay, and includes the whole of the Dravada district. The learned Counsel for the appellants, however, appeal from Sir Thomas Strange as a text-writer, to Sir Thomas Strange as a Judge, and cite his dictum in Pillai *vs.* Pillai (2 Strange's Notes of Cases, p. 193), as opposed to this passage. In that case, Sir Thomas Strange, after citing the text of Vasishta, says: "Hence it may

be inferred what appears confirmed by opinions of living Hindoo lawyers, and by every case of the kind we are acquainted with, that the consent of the husband is indispensable to adoption into his family." But this passage does not alter the view which their Lordships have already expressed as to the effect of the matured authority of Sir Thomas Strange. The precise question which is now under consideration was not in issue in that case, where there was a written authority from the husband, and where the real issue was whether the widow could adopt a boy not designated in that written authority. Again, the case was decided in 1801, at a time when the ancient authorities of Hindoo Law were far less accessible to an European Judge than they have since become. And Sir Thomas Strange, in his work composed twenty years later, says of this very case of Pillai *vs.* Pillai, that it was discussed on comparatively imperfect materials; that the public was not then possessed of the extensive information contained in Mr. Colebrooke's translation of the Law of Inheritance, and the treatises on adoption since translated by Mr. Sutherland, to say nothing of the MSS. materials that came subsequently to his own hands, and which had contributed largely to every chapter of his work. There can, therefore, be no doubt but that the passage in his book contains the matured opinion of Sir Thomas Strange, and that it must be treated as an authoritative declaration of that opinion controlling his dictum in Pillai *vs.* Pillai.

Having thus ascertained what was the opinion of two of the highest European authorities upon this question of the Hindoo Law current in the south of India, their Lordships have next to consider whether any sufficient reason has been assigned for treating that opinion as unfounded.

The remoter sources of the Hindoo Law are common to all the different Schools. The process by which those Schools have been developed seems to have been of this kind. Works universally or very generally received became the subject of subsequent commentaries. The commentator put his own gloss on the ancient text; and his authority having been received in one and rejected in another part of India, Schools with conflicting doctrines arose. Thus, the Mitakshara, which is universally accepted by all the Schools except that of Bengal as of the highest authority, and which in Bengal is received also as of high authority yielding only to the Dayabhaga in those points where they differ, was a commentary on the Institutes of Yajnavalkya; and the Dayabhaga, which, wherever it differs from the Mitakshara, prevails in Bengal, and is the foundation of the principal divergences between that and the other Schools, equally admits and relies on the authority of Yajnavalkya. In like manner, there are glosses and commentaries upon the Mitakshara, which are received by some of the Schools that acknowledge the supreme authority of that treatise, but are not received by all. This very point of the widow's right to adopt is an instance of the process in question. All the Schools accept as authoritative the text of Vasish'ta, which says: "Nor let a woman give or accept a son unless with the assent of her lord." But the Mithila School apparently takes this to mean that the assent of the husband must be given at the time of the adoption, and, therefore, that a widow cannot receive a son in adoption, according to the Dattaka form, at all. The Bengal School interprets the text as requiring an express permission given by the husband in his lifetime, but capable of taking effect after his death; whilst the Mayukha and Koustubha treatises, which govern the Mahratta School, explain the text away by saying that it applies only to an adoption made in the husband's lifetime, and is not to be taken to restrict the widow's power to do that which the general law prescribes as beneficial to her husband's soul. Thus, upon a careful review of all these writers, it appears that the difference relates rather to what shall be taken to constitute, in cases of necessity, evidence of authority from the husband, than to the authority to adopt being independent of the husband.

The duty, therefore, of an European Judge who is under the obligation to administer Hindoo Law is not so much to inquire whether a disputed doctrine is fairly deducible from the earliest authorities, as to ascertain whether it has been received by the particular School which governs the district with which he has to deal, and has there been sanctioned by usage. For, under the Hindoo system of law, clear proof of usage will outweigh the written text of the law. The respondent Ramalinga insists that, tried by either test, the proposition for which he contends will be found to be correct.

The industry and research of the Counsel in the Courts below have brought together

a *catena* of texts, of which many have been taken from works little known and of doubtful authority. Their Lordships concur with the Judges of the High Court in declining to allow any weight to these. But the highest European authorities, Mr. Colebrooke, Sir Thomas Strange, and Sir William Macnaghten, all concur in treating as works of unquestionable authority in the south of India the Mitakshara, the Smriti Chandrika, and the Madhavyam, the two latter being, as it were, the peculiar treatises of the Southern or Dravada School. Again, of the Dattaka Mimansa of Nanda Pandita, and the Dattaka Chandrika, two treatises on the particular subject of adoption, Sir William Macnaghten says that they are respected all over India; but that, when they differ, the doctrine of the latter is adhered to in Bengal and by the Southern Jurists, while the former is held to be the infallible guide in the Provinces of Mithila and Benares. The Dattaka Mimansa, by the author of the Madhavyam, is also recognized as of high authority in the south of India by Mr. Ellis in his note at page 168 of the 2nd volume of Strange.

Of these treatises, the Mitakshara is silent on the point in question. The Dattaka Mimansa of Nanda Pandita (Sec. 1, Articles 15 to 18, and Articles 27 and 28) is opposed to the respondent's view of it; but it seems equally opposed to an adoption by a widow under any circumstances. The Dattaka Chandrika (Sec. 1, Articles 31 and 32) allows a widow to give a son in adoption where her husband has not forbidden her to do so, implying his assent from the absence of prohibition. The Smriti Chandrika also permits a mother to give her son if she be authorized to do so by an independent male. And it is argued that, what these two last authorities lay down concerning a widow's right to give, must, by parity of reasoning, be taken to be laid down concerning her right to receive a son in adoption. The Madhavyam (if that term is confined to the Parasara Madhaviya, and does not embrace all the works of Vidya Narainsamy) seems also to contain no direct determination of the point in question; but the Dattaka Mimansa of that author clearly and explicitly declares the right of the widow to adopt with the authority of her father-in-law, and whatever other kinsmen of her husband may be comprehended under the *et cœtera*. It cannot, therefore, be said that the proposition laid down by Mr. Colebrooke, and adopted by Sir Thomas Strange, is not supported by at least one of the original treatises of undoubted authority in Dravada. The Dattaka Mimansa of Sri Rama Pandita, who is stated by the Judges of the High Court to be an authority very generally cited in the south of India, also confirms the proposition.

Their Lordships have excluded from their consideration of what is the positive law of Dravada the peculiarly Mahratta treatises (the Mayukha and Koustubha), and also the Viramitrodaya, which is a treatise of especial authority at Benares. It must, however, be admitted that the fact of the reception of the doctrine in question by Schools so closely allied to that of Dravada is in favor of the hypothesis that it also obtains in the latter, and strengthens the authorities which directly support that hypothesis.

The evidence that the doctrine for which the respondents contend has been sanctioned by usage in the south of India, consists partly of the opinions of pundits, partly of decided cases. Their Lordships cannot but think that the former have been too summarily dealt with by the Judges of the High Court. These opinions, at one time enjoined to be followed, and long directed to be taken by the Courts, were official, and could not be shaken without weakening the foundation of much that is now received as the Hindoo Law in various parts of British India. Upon such materials, the earlier works of European writers on the Hindoo Law, and the earlier decisions of our Courts, were mainly founded. The opinion of a pundit, which is found to be in conflict with the translated works of authority, may reasonably be rejected; but those which are consistent with such works should be accepted as evidence that the doctrine which they embody has not become obsolete, but is still received as part of the customary law of the country. A considerable body of these futwahs, or opinions, is collected in the third part of what has been called throughout the argument in this case "the green book." It is not necessary to consider whether they can all of them be supported to the full extent of what they affirm. But they show a considerable concurrence of opinion to the effect that, where the authority of her husband is wanting, a widow may adopt a son with the assent of his kindred in the Dravada country.

The decided cases, exclusive of those in the Bombay Presidency, which may be taken to be governed by the Mayukha, are certainly

not many. But there is at least the case G, decided by the late Sudder Court of Madras, and there are the French cases, which ought not, their Lordships think, to be wholly disregarded as recognitions of the law prevailing in the south of India. They are to be relied on in this case as affording evidence of a long-continued series of opinions officially given and judicially received, which were adopted as the grounds of decision, showing a continued and recognized existence of a doctrine which suffices to remove from the opinions of the pundits in this case every suspicion of being opinions given to support the interests or judgments of others. Against these authorities the appellants have invoked that of the case in 2 Knapp, p. 203. But what was, in fact, decided by the very guarded judgment delivered by the late Lord Wensleydale in that case? It was that, according to the native text-writers—including probably Vasishta, certainly including the Dattaka Mimansa of Nanda Pandita—the authority of the husband was a requisite to a valid adoption; that the strictness of the law had been in many districts, and particularly in the Mahratta States, relaxed or modified by local usage, but that it had not been established to their Lordships' satisfaction that that relaxation had extended to the particular district of Etawah, in Upper India. Disclaiming, therefore, the intention to decide what was the law in other parts of India, their Lordships held that they could not say that the law in that district did not require the direction of the husband in order to the validity of an adoption, which it was necessary for them to do in order to reverse the judgment of the Court below. It is clear that that decision was not intended to govern, and cannot be taken to govern, a case arising in the south of India.

Upon the whole, then, their Lordships are of opinion that there is enough of positive authority to warrant the proposition that, according to the law prevalent in the Dravada country, and particularly in that part of it wherein this Ramnad zemindary is situate, a Hindoo widow, not having her husband's permission, may, if duly authorized by his kindred, adopt a son to him. And they think that that positive authority affords a foundation for the doctrine safer than any built upon speculations touching the natural development of the Hindoo law, or upon analogies, real or supposed, between adoptions according to the Dattaka form, and the obsolete practice with which that form of adoption co-existed, raising up issue to the deceased husband by carnal intercourse with the widow. It may be admitted that the arguments founded on this supposed analogy are in some measure confirmed by passages in several of the ancient treatises above referred to, and in particular by the Dattaka Mimansa of Vidya Narainsamy, the author of the Madhavyam; but as a ground for judicial decision, these speculations are inadmissible, though, as explanatory arguments to account for an actual practice, they may be deserving of attention.

It must, however, be admitted that the doctrine is stated in the old treatises, and even by Mr. Colebrooke, with a degree of vagueness that may occasion considerable difficulties and inconveniences in its practical application. The question who are the kinsmen whose assent will supply the want of positive authority from the deceased husband is the first to suggest itself. Where the husband's family is in the normal condition of a Hindoo family—*i. e.*, undivided—that question is of comparatively easy solution. In such a case the widow, under the law of all the Schools which admit this deputed power of adoption, takes no interest in her husband's share of the joint estate, except a right to maintenance. And though the father of the husband, if alive, might, as the head of the family and the natural guardian of the widow, be competent by his sole assent to authorize an adoption by her, yet, if there be no father, the consent of all the brothers, who, in default of adoption, would take the husband's share, would probably be required, since it would be unjust to allow the widow to defeat their interest by introducing a new co-parcener against their will. Where, however, as in the present case, the widow has taken by inheritance the separate estate of her husband, there is greater difficulty in laying down a rule. The power to adopt when not actually given by the husband can only be exercised when a foundation for it is laid in the otherwise neglected observance of religious duty, as understood by Hindoos. Their Lordships do not think there is any ground for saying that the consent of every kinsman, however remote, is essential. The assent of kinsmen seems to be required by reason of the presumed incapacity of women for independence, rather than the necessity of procuring the consent of all those whose possible and reversionary interest in the estate would be defeated by the adoption. In such a case, therefore, their Lordships think that the consent of the father-in-law, to whom the law points as the natural

guardian and "venerable protector" of the widow, would be sufficient. It is not easy to lay down an inflexible rule for the case in which no father-in-law is in existence. Every such case must depend upon the circumstances of the family. All that can be said is, that there should be such evidence of the assent of kinsmen as suffices to show that the act is done by the widow in the proper and *bonâ fide* performance of a religious duty, and neither capriciously nor from a corrupt motive. In this case no issue raises the question that the consents were purchased, and not *bonâ fide* obtained. The rights of an adopted son are not prejudiced by any unauthorized alienation by the widow which precedes the adoption which she makes; and though gifts improperly made to procure assent might be powerful evidence to show no adoption needed, they do not in themselves go to the root of the legality of an adoption.

Again, it appears to their Lordships that, inasmuch as the authorities in favour of the widow's power to adopt with the assent of her husband's kinsmen proceed in a great measure upon the assumption that his assent to this meritorious act is to be implied wherever he has not forbidden it, so the power cannot be inferred when a prohibition by the husband either has been directly expressed by him, or can be reasonably deduced from his disposition of his property, or the existence of a direct line competent to the full performance of religious duties, or from other circumstances of his family, which afford no plea for a supersession of heirs on the ground of religious obligation to adopt a son in order to complete or fulfil defective religious rites.

Their Lordships, having thus stated the conclusions to which they have come upon the general question of law involved in these appeals, will now consider whether the High Court of Madras has correctly applied that law to the facts of the present case.

They are of opinion that both the Courts below were right in holding that the collateral kinsmen of Ramasami were to be found in the Taver family, of which the printed pedigree forms part of the record. According to Hindoo law, Ramasami was the son, though by adoption, of Annasami; and he again was the son, though by adoption, of the first Ramasami, who was a Taver; and the heirs of Ramasami, in the absence of descendants, were traceable upwards through these two persons, as if they had been his natural father and grandfather. There is no ground for saying that this, the legal consequence of the successive adoptions, was effected by the assumption of the name of Satoopati, the family-name of the ancient zemindars of Ramnad and of Mangalaswari, the grantee of the zemindary. It is to be observed, however, that this line affords none but very remote kinsmen, if their relationship to Ramasami be calculated on the principle just stated. The nearest of them, Motoosamy, would on that principle stand in a degree of relationship to Ramasami, which, according to the rule of the Mitakshara (Chap. 2, Sec. 5, Art. 6), would exclude him from the category of sapindas, and place him in that of Samanodakas, or those connected only by a libation of water and a common family-name. He was, however, the natural brother of Annasami, and that circumstance might strengthen his title to be considered, in the absence of nearer connections, the natural male protector of Ramasami's widow. Again, the person who really filled the office of protector, and that by the express appointment of Ramasami, was, up to the time of her quarrel with her daughter-in-law, Mootoo Verayee. Nor is it by any means unusual in a Hindoo family to find the mother-in-law occupying a position of considerable power and importance. Moreover, she was unquestionably the heir to the property next in succession to Purvata, after failure of Ramasami's descendants. It, therefore, appears to their Lordships that, in this state of the family, the assent of Mootoo Verayee, of Mootoosamy, and of the other persons who are proved beyond all question to have assented, was sufficient to legitimate the adoption, even if the evidence has failed to prove the consent of the yet remoter kinsman Ramrajah Taver.

It has been argued, however, that, even if this adoption would have been regular had Ramasami died childless and intestate, his urzee relating to the management and descent of the zemindary contains an indication of his intention that his daughters and their descendants should be his successors and representatives, which ought to be taken to imply a virtual prohibition of the act of adoption by his widow. Their Lordships cannot accede to this argument. Ramasami, no doubt, intended to be represented by his daughter's line, should that line continue. But he made no express provision for its failure, and the same reasons which justify a presumption of authority to adopt in the absence of express permission are powerful to exclude a presumptive prohibition to adopt

on a new and unforeseen occasion the religious duty arises. His widow has not claimed a power to adopt. except on the happening of the contingency for which her husband omitted to provide. And her power so limited, not having been qualified by his disposition, must be determined by the general law.

Another argument for the appellants was founded on the attempted adoption of a son, Annasami, by Doraraja. That person is not a party to either of these suits; he has not impeached the adoption of the respondent Ramalinga; he has, on the contrary, supported it as a witness. Nothing decided by the decrees under appeal can prejudice his rights, if he has any, under an adoption which the Revenue Authorities at the date of it seem to have treated as illegal. Their Lordships have not before them the necessary materials for determining whether that adoption was, in fact, valid or invalid; or whether, if valid, it would have any, and what, effect on the title of the respondent Ramalinga. In that state of things neither of the present appellants can be allowed to insist on this supposed *jus tertii* as an objection to the decrees which they impeach.

Their Lordships have, therefore, come to the conclusion that these decrees and the judgment on which they proceed are substantially right in so far as they affirm, as between the parties to this litigation, the validity of the adoption by Purvata of the respondent Ramalinga.

They also think that there is no foundation for the other and minor objection taken by the Collector to the decree of the 18th of March 1861, on the ground that it asserts a power in Purvata to alienate or affect the zemindary beyond her life interest. Her power of alienation is expressly stated to be "subject to the provisions of Hindoo law;" and the only object of that part of the decree was to affirm her right to exercise that power within the limits prescribed by the Hindoo law, free from the control of the Government or its Revenue officers.

Their Lordships are further of opinion that there are no grounds for impeaching the decree of the 12th of April 1861, in so far as it found that the appellant Kunjara stood in the relation only of step-mother to Ramasami, and therefore could have no right to inherit his estate. They think that this conclusion is supported by the document No. 36, which expressly states that Ramasami was adopted by Annasami and Mootoo Verayee unanimously.

Upon the cross-appeal their Lordships have only to observe that the *quantum* of maintenance is a question with the Courts of India, having local knowledge, and being conversant with the habits of native families are peculiarly competent to deal; and that strong grounds should be shown to justify any interference by this Committee with their discretion in that matter. And their Lordships see no reason for questioning the soundness of the discretion exercised by the High Court of Madras in the present case.

Being, therefore, of opinion that the decrees under appeal are correct, and ought to be affirmed, their Lordships will humbly recommend to Her Majesty that the two appeals and the cross-appeal be each dismissed with costs.

The 20th December 1867.

Present:

Sir James W. Colvile, Sir Edward Vaughan Williams, Lord Justice Rolt, and Sir Lawrence Peel.

Alienation—Succession — Mahomedan law — Deed of gift—Act of State—Procedure.

On Appeal from the Judicial Commissioner of Oude.

Nawab Umjad Ally Khan

versus

Mohumdee Begum and another.

Where a Mahomedan transferred certain property (Company's paper) to his son, reserving the interest to himself for life, the object of the disposition being to give the son a larger share of the father's property than would come to him by succession *ab intestato:*

HELD that the transaction could not be impeached on moral grounds, as a design to alter the disposition of property so as to defeat a succession by an alienation which the law allows is simply a design to conform to the law while working out an unforbidden object.

HELD that the intention of the parties did not violate any provision of the Hedaya, and the transfer was complete and the gift valid.

To question an act of State, directly or indirectly in the contention, must be raised on a suit duly constituted, to which the Government must be made a party.

THIS is an appeal under an order made on a special application to Her Majesty, for leave to appeal against so much of the decree of Mr. George Campbell, made by him when Judicial Commissioner of Oude, as reverses or varies a decree of Mr. Fraser, the Civil

Judge of Lucknow, in favor of this appellant. The suit in which Mr. Fraser's decree was made was brought by the respondents Mohumdee Begum and Nawab Begum, as daughters and co-heirs of the deceased Nawab, against the appellant as the son and the administrator of his father's estate under Act XXVII. of 1860, against the widow of their father, and two sisters of plaintiffs, also co-heirs; and, lastly, against certain other persons described as nominal defendants whom it is unnecessary here to name or further to describe.

The suit was in the nature of an administration-suit; it sought a discovery of a portion of the assets alleged to be withheld, and an account and a division of the assets amongst the heirs according to the Mahomedan Law. The deceased and his family were Mahomedans, and followers of the "Sheah" School. The widow of the deceased instituted also a distinct and separate suit against the heirs, claiming her dower according to a settlement of it upon her by her husband, and claiming, in addition to it, a large sum of money by gift from her husband during his lifetime. Her share to one-eighth of the clear assets seems not to have been disputed. The appellant claimed a large portion of the property, consisting of promissory notes of the Government, commonly called Company's paper, amounting to 7,35,300 rupees, as his property by gift from his father in the lifetime of the latter, the validity of which gift was disputed by the respondents, the plaintiffs in the suit, as well as by the widow, a co-defendant.

Mr. Fraser's decree established this gift in favor of the appellant. The decree of Mr. Campbell reversed that portion of Mr. Fraser's decree, and declared the gift invalid according to Mahomedan Law. The appellant claimed also against the co-heirs, the immoveable property described in the suit. Of this a large portion was situate in Oude, and was claimed by him under a firman from the Government of India granting it to him exclusively as property which had been declared forfeited, and to be the property of the State by Lord Canning's proclamation on the suppression of the rebellion in Oude, and a small portion, being land situate in Furruckabad, was claimed by him under a certain instrument of conveyance from his father, termed a *solehnamah*. The property was adjudged to him by Mr. Fraser's decree. Mr. Campbell did not adjudicate upon that part of Mr. Fraser's decree relating to the above-mentioned immoveable property, otherwise than by declaring his intention to reserve the consideration of these issues to a further time, for the reason assigned in the concluding paragraph of his judgment. The appellant treats this reservation of judgment as a variation by Mr. Campbell of Mr. Fraser's decree, and makes the propriety of it a ground of appeal. The respondents, on the other hand, contend that, as a mere reservation of a judgment on appeal by the Appellate Court is neither a reversal nor a variation of a decree appealed against, the appellant is not entitled to insist on this part of Mr. Campbell's judgment as a grievance against which he has been permitted to appeal. The appeal is brought not as of right, but by special leave, and in the petition on which leave to appeal was granted, the appellant named only the two respondents who were plaintiffs in the suit, but the appellant has nevertheless now named all the parties interested in the general estate, including the widow, as respondents.

Application was made on the part of the widow of their Lordships, on the first day of their sittings, to dismiss or suspend the hearing of the appeal on the ground of irregularity. Her Counsel stated that the widow had not appealed against the decrees affecting her claims to the sum disallowed as a gift, being, on the whole, content to take her portion of the seven lakhs, which, by Mr. Campbell's decree, fell into the residuary estate; but that, if this appeal succeeded, she would be prejudiced thereby to so large an extent that she should then desire to appeal against the disallowance of a part of her claim by the decrees of the two Courts. Leave was given to her to appeal against that portion of the decrees, and she has been heard by her Counsel as a party-respondent on the present appeal. The decision of their Lordships on the present appeal will be without prejudice to her rights in her own appeal if preferred, as respects the claims disallowed her by those decrees; in other respects, it will conclude her rights, in the ordinary way, as a party-respondent to this appeal.

The matters to be determined on this appeal are three in number, and are, *first*, the validity of the gift to him of the Company's paper, amounting to 7,35,300 rupees; *secondly*, the appointment of a stranger to be and act as co-trustee with the appellant in the trust as to the family religious or charitable fund called *Ruddi Muzalim*, and the direction to settle a scheme for the administration of that fund; and, *thirdly*, the reser-

d

vation of his judgment, indefinitely, by the Judicial Commissioner on the right of the appellant, as declared by Mr. Fraser in his decree, in respect of the landed property adjudged to the appellant by that last-mentioned decision.

The first in order of these matters involves an important point of Mahomedan Law relating to gifts *inter vivos*.

If the gift be sustained as a valid gift *inter vivos*, it will be unnecessary to review the evidence as to the genuineness of certain documents propounded by the appellant, and said to constitute a valid testament by the Mahomedan Law, or to consider in any way the validity or effect of those documents.

The effect of the non-assent of co-heirs to a bequest to an heir by a Mahomedan of the *Sheah* sect becomes also immaterial as a subject of inquiry here, if the gift be valid as a gift *inter vivos*.

Before the validity of this gift as one *inter vivos* is determined, it must first be considered by their Lordships what the real nature of the transfer was. The legal title in the promissory notes was undoubtedly in the appellant in his father's lifetime, by virtue of an act of the father.

But though the transfer of a legal title will satisfy that provision of the Mahomedan Law which relates to the point of seisin, in its legal and technical sense, yet that alone will not suffice where no intention exists to transfer the beneficial ownership, either present or future. The facts relating to the gift have been most carefully investigated by Mr. Fraser, the Civil Judge. The Judicial Commissioner, paying a just tribute of commendation to Mr. Fraser on his accurate investigation of the facts, expresses no dissent from his conclusion as to them, but reverses his decision as to this gift as erroneous in point of law. Mr. Fraser's observations as to the mode of dealing amongst natives living amongst themselves as a family in a state of family-union, and dealing in this state with the proceeds of property standing in the names of separate members of the family, to whom it has been transferred by the parent and head of the family, and on the deference to his wishes and arrangements and acquiescence in them commonly exhibited, are forcible as arguments to exclude the notion of fraudulent concealment or design in a transfer circumstanced as the present. They strengthen the probability of an intended transfer of property in the lifetime of the donor, with a reservation of the use or proceeds of the money transferred during the lifetime of the donor only.

In consequence of the tendency amongst natives to disguise their ownership under *benamee* transfer of property, a natural suspicion arises often that such is the design when the transaction is really fair and open, and the apparent and real title are entirely consistent. The transaction questioned in this case, though between natives, differs in no respect as to the manner of dealing with the property in question (Company's paper in the hands of the Government Agent at Calcutta at the time of and after the gift), from the mode in which a European father and son, designing to make between themselves a similar disposition of the like property, giving the paper to the son with a reservation of the interest to the father for life, might have dealt with it so as completely to effectuate their intention. There is no evidence of any attempt or design to conceal from the Government Agent, or from others, the origin of the property, its source, transfer, or continuing state of enjoyment. Mr. Fraser accordingly, and very reasonably, negatives any fraud in the transaction as to these notes, and Mr. Campbell, though he treats the case as one undeserving of support in a Court of Justice, proceeds, not on actual fraud, but on his views of the policy of the law, and treats the transaction as fraudulent in contemplation of law, and done in evasion of its provisions, which limit the testamentary power of a Mahomedan, and aim in some degree at equality of division amongst the descendants *ab intestato*.

Everything which took place in respect of these notes at the Government Agent's office was perfectly consistent with the appellant's real title in them. It is true his case is stated higher in his pleadings than the real title warrants; but the case as stated includes the real title, and is only the common error which is so frequently observed in the cases of natives in India, where their legal advisers, from ignorance or foolish craft, mis-state a good case, and place it on false grounds. This was not an absolute personal transfer of the whole property including all future interest, beneficial as well as legal; nor was it a *benamee* transaction. A mere *benamee* or *ism furzee* title is simply a nominal title without interest. It may, or may not, be fraudulent in design. Such a disposition by a donor, where the transfer of

the property, from its very nature, effected a legal transfer of it, would be simply the creation of a trust in his favor, and would, of course, leave the disposition *ab intestato* undisturbed. But such was not the intention here, and such is not the nature of the disposition. The object of the disposition is correctly stated by Mr. Fraser to have been to give the son a larger share of the father's property than would come to him by succession *ab intestato*. Mr. Campbell, the Judicial Commissioner, treats that intention and act as evasive of the testamentary law of Mahomedans, and as inconsistent with their law of gifts. Upon the first ground of decision it is to be observed that, in the absence of immoral or illegal purposes accompanying and prompting an act of disposition of property, a disposition which the law admits cannot be evasive of the law. The law of succession *ab intestato* applies only to the assets which constitute the succession. If the law allow alienation so as to defeat a succession, the question whether a subject of property is an asset or not raises simply the question whether the transfer of it is legally complete. The design to alter, and so in one sense to defeat, the disposition of property, is simply a design to conform to the law, whilst working out an unforbidden design. The other view of the subject, that this is an incomplete gift by the Mahomedan Law, is one which presents more difficulty, and will be presently considered. On moral grounds the transaction cannot be impeached. It seems to have proceeded simply from the cause assigned for it in Mr. Fraser's judgment, *viz.*, a desire to maintain the dignity of the eldest branch of the family. Neither can the policy of the law be invoked, for the reasons above assigned that the policy of the law is to be collected from its whole body, and not from a detached portion of it; so that, if the law suffers a father by an act *inter vivos* to alter his succession, his exercise of that power cannot be deemed a fraud upon the law.

It remains to be considered whether a real transfer of property by a donor in his lifetime under the Mahomedan Law, preserving not the dominion over the *corpus* of the property, nor any share of dominion over the *corpus*, but simply stipulating for and obtaining a right to the recurring produce during his lifetime is an incomplete gift by the Mahomedan Law. The text of the *Hedaya* seems to include the very proposition, and to negative it. The thing to be returned is not identical, but something different. See "*Hedaya*," tft. "Gifts," Vol. III., book 30, page 294, where the objection being raised that a participation of property in the thing given invalidates a gift, the answer is: "The donor is subjected to a participation "in a thing which is not the subject of his "grant, namely, the use (of the whole in-"divisible article); for his gift related to the "substance of the article, not to the use of "it." Again, if the agreement for the reservation of the interest to the father for his life be treated as a repugnant condition, repugnant to the whole enjoyment by the donee, here the Mahomedan Law defeats, not the grant, but the condition. (See "*Hedaya*," Vol. III, p. 307.) But as this arrangement between the father and the son is founded on a valid consideration, the son's undertaking is valid, and could be enforced against him in the Courts of India as an agreement raising a trust, and constituting a valid obligation to make a return of the proceeds during the time stipulated. The intention of the parties, therefore, is not found to violate any provision of the Hedaya and the transfer is complete. The Mahomedan Law authority, whom Mr. Campbell consulted, supported it. His opinion is treated somewhat lightly as a nude opinion unsupported by authority; but it is to be observed that, unless some authority had been cited to show the transaction invalid, effect should have been given to the manifest intention of the parties.

The *second* matter of complaint is the appointment of a co-trustee. The ground taken on the argument of the incompatibility of such an application with the *status* and dignity of the appellant and with family usage seems to their Lordships to be displaced by one of the documents which the appellant propounded and used before the Court, which does associate a co trustee with him. As against the appellant the appointment of a co trustee will justly give effect to what he alleges to have been the intention of the founder of the trust. The discretion of the Judicial Commissioner as to the person appointed is a matter with which their Lordships are indisposed to interfere, and no sufficient reasons are advanced to control it in this instance. His direction as to a scheme for the administration of this trust seems to their Lordships reasonable.

The *third* point requires a more detailed statement of the grounds on which their Lordships think that the decision of Mr. Fraser may be affirmed here, rather than by

the Judicial Commissioner acting under their Lordships' expression of opinion. As it is clear that the appellant meant to include this part of the judgment in his appeal, any merely verbal insufficiency in his grounds of complaint, or of the order made thereon, might be removed by leave given to renew and extend the application to appeal, so as to cover and remove a mere technical defect. But as the intention is manifest, and the decree of Mr. Fraser, though untouched in terms, is, in effect, suspended by Mr. Campbell's judgment; upon a liberal construction of the language of the petition to appeal, this part of the judgment of Mr. Campbell may be considered as included within the term "varied." When the Appellate Court in India on appeal has omitted to decide a question raised by the appeal, their Lordships have remitted the case for decision to that tribunal, in all cases where they did not find clearly on the record before them materials for a final judgment doing complete justice between the parties. This case is not of that nature. Mr. Fraser forbore to question the appellant's title under the firman, because that firman could not be questioned in that Court. That Court itself existed under an exercise of powers of a similar character, and it did not think itself invested with a jurisdiction to question an act of State, under which the firman had its origin. The proclamation was necessarily impeached by impeaching the firman, and it was undoubtedly an act of State. Even if this act could be directly or indirectly questioned in a Municipal Court (on which we express no opinion), the contention must be raised on a suit duly constituted, to which the Government must be made a party. The forfeited estates were not an asset at the time of the Nawab's death, and could only be treated as such when the Government title was displaced. To remand the case for hearing to the Judicial Commissioner would be simply to involve the suitors in unnecessary expense and subject them to unnecessary delay, since it must be accompanied with a declaration that in that suit, between those parties, and on those pleadings, the legality of the title of the grantors of the firman could not be questioned.

The objection raised to the *solehnamah* by Mr. Bell (which it is necessary to notice only as respects the lands in Furruckabad) does not arise on the facts. The consideration, two rings, may be small and inadequate in the sense of purchase-money; but it cannot be treated as of no pecuniary value; and the record furnishes no grounds to justify a remand to the Judicial Commissioner on this comparatively trifling point.

Their Lordships think that a valid gift *inter vivos* as to the Company's paper was effected by the Nawab in his lifetime in favor of his son, the appellant, and therefore they deem it unnecessary to consider the question as to the genuineness of the document set forth as constituting his will, or to consider whether the non-assent of the heirs does or does not vitiate the will of a Mahomedan of the *Sheah* School in favor of an heir.

On the whole case, they will humbly advise Her Majesty to reverse the decision of the Judicial Commissioner of Oude, except as to the appointment of a co-trustee, and to affirm the decision of the Civil Judge, Mr. Fraser, with that variation.

As the contention in this appeal arises from the acts of the last owner, who has subjected his property by his mode of dealing with it to questions fairly raised, their Lordships think that the costs of the appeal of both parties should come out of the residuary estate. Their Lordships, therefore, direct that the costs of the appellant and the respondents be taxed by the Registrar as between solicitor and client, and likewise the costs of Iftakaroonissa Begum Afzal Muhul, with reference to this appeal.

The 29th June 1868.

Present:

The Master of the Rolls, Sir James W. Colvile, Sir Edward Vaughan Williams, the Lord Chief Baron, and Sir Lawrence Peel.

Deposit of money into Court under protest—Voluntary payment.

*On Appeal from the High Court at Calcutta.**

Fatima Khatoon and another

versus

Mahomed Jan Chowdhry and others.

Where money was deposited in Court by a judgment-debtor under protest, for the purpose of preventing an injurious sale, and the depositor, declaring his intention to bring a regular suit to set aside the summary order rejecting his claim, prayed that the sum might be paid to the decree-holder and the sale stayed, the payment was held not to be a voluntary payment.

* Regular Appeal No. 291 of 1863, decided 10th July 1863 by Raikes and Seton-Karr, JJ. (Not published.)

This case, when divested of all that which is not material to the question before this Board, may be stated as follows: The appellants, two sisters, who had married individuals of the same family, became entitled, under what we should in this country call a marriage settlement, to dower in the form of a charge on an estate or property which had belonged to a person of the name of Nyum Chowdry. He having died in debt, his heirs or representatives were sued by various persons, and among others by the respondents, or those whom the respondents now represent, to recover some very considerable debts alleged to have been due by him; in which suit they obtained judgment. Under that judgment certain other properties were attached and sold, and the judgment was in part satisfied. If it were necessary to look into the particulars of these numerous and somewhat complicated proceedings, it would probably appear (and that alone would be a ground upon which these respondents must be held disentitled to retain the money they have received that this judgment was in effect satisfied that all that the decrees of the Court had entitled the respondents to take out of the different properties in question had been paid and satisfied in one way or another, and were received by them so as to disentitle them to institute or to continue any further proceedings against these properties in respect of the claim now in question. However, they did in fact obtain an authority, under one of the many proceedings that have taken place, to sell the estate or property upon which this dower of the appellants was charged.

In order to prevent that sale, which would have been mischievous and prejudicial in the highest degree to the rights of the new appellants, they upon a proceeding which they instituted, and under the authority of the Court, not voluntarily, but under protest, and because they were compelled to take that step in order to prevent the sale of the property, paid the sum of between 59,000 and 60,000 rupees into Court; and it appears that that payment into Court having taken place in order to prevent a sale of the property, under which the rights of all parties, and, among others, of these appellants, were expressly reserved, the question arose, and arose in rather a singular form, whether the money should remain in Court, or whether it might not be paid over to the new respondents. Undoubtedly the Counsel for the person who represented the new appellants consented at once that the money should be paid over to them.

The money that had been paid into Court, not voluntarily, but under this species of compulsion, and for the purpose of preventing this injurious sale of the property, was paid over accordingly; the only voluntary act which was done being the consent given by the appellants that the money, instead of remaining in Court, should in the meantime, and until the right of the parties could be settled by the final decree of the Court, be paid over to the respondents. Afterwards, when all these circumstances came before the Zillah Court, and all the questions were raised which either party thought fit to raise, or had the power to raise, on the then state of the suits, the appellants obtained a decree in their favor against the respondents of the date of the 8th of June 1862, for the sum of 59,281 rupees and a fraction, being the amount paid to them out of Court as before mentioned.

Against this decree an appeal was lodged, which was carried before the High Court of Judicature at Fort William in Bengal. The High Court having heard the parties by their Counsel or Advocates, and having considered the whole case, did not in any way enter into the merits of the case itself or of the decision of the Court below, at least upon the grounds upon which the case had been decided, but took the point for themselves, that by the law this payment to the respondents of the money of the appellants, under the circumstances in which it was made, constituted a voluntary payment with the full knowledge of the facts, and therefore that the money could not be recovered back. If it had been such a payment, no doubt such is the law; but when we look at the circumstances as they appear, we find, in the first place, it was not a payment at all. It was originally a mere deposit in Court of the full amount recoverable by the decree-holder. It was deposited under protest, for the purpose of preventing an injurious sale of the whole property. Then it appears that upon the reading of the petition, the pleader for the petitioners was asked whether his client had any objection to the payment to the decree-holder of the amount which had been so deposited; and the answer was: "I will "bring a regular suit for setting aside the "summary order rejecting the claim, but "the sale cannot be stayed unless the "amount recoverable by the decree-holder "is deposited: I therefore deposit the

"amount for the purpose of its being paid "to the decree-holder, and pray that the "said sum be paid to the decree-holder, and "the sale be stayed."

Those were the circumstances under which the money was paid, the payment being clearly no voluntary payment; and the suit having been determined on its merits in favor of the appellants, they are clearly entitled to recover this money back again. Therefore, the order that we shall advise Her Majesty to make is, that the decree of the High Court of Judicature, reversing the decree of the Zillah Court, be reversed, and that the decree of the Zillah Court be confirmed; and that the appellants be held entitled to recover 59,821 rupees and a fraction, as decreed by the judgment of the 8th of June 1860. It is satisfactory to feel, as their Lordships have not entered into the merits of the case on the many points argued in the Zillah Court and in the High Court, that substantial justice is done by the order which they will now advise Her Majesty to pronounce; for it is perfectly clear, on the one hand, that the respondents had no right to this money out of that estate at all, they having been satisfied to the extent that the former decrees of any Court or Courts entitled them to recover out of that property; and, on the other hand, it appears perfectly clear that the appellants paid this money merely for the purpose of preventing a sale of the property, so that they are, in justice as well as in law, entitled to recover. The appellants must also be held entitled to the costs of the appeal and of the reversal of the order, and to the usual interest, at the current Court rate, upon the sum to which they are so entitled.

The 17th July 1868.

Present:

The Master of the Rolls, Sir James W. Colvile, Sir Edward Vaughan Williams, the Lord Chief Baron, and Sir Lawrence Peel.

Hindoo law—Mitakshara—Viramitrodaya—Bandhus—Father's maternal uncle—King.

*On Appeal from the High Court at Calcutta.**

Gridhari Lall Roy

versus

The Government of Bengal.

* 30th August 1865 (Present: Trevor, Officiating Chief Justice, and Campbell, J.)—See 4 W. R., Civil Rulings, p. 13.

HELD that the list of bandhus given in Article 1, Section 6, Chapter 2 of the Mitakshara, is not exhaustive, but simply illustrative of the proposition that there are three classes of bandhus, and that a person's father's maternal uncle is a bandhu, and as such entitled to inherit in preference to the king, who cannot take to the prejudice of a maternal uncle or a maternal grand-uncle.

The Viramitrodaya is properly receivable as an exposition of what may have been left doubtful by the Mitakshara, and is declaratory of the law of the Benares School.

THE facts on which the determination of this appeal depends are few and undisputed. Woopendro Chunder Roy, the owner of the zemindary and other property in dispute, died on the 7th of August 1860, an infant and unmarried. He was of a family which had formerly come from the Upper Provinces, and, though settled in Lower Bengal, where the zemindary is situated, is admitted to have retained the ceremonial and other law of its original *habitat*. There is, therefore, no dispute that any question touching the succession to Woopendro Roy is determinable by the law of inheritance current at Benares.

On Woopendro's death, the appellant, as the nearest male relative surviving him, performed his shradh, claimed his property as heir, and shortly afterwards applied to have his own name substituted for that of the deceased as owner of the zemindary on the Collector's register. He is, however, but a remote kinsman of the deceased, being only the brother of his grandmother *ex parte paternâ*, or, to use the phraseology of the Mitakshara, his father's maternal uncle. And, accordingly, at the time of this application for mutation of names, some question, whether the appellant was entitled to inherit, and whether the property did not pass for want of heirs to the Crown, was raised. Thereupon the Board of Revenue consulted their adviser, the Legal Remembrancer, and on his opinion, fortified by that of a Pundit which he had procured through the Registrar of the High Court, determined to recognize the title of the appellant, who accordingly was put into possession, or left in possession of the property, recorded as proprietor of the zemindary in the Collector's books, and continued to pay the Government revenue assessed upon it up to the date of the institution of this suit.

In 1863, the Government authorities appear to have changed, for reasons which have not been explained, their view of the appellant's title; and on the 3rd of August in that year, the suit out of which this appeal has arisen was commenced against him in the name of the Government of Bengal, as representing the Crown, for the recovery of

the real and personal property of Woopendro, on the allegation that, upon his death, it had escheated for want of heirs to the Crown.

By a decree, dated the 30th of September 1864, the Zillah Judge dismissed the suit, holding that the Government was not entitled to oust the appellant. The precise grounds of his judgment it is unnecessary to examine.

On appeal to the High Court, this decision was reversed by two of the Judges of that Court, and the present appeal has been preferred against their decree.

The points ruled by the judgment of the High Court were:—

1st.—That the Government was not estopped by the acts of its officers in 1861, when the appellant applied for and obtained the mutation of names, from bringing this suit.

2nd.—That upon the true construction of the Section in the Mitakshara, which will be hereafter considered, the appellant, as the maternal uncle of the father of the deceased, was excluded from the class of "bandhus" capable of inheriting; and that, consequently, as between him and the Government, he had no title to the property sued for.

Upon these findings, the Court decreed that Government should obtain possession of all the real property admittedly in the appellant's possession, with a certain specified exception, but that, for want of proof as to its value, their claim to the moveable property should be dismissed; and the judgment then proceeded as follows:—

"This decree of Government against "Gridhari is final, but it does not become "absolute until the claim of Sohun Lall "and Mohun Lall, who represent themselves "to be maternal grandmother's sister's sons, "and that of Harro Bhoja Misser, the spiri-"tual preceptor of the deceased, have been "inquired into.

"The last-named person has filed no "evidence, but his claim cannot be determined "until that of Sohun Lall and Mohun Lall "has been set at rest, and they have filed "no evidence at all. They, as well as the "Acharjee or spiritual preceptor, do not "oppose the defendant Gridhari's claim, but "only prefer a claim in case he is declared "to be invalid; and if they prove themselves "to be what they allege they are, they are "undoubtedly entitled to succeed as enumer-"ated bandhus.

"The case must, therefore, be remitted to "the Judge, with instructions that he will "without delay take up the case, and call on "these parties, and any others who may "appear to claim the property of the deceased "minor, within a reasonable time, to file "their evidence. He will then examine it "thoroughly, and, guided by his estimate of "it, and by Hindoo Law, he will either con-"firm the present order in favor of Govern-"ment as against them also, or pass in their "favor whatever decree the law of the case "seems to require."

The able arguments before this Committee have been principally addressed to the question raised by the second of the above findings, *viz.*, whether, under the law current at Benares, the appellant has not a title to inherit the property preferable to the claim of the Government by escheat; and that question their Lordships will first consider.

Its determination will ultimately be found to depend on the construction to be given to the first article of the sixth Section of the second Chapter of the Mitakshara. The absolute exclusion of the father's maternal uncle from the list of possible heirs, for which the respondents contend, can rest on no other ground.

Mr. Forsyth, indeed, argued strongly against the right of the appellant to inherit, on the assumption that he was not entitled to offer the funeral oblations. But is this assumption well founded? There is evidence of the family priest and others that the appellant did, in point of fact, perform the *shradh* of Woopendro; and he seems, in the judgment of the priest, properly to have performed that function in the absence of any nearer kinsman. It is, however, unnecessary to determine whether this act of the appellant was regular or not. The issue in this case is not between two competing kinsmen, but between a kinsman of the deceased and the Crown. Let it be supposed, for the sake of argument, that the nearest existing relative of Woopendro at the time of his death had been, not the appellant, but a natural-born son of the appellant. It is admitted that, on the strictest interpretation of the Mitakshara, such a person is a bandhu; that the three classes of bandhus must be exhausted before the king can take for want of heirs; and therefore that the title of the appellant's son would prevail against the Crown. Now, such a bandhu either is competent to perform the *shradh* of the deceased, offering some kind of funeral oblation, or he is not. If he be incompetent, it follows that his right to inherit is wholly independent of the doctrine of spiritual benefits derivable from funeral oblations, and is determined solely by kins-

manship. If he be competent, it follows *à fortiori* that his father, who would have been one degree nearer akin to the deceased, would also have been competent; and that *his* exclusion from the line of inheritance, if it exists, depends upon some other principle.

It is impossible to read the second Chapter of the Mitakshara without remarking the extreme jealousy with which the Hindoo law regarded the right of the king to take on a failure of heirs. The 7th Section refuses altogether to recognize that right where the property was that of a Brahman. Admitting it as to the property of the other castes or classes, it expressly says, "*if there be no relations* of the deceased, the preceptor, or, on failure of him, the pupil;" and again, "if there be no pupil, the fellow-student is the successor." It thus exhausts the relatives, and then interposes between them and the king three classes of heirs not connected with the deceased by blood, or participation in funeral oblations. The title of the king is afterwards stated affirmatively, thus: "The king may take the estate of a *K'shatriya* or other person of an inferior tribe, on failure of heirs down to the fellow-student." So Menu ordains: "But the wealth of the other classes on failure of all (heirs), the king may take." So far, then, the law would seem to be clear that the king cannot take the property to the prejudice either of a maternal uncle, or a maternal grand-uncle, each of whom is obviously "a relation" of the deceased. What grounds, then, does the sixth Section afford for the hypothesis that these two relations are arbitrarily excluded from the list of possible heirs? That Section begins by stating broadly: "On failure of Gentiles, the bandhus (rendered by Mr. Colebrooke 'cognates') are heirs." Much has been said about this word "bandhu." It seems (*see* note at p. 350 of Mr. Colebrooke's translation of the Mitakshara) to be sometimes used as equivalent to "kinsmen" generally. But in this particular Section it may be taken, as defined elsewhere by the Mitakshara itself, to import kinsmen springing from a different family (and therefore opposed to "*gotraja*" or "gentiles"), and connected by funeral oblations. From this class the maternal uncle, or the father's maternal uncle (assuming their connection with the deceased by funeral oblations), can be excluded only by some arbitrary definition. Such a definition, the respondents contend, is found in the passage which immediately follows the last citation from the Mitakshara. But is that necessarily so? The author of that treatise goes on to state: "Cognates (bandhu) are of three kinds; related to the person himself, to his father, or to his mother, as is declared by the following text." And then follows, as a quotation, a more ancient text (the authorship of which seems, from Mr. Colebrooke's note, to be uncertain), which says: "The sons of his own father's sister, the sons of his own mother's sister, and the sons of his own maternal uncle, must be considered as his own cognate kindred. The sons of his father's paternal aunt, the sons of his father's maternal aunt, and the sons of his father's maternal uncle, must be deemed his father's cognate kindred. The sons of his mother's paternal aunt, the sons of his mother's maternal aunt, and the sons of his mother's maternal uncle, must be reckoned amongst his mother's cognate kindred."

This sub-division of bandhus into three classes is possibly a consequence of that part of the definition already referred to, which treats them as kinsmen connected by funeral oblations. It may be that the bandhus of the parent, though connected with him by funeral oblations, would, by reason of remoteness of kinsmanship, not be so connected with the son.

If, for the determination of the question under consideration, their Lordships were confined to the four corners of the Mitakshara, they would feel great difficulty in inferring, from the omission of "the maternal uncle" and "the father's maternal uncle" from the persons enumerated in this text, that either of those relatives is incapable of taking by inheritance the property of a deceased Hindoo in preference of the king. Such an inference, in the teeth of the passages which say that the king can take only if there be no relatives of the deceased, seems to be violent and unsound. For the text does not purport to be an exhaustive enumeration of all bandhus who are capable of inheriting, nor is it cited as such or for that purpose, by the author of the Mitakshara—it is used simply as a proof or illustration of his proposition that there are three kinds or classes of bandhus; and all that he states further upon it is the order in which the three classes take, *viz.*, that the band'hus of the deceased himself must be exhausted before any of his father's Bandhus can take, and so on.

Again, further doubt is thrown upon the theory of exhaustive enumeration by the passage of the Mitakshara, which is not found in that portion of the treatise which was translated by Mr. Colebrooke, but has been translated for the purposes of this suit, and

is stated at page 97 of the record. The general effect of that passage is to introduce, in the case of a trader dying abroad, a new class of remote heirs, *viz.*, his returning co-traders. But this provision is preceded by an enumeration of preferable heirs, which includes among bandhus the maternal uncle. Here, then, is a passage, written by the author of the Mitakshara himself, which treats the maternal uncle as capable of inheriting. The learned Judges of the Court below meet this authority by suggesting that the heirship of the maternal uncle, as well as that of the co-trader, may be exceptional, and confined to the case of the trader dying abroad. Their Lordships, however, cannot admit the reasonableness of this hypothesis, and think that even on the Mitakshara the question under consideration is at least uncertain. That question, however, is not to be governed by the Mitakshara alone. Adhering to the principles which this Board lately laid down in the Ramnad case,* their Lordships have no doubt that the Viramitrodaya, which by Mr. Colebrooke and others is stated to be a treatise of high authority at Benares, is properly receivable as an exposition of what may have been left doubtful by the Mitakshara, and declaratory of the law of the Benares School.

The passage cited from that commentary at p. 15 of the record, and more fully in 9 Sevestre's Reports of cases in the High Court, p. 552,† is explicit. After stating that the term "*sakulya*" or distant kinsman, found in the text of Menu, comprehends the three kinds of cognates, the commentator goes on to say: "The term cognates (bandhus) in the text of *Jogishwara* must comprehend also the maternal uncles and the rest, otherwise the maternal uncles and the rest would be omitted, and their sons would be entitled to inherit, and not they themselves, though nearer in the degree of affinity, a doctrine highly objectionable." The passage, as translated at p. 15 of the Record, has "*then* they themselves" in place of "*not* they themselves." If this be the correct reading, it would follow that, even if the exclusion of the maternal uncle and others not mentioned in the text relied upon by the respondents from the list of bandhus were established, they would still, as relations, be heirs whose title would be preferable to that of the king. But the passage on either view of it declares that they are not so excluded; and it is, therefore, unnecessary to consider whether the title of any remote relation who could not be brought within the category of bandhus, or other class of heirs specified by the Mitakshara, would prevail against that of the Crown. The learned Counsel for the respondents remarked that this passage of the '*Viramitrodaya*' goes no further than to affirm the right of a maternal uncle, and that it says nothing of a maternal grand-uncle. But to say nothing of the use of the term "and the rest," the text is at least an authority for the proposition that a maternal uncle is a bandhu. The maternal uncle of the father is, therefore, a bandhu of the father, and it is admitted that, failing the bandhus of the deceased, the bandhus of the father are entitled to inherit.

This view of the law is confirmed by the majority of the consulted Pundits. It seems also to make the law of the Benares School consistent on the point in question with that of Bengal; and the concurrence of opinions of Mitra-misra, the author of the '*Viramitrodaya*,' with Jimuta Vahana, the author of the '*Dayabhaga*,' is not unimportant, since they are stated by Mr. Colebrooke (Preface, p. VIII.) to differ on almost every disputed point of Hindoo law.

Their Lordships do not think it necessary to consider at any length the decided cases which are cited in the judgment under review. It is admitted that there is no case precisely in point; and the authority of those cited, in so far as they go to support the theory that the enumeration of bandhu in the text quoted in the Mitakshara is to be taken as exhaustive, has been shaken, if not altogether overruled, by the decision which, we are informed, has been recently passed by the High Court of Bengal in the case of *Amrito Kumari* versus *Luckynarain Chuckerbutty*. The question under consideration must, therefore, be held to be an open one even in the Courts of India.

Their Lordships, then, have come to the conclusion that, according to the law by which this case is to be governed, the appellant was capable of inheriting the property in dispute, and that his title thereto is preferable to that of the Crown; and therefore, without adopting the reasons given for his judgment, they think that the Zillah Judge did right in dismissing the suit. This con

* See *ante*, Privy Council, p. 17.

† Case of Amrito Kumari *versus* Luckynarain Chuckerbutty, cited lower down in this judgment. This case was referred to the Full Bench and has been argued. The judgment of the Full Bench is expected to be soon delivered.

clusion necessarily disposes of this appeal. Their Lordships, however, deem it right to add that, even had they agreed with the learned Judges of the High Court in their view of the Law of Inheritance, they could not have concurred in the decree under appeal. Their Lordships do not impugn the correctness of the conclusion to which both the Courts below came on the question whether the proceedings in 1861 estopped the Government from bringing the suit. But the effect of these proceedings was to determine, if it were previously doubtful, the fact of possession. The respondents, therefore, were in the position of plaintiffs in an ordinary suit in the nature of an ejectment. They could only recover by the strength of their own title. Accordingly, it lay upon them to prove, at least *primâ facie*, that Woopendro died without heirs; and, on the other hand, the appellant was entitled to defend his possession, not only by proof of his own title, but by setting up any *jus tertii* that might exist. By an alternative plea he did set up such a bar to the respondents' suit; and the title of those persons who, he says, are, failing himself, the heirs to Woopendro, has never yet been determined. The decree under appeal would remit the cause to the Judge in order to allow those persons, who, according to the practice in India, have intervened as objectors, to litigate their title with Government, casting apparently the burden of proof on them. But it seems to deprive the appellant of his right to defend his possession on the ground of an existing *jus tertii*.

It is unnecessary, however, to say more on this point, since the conclusion to which their Lordships have come on the appellant's own title obliges them humbly to recommend to Her Majesty that the decree of the High Court be reversed, and that in lieu thereof it be ordered that the appeal to the High Court from the decree of the Zillah Judge be dismissed with costs The respondents must pay the costs of this appeal.

The 2nd July 1868.

Present:

Sir James W. Colvile, Lord Justice Wood, Lord Justice Selwyn, and Sir Lawrence Peel.

Custom—Succession.

*On Appeal from the High Court at Calcutta.**

Soorendronath Roy

versus

Mussamut Heeroomonee Burmonee and others.

The prevalence in any part of India of a special course of descent in a family, differing from the ordinary course of descent in that place of the property of people of that class or race, stands on the footing of usage or custom of the family; and the custom is capable of attaching and of being destroyed equally, whether the property be ancestral or self-acquired.

THIS is an appeal from a decision of the High Court at Calcutta which reversed the decree of the Judge of the Zillah Court of Nuddea, dismissing the plaintiffs' (the respondents') suit with costs.

The suit, which is to determine the right of succession between the representatives of each of two joint owners, Paresnauth and Batooknauth, Hindoos, to the succession of one of them, Batooknauth, was brought to recover a moiety of a family-estate consisting of landed and of moveable property which had belonged to one Khoderam Roy, the grandfather of both Paresnauth and Batooknauth. The property of Khoderam descended from him, by inheritance, to his two surviving grandsons, Paresnauth and Batooknauth, the sons respectively of his two sons, Jai Singh Roy and Prag Singh Roy, who had pre-deceased their father. These grandsons, who were first cousins, formed a joint undivided Hindoo family, joint in food, worship, and estate. During their joint lives they resided continually together.

Paresnauth was the manager. He survived Batooknauth about two-and-a-half years. Batooknauth left no children. The plaintiff was his childless widow. She was very young at the time of her husband's death; certainly under fourteen years of age, and perhaps younger. She had, however, near relations, members of her own family, competent to the protection of her rights, her father and two other persons; and the sister of Batooknauth had a son, a minor, in the line of succession to his deceased uncle un-

* Regular Appeal case, No. 24 of 1860, decided 12th September 1862 (Present: Trevor, Seton-Karr, and L. S. Jackson, JJ.)—See I Hay's Reports, p. 292.

der the law of Bengal, and whose father was competent to the protection of his rights also. The widow, if entitled, might have been placed under the protection of the Court of Wards in the case of any probable invasion of her rights.

Paresnauth, on the 18th Bysack 1260, that is, thirteen days after the death of Batooknauth, which took place on the 5th Bysack 1260, corresponding to the 16th April 1853, propounded and proved before the Civil Court of Nuddea, under Act XX. of 1841, an alleged will of Batooknauth, the cancellation of which instrument is also sought by the plaintiff's suit. By this will, which bore date the 2nd Bysack 1260, three days before his death, the whole of Batooknauth's property was given to Paresnauth. It contained a provision for maintenance of the widow; but in case of her quitting the family, 25 rupees per month only were to be allowed her for her maintenance. The usual notifications were issued by the Court; no person appeared to oppose, witnesses were examined, the will was proved, and the ordinary certificate obtained, and under that title Paresnauth enjoyed the property unopposed and undisturbed during the remainder of his life, a period of about two-and-a-half years. The will was not registered, but two days only elapsed between the date of it and the death.

Paresnauth left a will, or testamentary trust-deed, by which he appointed his mother and wife, guardians of his infant son. It contained a provision for adoption by his widow, in case the infant died, and some directions as to religious rites and usages.

Shortly after Paresnauth's death, the widow of Batooknauth asserted her title to a moiety of the property jointly owned and enjoyed by her husband and Paresnauth. Upon her application to the proper authorities to be admitted to her share, she was, in consequence of the certificate before mentioned having been obtained and being in force, directed or advised to proceed by regular suit, and she instituted the suit accordingly out of which this appeal arises. She was the sole plaintiff, and the defendants were the mother and widow of Paresnauth, as trustees and guardians of the infant son of Paresnauth, who was also named a party. The suit proceeded in that form until the son attained majority, when he applied for leave, and was permitted to defend in his own person without guardians. He is the appellant in this appeal. The property being situate wholly in Bengal, and the family having been long resident there, the plaintiff was certainly entitled to rely on her *primâ-facie* title as heiress under the general Hindoo law as administered in that part of India.

It was incumbent on the defendants to allege and prove a title displacing this *primâ-facie* title. They accordingly pleaded their title, which embraced two separate answers of the plaintiff's title. They alleged that the title to the property was, by reason of the retention by their family of its ancient law, that of the Mitakshara, to be governed by that authority, under which Paresnauth, and not the widow, was heir to Batooknauth; and, besides this, they alleged that Batooknauth had bequeathed his whole property to Paresnauth. If this last title prevail, it displaces equally a descent *ab intestato* under either system of law, *viz.*, that of the Mitakshara or that of the Dayabhaga.

Some doubt was raised by Mr. Cave in his argument of this case as to the original acquisition of this property, whether the whole was acquired by Khoderam, as a large part certainly was, or whether a part was not ancestral property which had descended to him. It is not necessary to inquire into this subject, because the prevalence in any part of India of a special course of descent in a family, differing from the ordinary course of descent in that place of the property of people of that class or race, stands on the footing of usage or custom of the family. It must have had a legal origin and have continuance (*see* Abraham *vs.* Abraham, * 9 Moore's Privy Council Cases, Indian, pp. 242 and 243); and whether the property be ancestral or self-acquired, the custom is capable of attaching and of being destroyed, equally as to both. A legal foundation for this family-usage was laid sufficiently by the evidence. The family came into Bengal from a distant part of India where the Mitakshara prevails. The High Court did not decide more on this issue than that the family had adopted the law of Bengal for some generations; that is consistent with a discontinuance of a former usage. It appears further from the evidence of the Purohit that his was an hereditary office, as it very frequently is, and that his ancestors, officers of the priesthood and of the family, had followed the Mitakshara constantly.

* *See* 1 W. R., Pri. Coun., p. 1.

On the evidence, it seems clear that the family came attended by priests of their own persuasion; and since Orientals are commonly tenacious of their usages and customs, and more especially of their family and religious observances, therefore, on the ordinary principles of viewing evidence, a continuance of this state of things is presumable, and the *onus* would then lie on the party alleging an interruption or cessation of it to prove such allegation. In this case, therefore, the *onus* of proving such a cessation seems to have been properly declared by the High Court as incumbent on the plaintiff, in consequence of the admissions in the pleadings.

The plaintiff originally advanced a title which she did not maintain throughout her suit. She alleged originally that her husband had given her authority to adopt a son, and had constituted her heiress *ad interim* by a written instrument, of which she alleged the spoliation and destruction by Paresnauth. Such an authority is one not unlikely to be conferred. The will of Paresnauth himself evidences the strong desire of a Hindoo to be succeeded by a son. Why the allegation, if untrue, was made, or why, if true, it was abandoned, it is difficult to say. It is the great misfortune of Hindoo litigants that their cases often fall, in the earlier stages of litigation, into the hands of incompetent advisers, who, by the mixture of falsehood with truth, or by the suppression or abandonment of part of a true case from some mistaken views of policy or difficulty, create often impediments to its success from which the true story, if revealed, would have been free. If, for instance, it should seem expedient to exaggerate the illness, weakness, or incapacity of an alleged testator, and to tutor witnesses to such proof, it may be thought politic to drop that part of a case which necessarily supposes during the same interval a disposing capacity in the testator; and in Indian cases it is scarcely safe or just to make against the suitor himself the ordinary presumptions from the conduct of a suit which would be made in our own Courts under the like circumstances.

It has, therefore, been very properly urged in the able arguments on behalf of the plaintiff that her youth, ignorance, sex, and dependent state must all be weighed and have due importance given to them when her supposed acquiescence in the title of Paresnauth is urged against her. As respects herself personally, the force of these arguments may be admitted so far as they regard acquiescence alone; but her ignorance of Paresnauth's proceedings and claim to the whole succession, which she alleges, cannot so readily be conceded, and the weight of presumptive proof arising from the conduct both of herself and of other persons competent to the protection of her interests, cannot be excluded from the consideration of their Lordships when deciding whether such ignorance is established in any of them.

The plaintiff denied in her replication each title pleaded by the defendants. The will she alleged to be a forgery, and insisted that the Dayabhaga was the authority to be applied to the question of her title to the succession.

The issues of fact comprise these two points, the only ones before their Lordships on appeal:—

1st.—Whether Batooknauth executed a will, dated 2nd Bysack 1260, in favor of Paresnauth, or not.

2ndly.—Whether the question of inheritance in this suit is determinable by the Shastras of Bengal or of the Western Provinces.

The Judge of the Court at Nuddea found the first issue, that on the will, in favor of the defendants. He expressed no opinion on the second, which, in consequence of his finding on the first, he judged to be then an immaterial issue. On appeal to the High Court, that Court consisting of three Judges, Mr. Trevor, Mr. Seton-Karr, and Mr. Jackson, found unanimously the issue in favor of the plaintiff, the now respondent, and reversed the decree of the Civil Court.

In the view which that Court of appeal took, it was necessary to decide both issues, for a decision on the will alone, unless it had established the will, would not have decided the case. In the view taken of the will in the Civil Court of Nuddea, the contention as to which law, whether the Mitakshara or the Dayabhaga, should prevail was a needless one, except as it tended to disprove the will by showing it to be an inofficious disposition.

If, however, the evidence afford ground enough for believing that the ancient family-usage, whether legally obsolete or not, might yet be operative enough in the mind of a male member of his family to lead him to prefer the sole ownership of a male, his conjoint owner and co-heir, with whom he had been associated in the enjoyment and with whom the entire management had been, to what he might consider the risk of female ownership, then no sound argument derived

from the mere presumed inofficiousness of the disposition according to the general law could be used to weaken adequate evidence as to the *factum* of the will. In the opinion of their Lordships, it would be a rash conclusion, on the state of the evidence in this cause, to suppose that a preference of the law of Bengal was likely to be operative in the mind of the testator; and without a belief in the probable existence of such a preference, where is the foundation for treating the will as inofficious?

It is not necessary for their Lordships to decide the second issue in the view which they take of this case, which is substantially the same as that taken by the Civil Court of Nuddea. It is, however, necessary for them to review the evidence on this issue, to some extent, in order to support the opinion already expressed by their Lordships as to the probability of a continuing attachment by the testator Batooknauth to his original family-usages.

From the admissions in the pleading referred to by the High Court in their judgment, and from the evidence, it may be safely concluded that this family came from a part of India where the Mitakshara was and is the prevailing authority; that it came not unattended by ministers of religion; and that it originally continued in Bengal its ancient law. As at the time of that migration the Mahomedan was the governing power, and as the Hindoos were rather connived at than sanctioned by the governing power in the exercise of their religion, their law was in the nature of a personal usage or custom, and it is probable that migratory families or tribes amongst Hindoos would retain their own usages.

There seems to be no reasonable ground for doubting that the office of priest was hereditary, and derived to the existing family-priest by successors in the mode stated by the Purohit, whose evidence was rather laid aside by the High Court, on the ground that he might be swayed by interest, than rejected by it as untrustworthy. An adherence to family usages is a strong Oriental habit; it is in most places not a weak one, and since, generally, the love of them increases with their long prevalence, it requires no effort to believe that the retention of religious usages and customs spoken of by the defendant's witnesses did prevail in that particular branch of the family, to which point, indeed, the Purohit's evidence in a most important particular—that of the performance of the Shrad of Batooknauth—is clear and direct, and on that point not contradicted by proof, for though the plaintiff alleges, she does not prove, that she performed her husband's Shrad.

This, indeed, is not decisive of the question as to the devolution of property in the family by right of succession, since a family might retain its religious rites, and yet acquiesce in a devolution of property in the common course of descent of property in that district amongst persons of the same race. But still there is in the Hindoo law so close a connection between their religion and their succession to property, that the preferable right to perform the Shrad is commonly viewed as governing also the question of the preferable right to succession of property: and, as a general rule, they would be expected to be found in union. Now, it is proved by the Purohit, the proper witness to be adduced for the purpose, that Paresnauth performed the Shrad of Batooknauth, and that proof is not opposed by counter-proof. It is a fact which, unexplained, bears strongly on the question of the right to the succession being under the Mitakshara. The High Court considered the evidence to be nearly balanced, so far as the evidence, exclusive of the judicial proceedings hereafter to be referred to, went; but it is to be observed that the High Court, without any sufficient reason assigned, set aside the evidence of the Purohit, which, if it be regarded as the uncontradicted evidence of the appropriate and ordinarily adequate witness to the performance of a Shrad, by establishing the performance of the ceremony by Paresnauth, should have inclined the scale in favor of that side, specially when it is remembered that a presumption existed in favor of the continuance of the ancient family-custom.

Their Lordships are relieved from the necessity of considering whether the High Court did, or did not, attach undue weight to the proofs on which they mainly rested their judgment on this point; since the question now to be considered by their Lordships is only whether the will was inofficious. The High Court proceeded on the ground that the judicial proceedings which they rely on and state in their judgment, and which are set forth in the respondent's case, show that the family had for some generations recognized the law prevalent in Bengal as that of their succession. The High Court had no explanation given to it of these proceedings. It certainly lay on the defendants to give that explanation. Possibly Paresnauth might have been able to show that no

actual enjoyment according to such title by record had ever obtained in his branch of his family, and might have shown that he, as a party to the suit, had not advised or suggested that form of procedure and joinder of parties, and was not conscious of the effect of it, as evidence to rebut the continuance of a family-custom; but whatever weight may attach to such suggestions when made and established by proofs, it is not the duty of a Court to suppose them. It suffices to say that the decision on this issue of the High Court, on the evidence in the cause, may be correct; yet their Lordships cannot derive from such evidence, viewed in connection with the other evidence in the cause, that belief which would justify them in treating the will as *primâ facie* improbable, because inofficious, and inofficious because regardless of the ordinary preferences of Hindoos of the Bengal Schools.

Their Lordships proceed now to the consideration of the evidence as to the *factum* of the will itself. It must be remembered that Paresnauth is dead, and that imputations are cast on him after his death, which he might have been able, and which his representatives in this suit may be unable, to reject, at least with equal success. Therefore, a Court of Justice should be careful to see that no inference be raised against the title which he asserted and proved, and under which he obtained and retained possession during his life unopposed, unless it be such as the evidence in the cause clearly warrants. The evidence as to the *factum* itself in the judgment of both Courts appeared satisfactory. It is declared by the High Court to have been "precise enough on the main points of execution and signature, and to exhibit no signal discrepancies." In an ordinary case, even on proof of a Hindoo will, such evidence would be deemed adequate; and it must be remembered that this will was very soon after its execution publicly exhibited in Court, and submitted to some investigation and proof, and was proved; and that, though proved *ex parte*, yet such proof followed on the ordinary notifications which ordinarily must be taken to give due notice of a claim under a will.

If, then, no discrepancy of any material character be found between the proof which was given on the application for a certificate in 1853, and that given on the trial of the cause in 1859, the witnesses being native witnesses, and speaking again to the same facts after so long an interval, the absence of such discrepancy, and the precision of the statements as to the execution and signature, are some arguments in themselves in support of the truth of that to which those of the witnesses who were examined on both trials depose. One discrepancy, however, is noticed in the respondent's case at page 3, line 33, on which much stress was laid by Mr. Cave in his able argument for the respondent.

The witnesses at the earlier judicial investigation described the will as having been immediately dictated by the testator to Denonauth, the writer; whereas, at the trial of this cause, they depose that Tarucknauth made the draft from the dictation of the testator, and that Denonauth made a fair copy from it. This discrepancy certainly exists, but it is one which might be found in many a case free from suspicion. It may have proceeded from mere inaccuracy of recollection; and sometimes in native statements an intermediate agency is passed over, and an action ascribed to an immediate source, which, in truth, proceeded from a derivative one. The reason assigned by the respondent's Counsel for this variation of story is little probable. Had the witnesses for the will recollected the evidence which they gave on the first trial, they, if false witnesses, would have adhered to it. They are not likely on the trial to have made intentionally their evidence conformable to that of the respond-

ing to her so urgently recommended that the permission provided for five acts of adoption in succession on failure of each preceding one? If then the Court finds itself compelled to discredit these allegations, what rational ground has it for reposing confidence even on the story of her own continued ignorance, during the lifetime of Paresnauth, of any title adverse to her own? In a suit not instituted by Paresnauth, but which was instituted hostilely to him, to set aside a certain putnee-tenure, which suit affords not the slightest ground for a supposition that there was any collusion with him in it, he is found pleading the will, and she repeating that title, and praying therefore to be dismissed from that suit. *Primâ facie* at least, credit must be given to that pleading, that it proceeds from one who was qualified to represent her. Is the contrary proved? Is any one called to show how that answer came to be filed? Paresnauth is dead; and, after his death, is it to be presumed that he put her answer without her authority on record, that is, that he committed a fraud on the Court, and continued a fraud on her? A Court should not impute fraud; and after the death of Paresnauth nothing should be supposed to his prejudice for which there is not a legal foundation.

Their Lordships, therefore, on a review of the grounds on which the High Court has held this will not proved, are compelled to say that they think that the Court laid no foundation for treating the will as inofficious in itself, for disregarding the evidence of the Purohit, or for ascribing the answer of the widow to the deceased Paresnauth. The will had been proved, though *ex parte;* it had been acted on very recently after the testator's death, and possession held for a considerable time under it. There appears to have been no desire on the part of Paresnauth to escape from the publicity and responsibility attending the proof of such a document. In fact, it was not drawn into question so long as Paresnauth himself lived. That apparent acquiescence is attempted to be ascribed to a general and enduring ignorance, which is in itself eminently improbable. The will is met by distinct allegations of fraud and forgery, the witnesses to which are discredited by both Courts. Besides this, the case of the plaintiff does, in the several parts of it before commented on, bear the appearance not simply of exaggeration, but of conscious untruth. Whatever might have been the result of this case, had these presumptions in support of the case for the will been wanting, the ordinary support which the failure of an opposing case lends to the case which it impeaches, with the presumptions arising against the opposing case from the introduction into it of matters too grossly improbable for belief, and not the subject of innocent mistake, must be applied, on a review of the whole evidence in the cause, to support the *factum* of this will. Their Lordships think, therefore, that the decision of the High Court must be reversed with costs, and that the decision of the Civil Court of Nuddea should be restored and affirmed, and that the appellants should have the costs of this appeal; and they will humbly certify their opinion to Her Majesty to the above effect.

d

The 2nd July 1868.

Present:

Sir William Erle, Sir James W. Colvile, Sir Edward Vaughan Williams, Lord Justice Page Wood, Lord Justice Selwyn, and Sir Lawrence Peel.

Falsehood in a deed — Presumption of fraud—Onus probandi—High Court's powers—Striking a Solicitor off the rolls.

On Appeal from the High Court at Calcutta.

In the matter of the petition of Augustus Stewart.

The rule that the intentional statement of a falsehood in a solemn deed taken by itself without explanation betokens fraud until the contrary is shown, and that it is the duty of a Solicitor who has made such a statement to show convincingly the absence of fraudulent motive, can scarcely be applied when a fraudulent motive has not been alleged by any complainant, if the explanation offered be not simply incredible.

There is no such special authority in the High Court as would authorize the striking of a Solicitor off the rolls of the Court where such a step would not be sanctioned by the practice of the Courts in England.

THE appellant in this case seeks to reverse an order of the High Court of Judicature in Bengal, made on the 6th May 1867, whereby a rule *nisi* of the 18th April 1867, calling upon the appellant to show cause why his name should not be struck off the roll of Attorneys and Proctors of the Court, was made absolute; and it was ordered that his name should be struck off accordingly. The charge alleged against him by the rule *nisi* was that of misbehaviour in inserting in a deed a false recital as to the consideration, knowing the same to be false, and in attesting the execution of the deed with such false recital, and also in signing his name as a witness to the receipt of the consideration-money therein mentioned, knowing that no consideration had passed or was intended to pass.

The deed in question is dated the 16th February 1863, and purports to be an absolute conveyance by William Molloy Stewart to James Augustus Stewart, of a 4 anna or quarter share in an indigo factory, called Begum Serai, the property of William Molloy Stewart, in consideration of 32,000 rupees. A receipt for that sum is endorsed on the deed, and signed by William Molloy Stewart, and stamp affixed, and the covenants for title and further assurance are the same as would be found if the transaction had been that which the deed represents. Its execution and the receipt of the money are both attested by the appellant. It is admitted by the appellant that the real transaction was of a different character, and the circumstances of the case are stated by him and by the parties to the deed to have been as follows: The parties to the deed and the appellant are brothers. William Molloy Stewart was the owner of the factory, and is alleged to have been in good credit at the time of the transaction. His brother, the appellant, was an attorney in partnership with Mr. Hatch; a share in that partnership had been purchased for him by his elder brother, William Molloy Stewart. James had for some time assisted William in managing the factory. He had, in 1860, been admitted an attorney, and, about the time of the deed being executed, had been offered a partnership in the firm of Messrs. Barrow and Sen, Attorneys at Calcutta. William was desirous of still retaining his brother's services, and induced him to give up the offer of Messrs. Barrow and Sen, by proposing to make over to him one quarter of the Begum Serai factory. The assent of James to William's proposal formed the real consideration for the assignment made to him on the 16th of February; no money-consideration whatever was paid by James.

Mr. Barrow, by his evidence, confirms the statement of this offer of partnership having been made by him to James in July 1862, and of James declining it on the ground of "favorable arrangements having been made with his brother."

It does not appear that at the date of the deed there was any charge on the factory beyond a deposit of title-deeds with Messrs. Thomas and Co., the agents to the factory, for the current outlay, and a balance was, in fact, then due to the factory on this account. The deed was registered immediately upon its execution; and within a day or two afterwards William borrowed of Mr. Hatch the further sum of 14,000 rupees, of which 6,000 rupees seem to have formed the consideration for the appellant's share in the partnership, bought for him by William, and a mortgage was executed, the draft of which is produced, by which William mortgaged his 12-anna or three quarter share only, in the factory. The deed of conveyance of the 16th of February did not take any notice of the equitable mortgage to Thomas and Co.; the mortgage to Hatch recites its existence.

After these transactions, William purchased another considerable factory, and took shares in an Indigo Company, whither he went to reside; but James continued to superintend the Begum Serai factory. It is not shown that William was embarrassed till after the failure of the Agra Bank in June 1866. Thomas and Sons also failed about that time; and towards the end of the same year William presented his petition in the Insolvent Debtors' Court.

James in the meantime had continued to manage the factory, and to draw a salary of 300 rupees a month; but he drew no sum as profits, nor was any division of profits made till after the insolvency of William, when James consigned his one quarter share of produce to separate agents.

On the 25th March 1867, the Official Assignee, under the insolvency of William, summoned the appellant, and James and Mr. Hatch, to be examined before the Insolvent Court as to the insolvent's estate; and on the 13th of April 1867, they and the insolvent were examined before Mr. Justice Phear, and specially interrogated as to the above transaction.

On the 18th April 1867, the appellant was served with the rule *nisi* of the High Court upon which the order now appealed from is based, which was obtained on the motion of the Advocate-General. The rule purported to be drawn up upon reading the affidavit of Mr. Davis, Chief Clerk of the Insolvent Debtors' Court, and two exhibits, marked A and B, and the examination of William Molloy Stewart, Mr. Hatch, and the appellant, and the deed of conveyance of the 16th January 1863.

Mr. Davis's affidavit merely verified the proceedings before the Insolvent Debtors' Court and the exhibits A and B. A appears to have been the deed of conveyance; B the mortgage to Mr. Hatch.

On this rule having been served, the appellant appeared, and filed affidavits in opposition to making the rule absolute.

The affidavits were, *first*, an affidavit by Mr. McLeod, an owner of factories in the Tirhoot district, which deposed to his having known for some years past that James was the owner of a quarter share in the factory, and to his having always believed that it had been given to him by his brother William; *secondly*, an affidavit of Mr. Barrow verifying his offer of a share in his business to Ja Stewart, who had assigned, as a reason declining it, that he had an offer of a fa able arrangement with his brother; 3, 4, 5 affidavits of the three brothers. Cer accounts of Thomas and Sons were produ showing a balance of 24,544 rupees 6 an 2 pie due to the factory in February 1 over and above a sum exceeding 2,000 ru paid to William M. Stewart's credit at bankers. An exhibit B was also produc being the draft of the mortgage to Hat originally prepared as a mortgage by the t brothers William and James, of the wh factory, and afterwards altered to a mortga of the 12 annas or three-quarter share William only.

The appellant states in his affidavit th the form in which the deed was drawn u suggested by William Molloy Stewart, w alleged as his sole motive for desiring it be drawn as a sale for a money-consideratio his wish to put a value on the factory, the sam being then a new one. The appellant stat that he was not aware of any other object that he believed, and believes, it to be a fa estimate; that his brother William was no indebted beyond 20,000 rupees, and had, a the date of the deed, property of a value far above the amount of his debts, as to which he states some particulars. He states the immediate registering of the deed—the mortgage to Hatch—and says that, in preparing and attesting the execution of the deed, and attesting the endorsed receipt, he had no fraudulent or dishonest intention of any kind whatever, and that nothing, either directly or indirectly, passed between him and his brother William to lead him to suppose that William contemplated, and he does not believe that he contemplated, any fraud directly or indirectly. James, in his affidavit, says that he was not aware of the form of the deed till after its execution. In his examination before the Insolvent Court he had said he wrote a letter about it, and that he thought it would have been better if the consideration had appeared; that letter cannot be found. In his affidavit he denies all intention of fraud, and says he is *bonâ-fide* owner of the property. William also, in his affidavit, denies all fraud, and makes a statement as to his estate, which, if true, would show him at the date of the deed to have possessed considerable property; and both agree in stating the real consideration to have been the consent of James to give up the offer of Mr. Barrow, and to attend to the management of the factory.

No evidence whatever was given impugning the statements contained in these affidavits. No evidence has been given of any person having been defrauded by any of the brothers, nor of any improper use of the deed having been attempted. Nor does the Assignee in Insolvency make any complaint, or impugn the actual ownership of the property, to the extent of one-quarter, by James. The deed was registered. McLeod speaks of the notoriety of the claim, at least, of ownership, by James; and Hatch took a mortgage of three-fourths on the footing of James being the owner of the other one-fourth within a day or two of the execution of the deed of conveyance.

Under these circumstances, the Chief Justice and Mr. Justice Phear have thought that the appellant ought to be struck off the list of Attorneys and Proctors of the Court. The Chief Justice, in the reasons which he assigned for this conclusion, states: "That the insertion of the recital and statement admitted to be false, and known by all parties to be false, and which might be used for the purpose of misleading others, was a very grave offence on the part of the Attorney. The offence is greatly aggravated if it is proved that the recital was inserted dishonestly, or in order that it might be used for a fraudulent or dishonest purpose if necessity should ever arise." And at a later part of his reasons the Chief Justice says: "I do not believe that Mr. Augustus Stewart acted honestly or innocently in inserting in the deed the false statements which are contained in it, and in attesting the execution of the deed, when he knew the statements were false, together with the false receipt for the 32,000 rupees." The Chief Justice cites also Section 428 of the Indian Penal Code, which punishes with fine or imprisonment, or both, any one "who dishonestly or fraudulently signs, executes, or becomes a party to any deed or instrument which purports to transfer or charge property, and which contains any false statements relating to the consideration for such transfer or charge, or relating to the person for whose use it is really intended to operate."

Mr. Justice Phear in his reasons states: "That the intentional statement of a falsehood in a solemn deed taken by itself without explanation must be considered as a badge of fraud;" adding "that it is, of course, possible to conceive cases in which the act should be unconnected with any fraudulent intention; but that if the person who has made such a statement relies on its having been done innocently, it is for him to prove it; that it betokens fraud until the contrary is shown." And in a later passage he says that "it is incumbent upon the officer of the Court who has done such acts as the appellant admits he has done, to show not merely that it is not certain after all that the act was not an innocent one rather than a fraud, but that he is bound to go further, and show convincingly that he was, in fact, acting innocently in the matter, with no fraudulent motive or motives of misconduct." The learned Judge concludes by observing "that the powers of the High Court could, if they thought it reasonable (even though such a cause might not, according to the reports of cases in England, have seemed as yet to have been judicially recognized by the Superior Courts of Westminster as a cause of punishment), remove or suspend from practice an Attorney of the Court."

Mr. Justice Norman concurred with the other learned Judges in thinking "that the appellant had been guilty of a very great and serious irregularity and impropriety, which, whatever views were taken of the motives which actuated him, would justify the Court in visiting him with severe penalties." He conceived, however, that on a question of striking an Attorney off the roll "the clearest distinction exists between cases where an Attorney misconducts himself for fraudulent purposes, and those where such misconduct or irregularity, however grave, is not committed with the intent of defrauding his client or injuring others." He further says: "I should require the fraud or the crime to be as distinctly proved against him as if he stood upon his trial at the bar of a Criminal Court for the offence." He finally came to the conclusion that the false statement was, in fact, not made with intent to injure or defraud any one, and with still more confidence that on the evidence no such intent had been proved; and he accordingly suggested suspension as an adequate punishment.

Their Lordships feel bound, on the consideration of the whole evidence before them, to come to the conclusion that the order complained of ought to be discharged.

They are of opinion that the preparation of the deed of conveyance containing an untrue statement of the transaction, and the attesting of the deed, and of a receipt for consideration-money which was never paid, would be circumstances of great, perhaps overpow-

ering, weight as evidence of guilty connivance against a Solicitor cognizant of the actual facts, in the event of such a deed, upon or soon after its execution, being used as an instrument of fraud. They are further of opinion that any Solicitor may very properly be called upon by the Court before whom such a deed shall have been produced, to explain the circumstances attending its preparation and execution. But if this explanation be given; if it be supported by evidence; if no counter-evidence be offered; if no fraudulent use of the instrument complained of has ever been made or attempted; and no person has complained of any injury directly or indirectly caused by it—we think that, however objectionable the practice may be of permitting, for any reason whatever, a deliberate mis-statement of facts upon the face of a deed, yet such practice, unfortunately by no means unfrequent, cannot be considered sufficient in itself to warrant the striking of the practitioner off the rolls.

Even assuming the correctness of the view taken by Mr. Justice Phear of the Solicitor's duty, namely, that of showing convincingly the absence of fraudulent motive, yet when a fraudulent motive has not been alleged by any complainant, such a rule can scarcely be applied if the explanation offered be not simply incredible.

Deeds are constantly prepared, which, on the face of them, deal with the parties as interested, who are, in effect, only trustees for others; and the knowledge of such a practice probably influenced the framers of the Code in preparing the enactment referred to by the Chief Justice; for they confined its penal provisions to "fraudulent and dishonest" participation in such an instrument.

It appears to their Lordships on the evidence in the present case, that James was intended to become, and did become, the *bond-fide* owner of the quarter-share. Mr. Barrow confirms the statement as to the circumstances under which he became such owner. Publicity as to the ownership was immediately given. There was no reason for representing him to be such owner with a view to protect William against his creditors. The deed was acted upon at the time of the mortgage to Hatch as if William had parted with a one-quarter share. James was (as is stated by McLeod) in possession not only as manager, but as the recognized owner of a share, and no one up to the present hour disputes the validity of that ownership. It does not seem, therefore, that any suspicion in such a state of circumstances can arise to displace the reality of the transfer made.

The reasons assigned for the false statements, though unsatisfactory, had any fraud whatever followed upon the transaction, are not inconsistent with the possibility of honest motives. Though James gave a consideration for his share in the shape of services only, yet if the share were really worth 32,000 rupees (and no evidence to the contrary was offered), it exceeded probably the value of his services, and his brother might be desirous to mark the fact of his bounty. Besides this, the condition requiring James to offer his share to his brother before parting with it to a stranger, would afford some ground for stating an estimated value. It is said that the deed contained no covenant by James to continue his management; but if the property were, as it seems to have been, flourishing, such a circumstance alone would afford an adequate motive for his continuing as owner, and the condition as to offering the share to his brother would prevent an immediate sale.

The absence of any mention of the deposit with Thomas and Son to secure the floating debt due to them as agents on the purchase-deed, as contrasted with the mention of it in the mortgage, is consistent with honesty. It was necessary to inform the mortgagee of all charges, but it was not necessary to inform the person purchasing the business of that which was really a security usual in the ordinary course of business.

The fact that James received no profits whilst he had a monthly salary as manager seems to their Lordships to throw no doubt on the transaction.

Their Lordships are not aware of such special authority as appears to be referred to by Mr. Justice Phear, as would authorize the striking of the appellant off the rolls of the High Court, where such a step would not be sanctioned by the practice of the Courts in England.

They desire expressly to state that they do not, in recommending to Her Majesty the discharge of this order, in any way sanction the propriety of deeds being prepared which on the face of them are inconsistent with fact, and wish simply to express the opinion that, upon the evidence, the irregularity was wholly unconnected with any intention to defraud, and does not, therefore, justify the penalty inflicted.

The 20th December 1867.

Present:

The Master of the Rolls, Sir James W. Colville, Sir Edward Vaughan Williams, Sir Richard Torin Kindersley, and Sir Lawrence Peel.

Alienation by Hindoo widow — Suit by reversioner—Onus probandi.

Appeal from the High Court at Madras.

Cavaly Vencata Narainapah

versus

The Collector of Masulipatam.

Where a party entitled to impeach an alienation by a widow of her husband's estate sues to set aside such an alienation, and the defendant establishes not only that he had a charge on the estate in virtue of a mortgage-deed executed by the widow, but that the debt to him was on account of advances made to her for purposes for which she would have been entitled to alienate the estate as against the next heirs, it does not follow that because plaintiff had a right to demand this peculiar proof, the ordinary rule which requires the party who alleges payment to prove payment is to be inverted in his favor, or that the debt is to be presumed to be satisfied unless the contrary is shown by the creditor; and if he alleges that the mortgage-deed was not *bonâ fide*, the burthen lies on him to prove his allegation.

This is the third appeal to Her Majesty in Council in this unfortunate case. On the first it was determined that the Crown, which is represented by the respondent, was entitled to the zemindary in question by escheat, subject to whatever interest the appellant might have acquired therein by virtue of the transactions between his late father and Lakshmidevammah, the widow of the last zemindar. The order made on the second, which bore date the 6th of January 1862, amongst other things declared that the Crown, taking by escheat, had the same right to impeach the alienation of the widow which the next heirs of the husband (if such there had been) would have had; and that the appellant, then the respondent, was entitled to a charge upon the estate, and to be paid and satisfied thereout the full amount of all such of the advances (if any) made by his father to the widow as were made for purposes for which, according to the Hindoo Law, she would have been entitled to alienate the estate against the next heirs of her husband, in so far as she had no other estate of her husband to answer such purposes; and by the same order the cause was remitted to the Sudder Adawlut of Madras with directions to inquire whether, having regard to the declarations aforesaid, the right of the Crown was absolutely defeated by the razeenamah relied on by the appellant, and, if not, to inquire what advances, if any, were made by the appellant's father to the widow, and whether all or any, and which of such advances, and to what amount, were made for the purposes for which, according to the Hindoo Law, the widow would have been entitled to alienate the estate as against the next heirs of her husband, and whether the widow had, when such advances were made, other estates of her husband sufficient to answer such purposes.

The Sudder Court sent down the issues so directed for trial in the Zillah Court. The judgment of Civil Judge (Mr. Elliot) states very carefully the facts which he found to have been proved before him, and came to the following conclusions: *1st*, that the alienation by the widow was for legal purposes sanctioned by Hindoo Law, and that the right of the Crown, as next heir of the husband, was therefore actually defeated by the razeenamah; *2ndly*, that the sums due for such advances amounted in April 1838 to 48,614 rupees 13 annas 6 pie, the balance of the account then adjusted and settled; and *3rdly*, that the zemindar, the late husband of the widow, died possessed of no property available for any purpose, save and except the estate in dispute which at his death was not unincumbered.

The decree of the High Court, made on appeal from this judgment, declared that the right of the Crown to take by escheat was not defeated by the razeenamah; that from the death of the zemindar in 1810 up to 1813, advances were made to the widow by the appellant's father for purposes for which according to the Hindoo Law, the widow would have been entitled to alienate the estate as against the next heirs of the husband, and that on the 18th of May 1822 the balance due to the widow on these advances, with interest, was about 20,000 rupees; that in the year 1828, a further advance of 1,033 rupees 3 annas 3 pie was made for similar purposes; and that when the beforementioned advances were respectively made, the widow had no other estates of her husband sufficient to answer the purposes for which they were taken and to which they were applied; but that the defendant had not shown what at the date of the advances last mentioned, was the debt on the former advances, or whether such former debt, or any part of it still subsisted; that no advances were made from that date

to the date of the mortgage-deed in 1838; that it lay upon the appellant to show, and that he had failed to show that the widow was in debt to his father at the date of the execution of the mortgage-deed for advances made for the purposes aforesaid; and that accordingly the respondent, on the part of Government, was entitled to take the estate by escheat, unincumbered with charges created in favor of the appellant or his at her.

Against this decree the present appeal has been brought; and their Lordships have now only to inquire what facts must be taken to have been proved on the trial of the issues directed by Her Majesty's order of the 6th of January 1862, and what conclusions ought to be deduced from them.

That the zemindar, the husband of the widow, died in debt and left little or nothing except the zemindary in question, is undisputed. There is, therefore, no contest as to the correctness of the conclusion to which both the Courts below have come upon the last issue. It seems to be also admitted that the gross annual revenue of the zemindary was, on the average, little, if at all, in excess of 10,000 rupees; that the peishcush or Government revenue was upwards of 4,000 rupees; and that the balance was not much more than would cover the zemindary and other expenditure of the widow. The probability, therefore, of her getting out of debt, if she ever found herself in debt to a considerable amount, was exceedingly small.

Again, it is proved that the pecuniary transactions between the late zemindar and the uncle and father of the appellant, who were first cousins of his wife, began before 1804. This is shown by Exhibit 13, which both the Courts below have treated as genuine, and from which they have, as their Lordships think, legitimately inferred that the statements in Exhibit 14 (also found to be genuine) may be accepted as true. If this be so, we have it established that in 1810, when the widow came into possession, her late husband was indebted to the appellant's uncle Seethiah in a sum exceeding 20,000 rupees, and that she had to borrow from him a further sum amounting to about 3,200 rupees, in order to defray the expenses of her husband's obsequies, and perhaps also for other purposes. That the debt so due to Seethiah was transferred to the respondent's father on the 15th of April 1811, is proved by Exhibit No. 16.

It is unnecessary to consider whether debt thus assigned included any furt sums paid for peishcush, as the appell would infer from Exhibits 15 and 16, beca the Courts below have, as their Lordsh think, correctly held that effect must given to the widow's admission, contain in her letter (No. 18) of the 18th of M 1822; that at that date the debts on her o showing did not exceed the sum there mentioned, a sum which this paper sta to be about 20,000 rupees, but which, accor ing to the printed record, is 22,000 rupee The antecedent proof, in the absence of a evidence to the contrary, is, their Lordship think, sufficient to establish that the whol of that sum represented debts which th widow was entitled to charge upon the z mindary as against the heirs of her husban The High Court has held that the only oth advance established to their satisfaction that of 1,033 rupees 3 annas 3 pie paid f peishcush in 1828, and their Lordships wi accept that finding as correct, though the is undoubtedly some evidence of other ad vances of the like nature.

This being so, determination of this a peal must turn on the question whether th High Court was right in holding that lay on the appellant to show, by positiv proof, what part (if any) of these debts re mained unpaid in 1838, at the date of th mortgage, and that, in the absence of su proof, it was to be inferred that no part o these debts subsisting in 1822 or in 1828 was subsisting in 1838.

The appellant had, no doubt, to sustain an extraordinary burthen of proof. He had to establish not only that he had a charge on the estate by the act of the widow, but that the debt charged was of a particular character. He has shown that such a debt once existed. It does not, however, follow that because the respondent had the right to demand this peculiar proof, the ordinary rule which requires the party who alleges payment to prove payment is to be inverted in his favor, or that the debt is to be presumed to be satisfied unless the contrary is shown by the creditor. If, indeed, the facts had shown a strong probability of the satisfaction of the debt by the proper application of the surplus revenues of the estate by the widow, the High Court might have been justified in pressing against the appellant the non-production of accounts, or of other satisfactory proof that the debt had not been so satisfied. They might legiti-

ly have held that the facts establishing probability afforded *primâ-facie* evi-ce of payment. But to their Lordships ppears that the facts proved are such as y lead to the opposite conclusion.

The widow is shown to have succeeded the zemindary encumbered with debt ch she had no means of discharging, ex-t the revenues, that are admitted to have en in ordinary years little more than suffi-nt to pay the Government revenue and rovide for the expenses of her establish-nent and family. A landholder, whether ale or female, when in such circumstances rely, very rarely in India, succeeds in tting out of debt. Again, in the present se, the Zillah Judge has shown that more an one of the years in the course of which e process of payment is assumed to have ken place, were years of distress and famine, hen the collections from the estate must ave fallen short of the Government revenue. nd there is also evidence of occasional igation, in which the widow had to defend her title against adverse claimants. She seems to have been throughout her tenure of the estate a needy and embarrassed woman. Nor can their Lordships find reasonable grounds for assuming that, between the years 1822 and 1838, she was in a condition to make payments in excess of those which from the account said to have been settled in 1838, it must be inferred that she had then made on account of interest.

The transaction of 1838 is on the face of it a settlement of accounts between the widow and her creditor; a balance struck and a mortgage to secure that balance. It is treated by the respondent as a mere contrivance to give the estate to the appellant's family in accordance with the desire which the widow's correspondence with Government shows she had expressed in 1822. There might be good grounds for so treating it, if the other evidence in the cause was in favor of the conclusion that she had then discharged the whole of the debts of 22,000 rupees and 1,033 rupees. But their Lordships have already stated that they cannot draw that conclusion from the evidence.

They think that the burthen of proof that this settlement of accounts was not a *bonâ-fide* transaction between the debtor and the creditor, lies on the respondent, and that he has failed to adduce any evidence to that effect. Assuming it, then, to have been a *bonâ-fide* transaction, it follows that advances with which she was entitled to charge the estate as against her husband's heirs, had previously been made to her to the amount of 21,000 or 23,000 rupees; and that there is no sufficient proof that she had then paid off these debts. What, then, is the effect of the transaction? Those advances, with the interest thereon, would considerably exceed the sum secured by the mortgage. Their Lordships think that it is a fair and just inference to take this sum of 48,614 rupees 13 annas 6 pie, which was secured by the mortgage, to be the balance due in respect of such advances after giving credit for all payments on account and after deducting the 5,000 rupees paid at the time of the settlement. If it be urged that the appellant's case assumes other advances which the Courts below have not found to be of the character required, the answer is that in a case like this, wherein both debtor and creditor were

interested in appropriating the payments so as to make this balance a charge upon the estate, the transaction itself, which could only be valid in the event of appropriating the payments made towards discharge of advances which could not constitute a charge upon the estate, may reasonably be treated as evidence that such an appropriation was made. Their Lordships, therefore, are of opinion that the appellant has succeeded in establishing that under the mortgage of 1838 his father acquired a charge on the estate for the sum therein named, which, on the widow's death, would have been valid against the next heirs of the husband if such there had been.

Further than this their Lordships are not prepared to go. They do not agree with the finding of the Zillah Judge that the title of the Crown was absolutely defeated by the razeenamah of the 5th of April 1841. They do not think that the Crown is bound by that document, or by the judgment of the 20th of March 1839 on which it was founded.

The result is that their Lordships must humbly recommend Her Majesty to reverse the decree of the High Court, and to declare that on 20th April 1838 there was due from the widow to the father of the appellant in respect of advances for which she would have been entitled to alienate the estate, as against the next heirs of her husband, if such there had been, the sum of 48,611 rupees 13 annas 6 pie; that that sum was duly charged upon the estate by the mortgage of the 20th of April 1838; and that accordingly the appellant is now entitled to hold the zemind against the Crown as a security for so m of the said sum and of the interest then as now remains unpaid. This declarat is fatal to the respondent's claim to imm diate possession of the zemindary; but will leave an equity of redemption in th Crown. In strictness the present suit shoul stand dismissed, leaving the Crown a assert that equity, if it shall be so minded in a suit properly framed for that pu pose. It has, however, been suggest at the bar that provision for redempti might be made in this suit. If the pa ties can agree as to the terms of redem tion, their Lordships would not be unwi ling to have them embodied in the order be made on this appeal. But if they do so agree, the order which their Lordship must recommend to Her Majesty, as the consequence of the beforementioned decla tion, is that the respondent's suit sha dismissed without prejudice to the right of the Crown to redeem.

The appellant is entitled to have the costs of this appeal and of the proceedings in the Courts below under Her Majesty's order of January 1862, and the general costs of the suit below, except such portion of them as was occasioned by his contesting the title of the Crown to take by escheat. This latter portion ought to be borne by him, and unless already paid, should be set off in the usual manner. The apportionment of these costs will be dealt with by the Court below in India.

d

The 17th July 1868.

Present:

Master of the Rolls, Sir James W. olvile, Sir E. Vaughan Williams, the ord Chief Baron, and Sir Lawrence eel.

itration—Submission to award—Revocation of authority.

Appeal from the High Court at Madras.

Pestonjee Nusserwanjee

versus

D. Manockjee and Co.

According to the proper construction of the Code of il Procedure (that is to say, construing it with ference to the constitution of the Civil Courts of dia and the abiding direction to them to proceed in cases according to equity and good conscience), n persons have agreed to submit the matter in ference between them to the arbitration of one or re specified persons, no party to the agreement can voke the submission to arbitration unless for good use, and a mere arbitrary revocation of the authority not permitted.

Where no time was originally fixed within which e award was to be made, it is open to either party to sten the proceeding by giving notice to the arbitrators at the award must be made, and an umpire appointed thin a reasonable time; but where the time elapsing er the notice has been actively employed by the itrators, and the delay has been owing to necessity ich they could not control, the parties cannot cede from their submission by reason of the notice.

THIS is an appeal from three orders of the High Court of Judicature at Madras. The uestion in substance is, whether the award f Mr. Schlunk settling matters in difference etween the appellant and the respondent valid and binding on the parties. The acts which raise the question may be stated very shortly.

On the 29th October 1863, the appellant and respondent entered into a partnership in certain farms of taxes imposed on spirituous liquors within certain districts in the Presidency of Madras. The appellant was to supply the capital required, and the respondent was to manage the business. Certain differences arose between them; and on the 10th of January 1864, they agreed that arbitrators should be appointed to settle these differences. Accordingly, this was done by an agreement in writing for submission to arbitration, bearing date the 10th of March 1864. Originally Mr. Pierce and Mr. Bates were appointed arbitrators, but Mr. Pierce refusing to act, Mr. Punnett was appointed in his place. The terms of the agreement are to this effect:—

"Know all men by these present that we, the undersigned, Pestonjee Nusserwanjee, of the firm of Framjee Nusserwanjee and Co., and D. Manockjee and Co., do make, constitute, and appoint R. H. Pierce, Esquire and W. Bates, Esquire, gentlemen, as arbitrators, chosen by our mutual consent to inquire into certain controversies and differences existing between us in regard to our copartnery in the transactions of the Abkary Farms of the Calicut, Kurumbranad, Palghaut, and Ponany Taluqs, and Mannur and Payenjanur Amshoons, of the Ernad Taluq rented from Government, giving, and by these presents granting, unto the above-said R. H. Pierce, Esquire, and W. Bates, Esquire, full power to substitute or appoint one or more arbitrator or arbitrators, as well as, if necessary, an umpire; and, further, to call for and examine the books and papers of the said copartnership, as also any party or parties connected with the farms and others, and otherwise to take all and every lawful means to arrive at a fair and impartial decision, to which we hereby mutually agree and bind ourselves to abide fully and entirely."

It contains the following memorandum at the foot:—

"*N. B.*—We, the undersigned, P. N., of the firm of Framjee Nusserwanjee and Co., and D. Manockjee and Co., have executed this power made in conformity with the provisions of Section 327 of Act VIII. of 1859; and we do hereby accordingly agree and bind ourselves to abide by the decision which the within-mentioned duly-empowered arbitrators may give under the aforesaid Act."

On the 15th of July 1864, the arbitrators made an intermediate award, dissolving the partnership, and giving the business to the appellant.

On the same day, a notice signed by both parties was publicly given of this fact, and which stated that all debts due to them by the Abkary farm were to be received and paid by Framjee Nusserwanjee and Co., and that the respondent had no longer any interest therein.

On the 3rd of October 1864, the appellant wrote to the arbitrators, complaining of the conduct of the respondent relative to the making up of the accounts.

On the 13th May 1865, the arbitrators came to a resolution, which was a second intermediate award, directing that the farm-outstandings due from the Ponany, Chowghaut, and Betatanad divisions should be taken by the defendant at 50 per cent. discount; it is in these words:—

"Resolved that the farm-outstandings due from the Ponany, Chowghaut, and Betatanad divisions, as they stood in the farm-books on the 30th June 1864, as per balance-sheet, be taken over by Messrs. Dhunjeebhoy Maneckjee and Co., or their nominee, at 50 per cent. discount, they receiving credit for all sums since recovered, less any regular expenses, and paying the amount as may be hereafter decided by us."

On the 6th July 1865, Mr. Punnett, one of the arbitrators, published a long written opinion on the subject of the remaining points that remained to be disposed of by the arbitrators under the submission to arbitration.

On the 24th of July, the appellant wrote to the arbitrators, and requested them to make their award in ten days, or that, if they

were unable to do so, they would nominate an umpire.

This was not done, and on the 5th of August 1865, the Solicitor of the appellant wrote a letter to the Solicitor of the respondents purporting to cancel the award, and he also sent in similar letters to the arbitrators. On the same day Mr. Bates, the other arbitrator, gave his written opinion on the remaining points referred to therein, stating in substance his differences from Mr. Punnett.

On the 12th August 1865, a further notice was given by the appellant requiring the papers to be delivered up to him. Two more written opinions were given, one by Mr. Punnett and another by Mr. Bates, the last on the 7th of September 1865; and Mr. Schlunk (who was afterwards appointed umpire, but who seems to have been already selected for that purpose by the arbitrators), on the 12th September 1865, made some written observations founded upon the written opinions of Mr. Punnett and Mr. Bates, the two arbitrators.

On the 22nd September 1865, the Civil Court ordered the submission to arbitration to be filed under the provision of the 326th Section of the Civil Procedure Code of India.

The appellant insists that this was wrong, and that the decision of the Court below ought to be reversed, and that the submission to arbitration could not properly have been filed under the Section 326 of the Code of Civil Procedure, as no agreement to file it had been made, contending that it was open to him to revoke the submission to arbitration at any time.

On the 22nd of September, the day on which this decision was pronounced, Mr. Schlunk was appointed umpire by the arbitrators, by writing signed by them at the foot of the submission to arbitration. This appointment was confirmed by the Civil Court on the 6th of October 1868, and on the 17th of October Mr. Schlunk made his final award in favor of the respondents. The order of the 22nd of September of the Civil Judge was appealed from and confirmed by the order of the High Court of Judicature on 15th January 1866. The appellant then presented a petition to set aside the award on five grounds, which was dismissed on the ground of being too late; and the final award of Mr. Schlunk was confirmed and carried into execution by the decree of the Civil Judge on 9th October 1866. The appellant petitioned for leave to appeal from the decision, which petition was dismissed by order of the High Court on the 7th January 1867. On the same the High Court of Judicature at Madr firmed the decision of the Civil Judge o 6th October 1865, confirming the appoint of Mr. Schlunk as umpire. The presen peal is brought from all these three deci of the High Court of Judicature.

The first question is whether the C had jurisdiction under the Section 326 o Code of Civil Procedure in India, to d the submission to arbitration to be f Their Lordships are of opinion that, up proper construction of the Sections of Code relating to this subject, they had jurisdiction. The Code, which is one procedure, and the Act enacting it, mus construed with reference to the constitut of these Courts, and the abiding directio them to proceed in all cases according equity and good conscience.

The 326th Section is to this effect :—

"When any person shall, by an instrument in wri agree that any differences between them or any of t shall be referred to the arbitration of any perso persons named in the agreement, or to be appointe any Court having jurisdiction in the matter to whi relates, application may be made by the parties ther or any of them, that the agreement be filed in s Court. On such application being made, the Court s direct such notice to be given to any of the partie the agreement other than the applicants, as it t think necessary, requiring such parties to show ca within a time to be specified, why the agreem should not be filed. The application shall be w ten on a stamp-paper of one-fourth of the va prescribed for plaints in suits, and shall be numb bered and registered as a suit between some or one of the parties interested, or claiming to be interested a plaintiffs or plaintiff, and the others or other of the as defendants or defendant, if the application have bee presented by all the parties, or if otherwise, betwee the applicant as plaintiff and the other parties a defendants. If no sufficient cause be shown agains the agreement, the agreement shall be filed, and a order of reference to arbitration shall be made thereon. The several provisions of this Chapter, so far as they are not inconsistent with the terms of any agreement s filed, shall be applicable to all proceedings under a order of reference made by the Court, and to the award of arbitration, and to the enforcement of such award."

Although this Section is not expressly referred to in the submission to arbitration, still their Lordships are of opinion that the submission to arbitration was under and subject to the Sections contained in the Code relative to this subject. Their Lordships are of opinion that this submission to arbitration was entered into subject to the provisions of this Code, and that the memorandum at the foot thereof is introduced for that purpose, and that, unless the provisions of the Code were expressly excepted by the parties to the agreement, it must be taken as having been agreed by them that it was to be subject to the Act, and that this special notice of Section 327 as to the enforce-

ent of the decision of the arbitrators was roduced only *ex majori cautela* for the rpose of expressing what, without such pression, would nevertheless have been plied.

Their Lordships are of opinion that, cording to the proper construction of this de, as previously explained, when persons ve agreed to submit the matter in differ- ce between them to the arbitration of one more certain specified persons, no party this agreement can revoke the submission arbitration unless for good cause, and that mere arbitrary revocation of the authority not permitted.

Their Lordships do not think it necessary refer to the English law on this subject rther than to point out that the direction recent legislation, both by English Acts d the Acts of the Indian Legislature, has een to put an end to the distinction between e agreement to refer, and the authority ereby conferred, which formerly enabled person who was a party to a binding greement to revoke the authority thereby onferred, and by so doing to put an end to e agreement for submission to arbitration, n the same footing as all other lawful agree- ents by which the parties to it are bound the terms of what they have agreed to, nd from which they cannot retire unless e scope and object of the agreement cannot e executed, or unless it be shown that some anifest injustice will be the consequence of inding the parties to the contract.

Their Lordships are therefore of opinion hat it was not in the power of the appellant imply, at his own mere will and pleasure, o revoke the authority of the arbitrators in hose appointment he had concurred.

It remains to be considered whether the ircumstances of this case justified him in oing so, and sending the letter of the 5th ugust 1865.

This is founded solely on the delay.

On the 24th July 1865, the appellant rote to the arbitrators, and required that n ten days from that date they would make heir award and appoint an umpire, and this ot being done, after waiting for ten clear ays, he sent the notice of the 5th August 865. If nothing whatever had occurred since the appointment of the arbitrators in June 1864, and all matters between the appellant and the respondent had remained in exactly the same position that they were in at the date of the submission to arbitration, their Lordships are disposed to think that this delay of the arbitrators would have justified the course which the appellant adopted. But, in truth, the facts disclose a very different course of proceeding. In July 1864, the arbitrators made their award in a very important part of the matter in difference. They dissolved the partnership, and delivered up the business to the appellant, who has, since that time, carried it on alone, and had done so for a year prior to the letter of the 24th July 1865.

A second decision of the arbitrators relative to the Ponani farms was made in May 1865, and acquiesced in by both parties, appellant and respondent.

A notice to the arbitrators to make their award and to appoint an umpire in ten days does not appear to their Lordships to be sufficient time given to entitle the appellant to stop all further proceedings, and to cancel all further proceedings.

It is to be observed that a most important part of the matters referred, namely, the determination of the person who was to have the business in future, had already and speedily been determined. After the two decisions of the arbitrators, there appears to have been little that remained to be done, except to determine matters of account between the parties. What was the intricacy or difficulty of settling them does not appear, and on a question of time this is a matter of importance. It might well be that the time occupied for that purpose was not excessive. On this point, even if it could be availing, their Lordships have no evidence. It might also well be that ten days might be usefully and properly employed by the arbitrator in an endeavour to remove the points of disagreement between them, and only when this was found to be impossible that it would become necessary to refer the matter to an umpire. On the 6th of July 1865, Mr. Punnett stated his views in a long written opinion. Mr. Bates stated his in a similar document on the 5th of August. This was answered by Mr. Punnett on the 25th of August; and on the 7th September Mr. Bates replied. Before this Mr. Schlunk had been selected, though not appointed, to act as umpire, his appointment having been delayed, as it seems, in consequence of the civil proceedings instituted in the Civil Court on the 23rd of August 1865. Mr. Schlunk took and considered the expressed opinion of the two arbitrators, and made observation thereon on the 12th September 1865. The decision of the Civil

Court asserting the jurisdiction of the Code of Civil Procedure over this matter was pronounced on the 22nd of September 1865 On the same day Mr. Schlunk was appointed umpire, and he made his award between the parties on the 17th October following.

No error is pointed out in the award itself; complaint is made that Mr. Schlunk did not open up the whole matter from the beginning. It is said that he appointed no meeting, that he heard no counsel, that he took no evidence. Their Lordships are of opinion that it was not necessary for him to do so. The parties had agreed to the arbitration of Mr. Punnett and Mr. Bates, subject to the decisions of an umpire on the points where they differed. They agreed on some important points; they expressed their decision in the first award of the 13th of July 1864, and in the second award of the 13th of May 1865. They differed as to other points. They expressed this difference in writing, and they appointed Mr. Schlunk to be the umpire to decide these points between them. This he did after, as it appears, weighing and considering the facts and arguments adduced by both the arbitrators in the documents laid before him.

Their Lordships are of opinion that the course so adopted was correct, and that the Courts below have acted rightly in upholding the decision of the umpire. Their Lordships do not mean to lay down that in cases of this description, where no time is originally fixed within which the award was to be made, it would not be open to either party to hasten the proceedings by giving notice to the arbitrators that the award must be made and an umpire appointed within a reasonable time. But it is to be observed that here the time which elapsed from the period when the appellant gave the notice of the 24th of July 1865 was actively employed. It was obviously of no use to appoint an umpire until the points on which the arbitrators differed were clearly defined. This was done by four papers:—*1st*, the opinion of Mr. Punnett; *2nd*, the opinion of Mr. Bates, delivered on the same day that the notice to cancel the submission was given; *3rd*, the further opinion of Mr. Punnett of the 25th of August 1865; and, *4th*, the final opinion of Mr. Bates on the 7th of September 1865; and these were adjudicated upon by Mr. Schlunk, the umpire, in his award made on the 17th October, but delayed apparently by reason of the suit and the necessity of obtaining the sanction of the Court to the confirmation of the order appointing him umpire.

If the object of the appellant was to accelerate the proceedings by his notice of 24th of July 1865, he certainly succeeded in doing so; but their Lordships are of opinion that he cannot recede from the submission by reason of that notice, followed by the notice of 5th August 1865, when in fact, he has for above a year enjoyed the fruits of the award on various points, and when it is impossible to restore the parties to the position they were in, if all the acts of the arbitrators were to be considered null and void.

On the whole, therefore, their Lordships without thinking it necessary to relate in detail the proceedings in the Courts in India, approve of the decisions there pronounced, *viz.*, the order of the 22nd September 1865 of the Civil Court, directing the submission to be filed; the order of the Civil Judge of the 6th October 1865, confirming the appointment of the umpire; the order of the High Court of the 15th January 1866, dismissing the appeal of the present appellant from these orders; and the final decree of the Civil Judge of the 8th February 1866, confirming the award of Mr. Schlunk and directing the same to be carried into execution; and also the order of the High Court of Judicature of Madras of the 7th January 1867, dismissing the petition of the appellant; and consequently they shall humbly recommend to Her Majesty that this appeal be dismissed with costs.

Stanford Law Library
3 6105 062 875 245